IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SIGFREDO GARCIA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No.: **1D19-4005**

L.T. No. 2016-CF-1581A

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA, HON. JAMES HANKINSON, CIRCUIT JUDGE

INITIAL BRIEF OF APPELLANT

FOR APPELLANT:

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Preliminary Statement

This is a direct appeal from a final judgment of conviction and sentence in a criminal case. The Appellant, Sigfredo Garcia, was the defendant below. The State of Florida is the Appellee.

The record consists of an initial record and two sequentially numbered supplemental records, to which references will be designated "R," followed by the page number. The trial transcript is filed separately, and will be referenced as "T," followed by the appropriate page number or numbers. The penalty phase and sentencing hearing transcripts are numbered separately from the trial. References to those proceedings will be designated "P," followed by the appropriate page number or numbers.

Statement of the Case and Facts

Appellant and Luis Rivera were charged by indictment in Leon County Circuit Court Case No. 2016-CF-1581A with first-degree premeditated murder (R. 41). The State also charged Appellant with conspiracy and solicitation to commit murder in Case No. 2018-CF-496, and those charges were consolidated for trial on motion by the State and order of the court (R. 184, 200). The State filed a notice of intent to seek the death penalty on June 24, 2016 (R. 107-108). Rivera subsequently entered a plea and agreed to testify against Appellant. Appellant entered a plea of not guilty (R. 110-111). Katherine Magbanua was also charged with murder in Case No. 2016-3036, and her case was joined with this case by order entered May 20, 2018 (R. 244). Appellant and Magbanua were then tried jointly in a jury trial commencing on September 26, 2019 (T. 1).

The State's theory of the case was that one or more members of the Adelson family in Miami hired co-defendant Magbanua, who subsequently hired Appellant and Luis Rivera, to kill Wendi Adelson's ex-husband, Dan Markel, so that Wendi Adelson could get sole custody of their children and move to South Florida (T. 29-35).

James Geiger testified that he heard a gunshot on July 18, 2014 and went next door to discover that his neighbor, Dan Markel, had been shot in

the head. He saw a light-colored Prius or similar vehicle leaving the driveway and called 911 (T. 73, 79-82). The 911 call was introduced in evidence and published (T. 96).

David Sims testified that he was a Tallahassee police officer who responded to the shooting (T. 107-108). Mr. Markel's vehicle was still running. A side window was shattered and Mr. Markel was still alive but unresponsive (T. 113).

Stewart Schlazer testified that he was on the phone with Dan Markel at the time of the shooting. Markel said there was someone in his driveway that he didn't recognize (T. 118-119). There was a loud noise, followed by breathing but no talking. Schlazer hung up and called 911 (T. 120).

Joanne Maltese testified that she was a forensic specialist who processed the crime scene (T. 126-127). She took photographs of the car, including a window with a bullet hole in it, collected physical evidence, and sent DNA swabs to the crime lab for testing (T. 133-142). She also took photographs of Wendi Adelson's vehicle at the Tallahassee Police Department on the same day (T. 142-143). She photographed Dan Markel at the hospital (T. 144-145).

Kerri Rosana testified that she was an FDLE lab analyst in 2014. The swabs from Markel's car did not produce any useful evidence (T. 155-159).

William Kornegay assisted Maltese at the crime scene. There were no bullet casings, indicating that the murder weapon might have been a revolver (T. 160-163).

Robert Shawn Yao is a forensic supervisor with the Florida Department of Law Enforcement (T. 166). The defense objected to him giving an opinion on bullet trajectory or probable height of the shooter because he stated in deposition that he did not have such an opinion (T. 171). During a proffer, Yao said that after giving his deposition, which was based solely on an examination of the projectile hole in the car window, he reviewed the autopsy report which detailed the injuries to the victim. He then formed an opinion that the shooter was probably around six feet tall rather than someone who is shorter (T. 173-174).

The court ruled that the defense could depose Mr. Yao before he would be allowed to testify in front of the jury about his opinion (T. 175). Counsel attempted to raise an objection based on a discovery violation, but the court said the defense would only be heard after the deposition (T. 176).

Shelby Blank is a surgeon at Tallahassee Memorial Hospital (T. 176). She treated Mr. Merkel for two penetrating injuries, one to the forehead and one to the cheek (T. 178). He died 12 to 14 hours later (T. 178).

Anthony Clark is the medical examiner who performed the autopsy (T. 180). Two bullets were extracted from Markel's head (T. 186). His wounds had soot deposits consistent with a revolver being used (T. 193). The gunshot wound to the forehead was the cause of death (T. 195). The bullet trajectory was "very slightly down" (T. 196). The other bullet struck the cheek and traveled "slightly up" (T. 196).

Len Harvey works for the Premier Health and Fitness Center. He authenticated security video taken at the gym on July 18, 2014 (T. 206-208).

Andrew Brown works for StarMetro bus service in Tallahassee (T. 210). He authenticated video recorded on two buses on July 18, 2014 (T. 211-212). The video shows a Prius with two occupants. The passenger wore a white shirt (T. 216). The video is not the original, but was enhanced by the prosecution (T. 219).

The defense requested a Richardson hearing based on not being provided the enhanced video, and also based on the original video not being introduced in evidence (T. 220). Appellant joined in the objection (T. 221). The court reserved ruling pending the next witness (T. 221).

Brock Dietz testified that he used computer software to alter the gym video recording (T. 227). These alterations included highlighting certain

vehicles at times indicated by the state attorney (T. 228). He did this whenever the green Prius appeared in the video (T. 228). He did the same thing to the bus video (T. 229). The most recent edit to the videos was provided to the State a week before trial (T. 233). He altered the gym video a total of five times (T. 235).

Investigator Mike Dilmore testified that he performed a forensic analysis of Charlie Adelson's iCloud data (T. 243). There were text messages between Charlie Adelson and co-defendant Katherine Magbanua (T. 248-249). The phone number was saved in Adelson's iCloud under the name "Kaddi" (T. 256-257).

Marcia Rodriguez testified that she performed a forensic examination of Wendi Adelson's phone (T. 268). Contacts included other members of the Adelson family, Wendi's ex-husband, Dan Markel, and a log of phone calls (T. 275-276).

Andrew Brown was recalled to authenticate the original, unedited bus footage (T. 280-281).

The court conducted a Richardson hearing and denied Appellant's motion to exclude Yao's opinion testimony on the ground that the discovery violation wasn't willful and did not procedurally prejudice Appellant (T. 301). Yao then testified that in his opinion, the bullets were fired at a downward

trajectory and the shooter was probably 6'1" in height rather than 5'4" (T. 316-318).

Craig Isom was the lead investigator for the Tallahassee Police Department in this case (T. 331). He interviewed Markel's ex-wife, Wendi Adelson (T. 333). He obtained the records of their divorce (T. 334). The proceedings were contentious, and there was animosity between Markel and Wendi Adelson's family (T. 337). Markel filed a motion to limit the children's contact with Donna Adelson, Wendi's mother (T. 339). The motion was never heard by the court because Markel was murdered while the motion was pending (T. 340). Wendi had previously been prohibited by the court from moving to Broward County with the children (T. 340).

Donna Adelson told Wendi in emails that she should threaten or bribe Markel (T. 341). Isom tried to interview Donna Adelson and her husband, but they didn't show up for the interview (T. 345).

On the day he was shot, Markel dropped his kids off at daycare and then went to the Premier Fitness center to exercise (T. 346). A surveillance video shows a green Prius pulling into the parking lot behind Markel (T. 349-350). An hour later, the Prius followed Markel out of the parking lot as he left around 10:38 a.m. (T. 352). The Prius was a 2006 to 2009 Toyota,

silver pine mica in color (T. 354). The 911 call about the shooting came in at 11:02 (T. 354).

Isom obtained additional video from city buses along the route between the gym and Markel's residence (T. 355). It shows the Prius still following Markel's car at 10:52 and 10:55 a.m. (T. 357-358). The Prius had a distinctive mirror and a Sunpass toll-paying device (T. 359). The passenger wore a white shirt (T. 360).

Isom requested information on toll activity for any Toyota Prius heading from Miami to Tallahassee on July 16 and returning on July 18 (T. 369). Only one transponder met those criteria (T. 370). He requested the subscriber information for that transponder (T. 370). It was registered to a rental car agency in Miami (T. 372). A 2008 Prius was rented to Luis Rivera by that agency on July 15, 2014 (T. 372-375). The rental information included phone numbers (T. 374). One of the phone numbers matches a Facebook account for a person using the moniker "Tuto" and a profile photograph of Appellant (T. 385-386).

Isom obtained a pawnshop ticket bearing Appellant's name and a phone number (T. 387). He also obtained phone numbers and records for Wendi, Donna, Harvey and Charlie Adelson, and co-defendant Katherine Magbanua (T. 389-394).

Ronald Witt is the law enforcement contact for T-Mobile (T. 504-505). He submitted cell phone tower logs in Tallahassee to law enforcement (T. 509).

Wendi Adelson testified that she was previously married to Dan Markel (T. 515-516). Her family lives in Broward County (T. 517). She has two children from Markel (T. 518). Divorce proceedings were initiated in 2012 (T. 519). She petitioned to move to South Florida with the children, but it was denied (T. 521). The divorce became final in 2013 (T. 522).

Markel filed a pleading to allege that Wendi's mother, Donna, was interfering with his relationship with the children (T. 524). Wendi's parents were very angry with Dan (T. 526). Her brother Charlie never mentioned hiring a hitman to kill her husband (T. 532). He made a joke that buying her a tv set would be cheaper than hiring a hitman (T. 532-533). She was not involved in any plot to kill Markel (T. 535). She met Katherine Magbanua once and went to the beach with her when Magbanua was dating her brother, Charlie (T. 535-537).

Thomas Balboni is an investigator for the State Attorney's Office (T. 614). Appellant's known fingerprints matched the print on the pawn ticket from Miami (T. 619).

Officer Bill Brannon responded to the shooting scene on July 18, 2014 (T. 641-642). A female in a Honda Odyssey approached the scene, turned around, and drove away (T. 645).

Jeffrey LaCasse had a relationship with Wendi Adelson in 2013 and 2014 (T. 669-670). He met her family, including brother Charlie, and Katherine Magbanua, but never met Appellant (T. 671). He met Wendi at a coffee shop on June 4, 2014. She was nervous and upset that the court wouldn't let her take her children and relocate to South Florida (T. 672-673). She was bitter and made statements about her brother considering options to take care of the problem (T. 673). Wendi told him that Charlie was looking into having Dan Markel killed (T. 677). She told him on the phone after the murder that she and Charlie had a celebration dinner (T. 678).

Stephen Lutes is a security specialist for Chase Bank (T. 718). He authenticated ATM video surveillance footage from a branch in Pembroke Pines, Florida in July of 2014 (T. 718-722).

Sergeant Christopher Corbitt has training in cell phone analysis (T. 738-739). The State qualified him as an expert (T. 740). He investigated the phones of several people in this case, including Appellant, Katherine Magbanua, and several members of the Adelson family (T. 741). Wendi

Adelson's phone traveled to Trescott Drive on July 18 and approached the police roadblock until it was unable to go any further (T. 749). It also attempted to call Markel at 11:42 a.m., but there was no answer and the call went to voicemail (T. 751).

Cell tower "dumps" were used to determine where certain cell phones were located at various times (R. 754). Markel went to the Premier Health and Fitness gym and then back to his residence prior to being shot (T. 755). A phone number ending in 5986 was found in the tower dumps that was also in Harvey Adelson's cell phone records (T. 765). This was Appellant's number (T. 765).

Corbitt compared known cell phone records to the tower dumps to see if any of the phones were in the Tallahassee area during the relevant time period (T. 768). Luis Rivera's phone was in the tower dump (T. 768). Rivera and Appellant both had phones appear on a tower dump for a tower near I-10 and Thomasville Road (T. 769). Appellant's phone location was consistent with the tower servicing the Premier gym (T. 769-771). Rivera's phone was in that area as well (T. 772). The tower data only provides a general area, not a precise location (T. 773).

Luis Rivera testified that he entered a plea to second-degree murder in this case and was sentenced to nineteen years in prison concurrent with

a federal prison sentence of twelve and one-half years, in exchange for becoming a cooperating witness (T. 810-811). He also had pending charges for which he hasn't yet been sentenced (T. 813).

Rivera grew up with Appellant (T. 815). Appellant's nickname is "Tuto" (T. 815). Co-defendant Katherine Magbanua is Appellant's wife, or at least he thought they were married (T. 815-816). Their relationship was on and off (T. 817).

Rivera's height is 5'4". Appellant is 6'1" (T. 820). Appellant approached him in 2014 about going to Tallahassee (T. 821). Appellant said he had a job and would pay Rivera to go with him, but Rivera didn't ask what the job was (T. 822-823). He made two trips to Tallahassee with Appellant (T. 823). He thought they were going to do a robbery, but Appellant said they would have to kill a man for some kids (T. 824). It was for a lady who wanted her kids back (T. 824). Appellant had a piece of paper with a picture of Dan Markel (T. 825). Appellant was driving on the first trip; Rivera brought the car (T. 826). The first trip was around June 4 or 5, 2014 (T. 827). Rivera admitted that he got a traffic ticket for speeding along the way (T. 828).

Rivera was going to be the shooter, but didn't want to do it in front of the kids. They lost contact with Markel as they were following him. They abandoned the plan and returned to Miami (T. 835-836).

They returned to Tallahassee on July 16 to try again (T. 837). Rivera rented a green Prius (T. 837). They saw a woman with kids walking to Markel's house as they pulled up, and she looked their way (T. 840-841). They drove off, and Appellant called "Katie" (T. 842). Katie told Appellant they had to finish the job before Markel left town (T. 843). Rivera posted a picture of an owl on Instagram while they were waiting, and then took it down (T. 844). Rivera said that Appellant pulled out a gun and accidentally shot a hole in the car, and they had to get it fixed (R. 845-846).

He and Appellant went back and followed Markel as he drove to the daycare center, and then to the gym (T. 847). Rivera was driving (T. 848). They followed Markel back to his house afterward (T. 848). The bus videos show the two of them driving before and after the murder (T. 849).

They pulled in behind Markel, who was talking on the phone (T. 849-850). Appellant got out, walked up to the driver's side of Markel's car, and shot him twice (T. 850). Appellant got back in the car, and they left (T. 851). Rivera was still driving (T. 852). They dumped the gun in the lake (T. 853). They stopped at an ATM to get cash on the way back to Miami (T. 855).

Katie was responsible for getting them their money (T. 856-857). Wendi was the one paying (T. 857). Rivera, Appellant and Katie each got a cut of the money (T. 860). Rivera and Appellant bought cars and motorcycles with the money (T. 865). The Adelson family hired Appellant to murder Mr. Markel, and Appellant paid him to help (T. 876).

Officer Jonathan Grossman testified that he located the Prius in 2015 by its VIN and searched it. He found a bullet hole in the passenger's floorboard (T. 1180-1184).

Heath Leland worked at the Creative Preschool (T. 1201). He saw Mr. Markel on the day he was killed (T. 1202). He noticed a Prius parked outside the daycare center in the parking lot (T. 1204).

Shoddrick Nobles testified that Appellant tried to buy cocaine from him in Tallahassee in June or July of 2014 (T. 1215-1218). He saw Appellant and Rivera two times about a month apart, and they had car trouble both times (T. 1221-1222). The second time, he took them to the auto parts store to buy a hose (T. 1224). He helped get them a room for the night (T. 1225). The vehicle was a grey station wagon (T. 1226).

Justin Willits provided toll booth information to law enforcement about a Sunpass transponder assigned to a Prius that went through the toll

booths on Alligator Alley on July 16, 2014 at certain times (R. 1254-1256). Only one customer account matched the search criteria (T. 1256).

Waldo Nunez was a sales representative at the rental car agency in Miami (T. 1264). He rented out a Nissan Altima on June 2, 2014 (T. 1269). He rented out a Hyundai Sonata on June 3 (T. 1271). The contracts were introduced in evidence (T. 1267).

Daren Schwartz owns a rental car company in Miami (T. 1281). All of his vehicles had Sunpass transponders installed (T. 1281-1282). He had two green Priuses in July of 2014 (T. 1283). He rented one of them to Luis Rivera (T. 1283).

Elizabeth Richey is a firearms analyst with FDLE (T. 1293). She analyzed two fired bullets (T. 1295). They were .38 caliber and were both fired from the same weapon (T. 1297-1298).

June Umchinda dated Charlie Adelson from 2015 to 2017 (T. 1334). He spoke of the murder of Dan Markel but never admitted any involvement in it (T. 1335).

Yindra Mascaro lives in Miami and testified about her knowledge and relationships with Katherine Magbanua, Appellant, and Luis Rivera. (T. 1366-1369).

Clariza Lebredo is Harvey Adelson's assistant at a dental office in Tamarac, Florida (T. 1430-1431). Charlie Adelson also worked there (T. 1434). Katherine Magbanua was a patient one time (T. 1440).

Erika Johnson also works at the dental office as a dental assistant (T. 1449-1450). Donna Adelson worked there too (T. 1452). She called Charlie when the FBI came looking for employment records for Katie (T. 1458). Charlie told her not to provide any records because it's his father's office (T. 1458-1460).

Christopher Corbitt was recalled to say that Luis Rivera's phone records revealed a preliminary trip to Tallahassee in June of 2014 (T. 1486). He returned to Miami on June 5 (T. 1490). A silver Nissan Altima was rented for the trip (T. 1492). Magbanua's phone had contact with the cell tower consistent with the rental agency, and also communicated with Charlie Adelson around the same time (T. 1494-1497). A second car was rented on June 3, a Hyundai Sonata (T. 1499). Rivera was issued a traffic citation in Gainesville on June 4 (T. 1500-1501). The phones of Appellant and Magbanua were in contact on June 6 (T. 1506). Appellant's phone called Harvey Adelson on July 1, 2014 (T. 1508-1509).

Rivera and Appellant both had phone records showing another trip from Miami to Tallahassee between June 16 and June 18 (T. 1510-1511).

Another car was rented for the July trip (T. 1511). Appellant's phone number was listed on Rivera's rental contract (T. 1515). GPS location information put the rented Prius in Magbanua's driveway on the evening of July 15 (T. 1519).

Rivera's phone and Appellant's phone left Miami just after noon on July 16 (T. 1520). The Sunpass transponder also paid a toll along the way (T. 1520). Rivera's phone communicated with a cell tower near the Budget Inn, and there was a registration for a hotel room at that location (T. 1521-1522). Both phones were active near Trescott Drive on the evening of July 17 (T. 1522-1523). There were communications between the phones for Appellant and Magbanua that evening as well (T. 1524).

Surveillance video put the Prius at Premier Health and Fitness at 9:16 on the morning of July 18 (T. 1524). Both phones were connected to towers consistent with that (T. 1525). Rivera made an ATM withdrawal in Pembroke Pines on July 18 on the way back to Miami (T. 1529-1530).

Mary Hull is a financial investigator with the Florida Attorney General's Office (T. 1722-1723). She reviewed the bank records of Appellant, Rivera, Magbanua, and the Adelsons to look for a connection or money trails (T. 1726).

Between July 26 and October 17, 2014, Appellant purchased two cars and a motorcycle (T. 1743). Rivera purchased one car and one motorcycle during the same time period (T. 1743-1744). Magbanua acquired a Lexus from Harvey Adelson for $1700 (T. 1744). Most of Hull's remaining testimony concerned co-defendant Magbanua's financial activities and employment by the Adelsons.

Oscar Jimenez was an FBI agent who did an undercover operation on April 19, 2016 (T. 1894). He pretended to be a member of the Latin Kings and approached Donna Adelson (T. 1894). He handed her a flyer about the Markel murder with handwritten notes indicating a telephone number and the amount of $5,000 (T. 1896-1897). A recording of their conversation was introduced and published (T. 1898). This was a "bump" operation done in conjunction with a wiretap (T. 1901).

He later called Donna Adelson to follow up in the hopes that it would create phone chatter between the parties to be picked up by the wiretap (T. 1905). He later received a call from Charles Adelson on April 28, 2016 on the number he'd provided to Donna Adelson (T. 1906-1907).

Christopher Corbitt was recalled to say that he participated in getting the wiretap (T. 1958). He tapped the phones for Charlie Adelson and Katherine Magbanua (T. 1964).

Sherrie Bennett was the custodian of the wiretap information (T. 1985-1986).

Special Agent Patrick Sanford of the FBI testified about his role in assisting the Tallahassee Police Department (T. 1987-1988). He assisted with the wiretap and interviewed several witnesses (T. 1989-1990). Rivera flipped and became a cooperating witness. He's a violent gang leader with a criminal history (T. 2436).

Special Agent Louis Bronstein of the FBI participated in a surveillance operation at the Dolce Vita restaurant in April of 2016 (T. 2505-2506). The objective was to surveil a meeting between Charlie Adelson and Katie Magnabua (T. 2506). A recording was introduced and played, but most of it was unintelligible due to poor audio quality (T. 2509).

Craig Isom was recalled to describe the crime scene tape around the shooting scene on Trescott Drive and the circumstances of Katherine Magbanua's arrest (T. 2516-2517). Mary Hull was recalled to authenticate Magbanua's tax returns (T. 2531-2533).

The State then rested its case (T. 2547). Appellant moved for a judgment of acquittal, which was denied (T. 2547-48). The court also denied co-defendant Magbanua's motion for judgment of acquittal (T. 2552).

Appellant called two witnesses. Trooper Steven Downing testified that he pulled Luis Rivera over in Alachua County on June 4, 2014. According to markings on the ticket and the trooper's usual practice, the citation indicates that Rivera was traveling alone (T. 2554-2559).

John Sawicki performed a cell phone records analysis for Charlie Adelson's phone between May and July of 2014 and discovered that thousands of text messages sent or received by the phone were deleted. He didn't know the content of the messages or the other party (T. 2581-2582). Appellant then rested (T. 2597).

Co-defendant Katherine Magbanua called five witnesses, including herself. She denied any involvement in the murder of Dan Markel, and denied hiring Appellant to commit the murder on behalf of Charlie Adelson (T. 2681).

The State recalled Christopher Corbitt called as rebuttal witness (T. 2897). He authenticated several text messages between Katherine Magbanua and Charlie Adelson, some of which included Ms. Magbanua complaining about money problems (T. 2898-2905).

The jury found Appellant guilty as charged of first-degree murder and conspiracy to commit first degree murder, and not guilty of solicitation to commit first degree murder (T. 3205, R. 1701-1702). After a penalty phase

trial, the jury found that the aggravating factors did not outweigh the mitigating circumstances (R. 1729). This rendered Appellant ineligible for the death penalty, leaving life imprisonment as the only potential sentence. Accordingly, the trial court sentenced Appellant to life imprisonment on count one (P. 206, R. 1737). The court sentenced Appellant to 30 years consecutive on count two (P. 207). This appeal follows.

Summary of the Argument

The trial court erred in finding that the State's discovery violation was not willful and did not procedurally prejudice Appellant. The State's expert said in deposition that he had no opinion on bullet trajectory. After the deposition, he reviewed the medical examiner's report. At trial, he testified that in his opinion, there was a downward bullet trajectory showing that the shooter was six feet tall (Appellant's height) instead of 5'4" (the other suspect's height).

The prosecutor admitted that she did not inform Appellant's attorney of the change in testimony, even though the new opinion was only damaging to Appellant. Instead, she only instructed the witness to "notify the defense" (R. 296). The witness then notified the co-defendant's attorney who deposed him but did not notify Appellant's attorney. The court found that it was unknown whether the State asked the witness to inform both attorneys, but the prosecutor expressly admitted during the Richardson hearing that she did not ask the witness to contact both attorneys.

Trial counsel argued that bullet trajectory was an important issue in the case, and that the change in testimony tended to identify his client as the murderer, a disputed point. Counsel added that had he known of the

expert's changed testimony, he would have obtained a defense firearms expert to dispute the State expert's conclusions that there was a downward trajectory and a tall shooter. The State's expert, Mr. Yao, said that the medical examiner's report was the basis for his new opinion. However, the medical examiner testified that one of the two bullets actually had an upward trajectory, while the other was "very slightly down" (T. 196) Thus, counsel would have had a strong basis for obtaining a defense expert and changing his pretrial preparation to dispute Yao's trial testimony.

The trial court also erred in its response to a jury question. The jury asked the same basic question three different ways. The jury asked if Appellant could be convicted as a principal to premeditated murder (1) if he only had the intent to commit robbery, (2) if he himself didn't premeditate, or (3) if he was a principal to any act. A defendant must have the specific intent to kill to be guilty as a principal to premeditated murder. However, instead of giving this answer or referring the jury back to the instructions on principal and independent act, the court replied that there are no exceptions or exemptions to a person being a principal to a criminal act. This was a misleading instruction that invaded the province of the jury to consider the independent act doctrine based on Appellant's lack of intent to kill.

Argument

I. THE TRIAL COURT ERRED IN FINDING THAT FAILURE TO DISCLOSE EXPERT OPINION ON BULLET TRAJECTORY AND HEIGHT OF SHOOTER WAS NOT A WILLFUL DISCOVERY VIOLATION AND DID NOT RESULT IN PROCEDURAL PREJUDICE

The trial court erred in finding that a discovery violation by the State was not willful and did not result in procedural prejudice. A trial court's findings after a *Richardson*[1] inquiry into an alleged discovery violation are reviewed for an abuse of discretion, but that discretion can only be exercised after making an adequate inquiry into all of the surrounding circumstances. *Barrett v. State,* 649 So. 2d 219, 222 (Fla. 1994).

During trial, the State called forensic investigator Robert Yao and asked him if he had an opinion on the bullet path (T. 170). Defense counsel objected on the ground that Yao stated in deposition that he had no opinion on bullet trajectory, and he wasn't told that Yao had changed his testimony until the co-defendant's attorney informed him recently (T. 170).

The prosecutor responded that she advised Mr. Yao to "contact you-all and advise you of the change" (T. 171). The new opinion is that the evidence is more consistent with the shooter being tall than short (T. 171-172). During a proffer outside the presence of the jury, Yao said that his original testimony was based on the height of the projectile hole in the car

[1] *Richardson v. State,* 246 So. 2d 772 (Fla. 1971).

window, which was consistent with the shooter being either tall or short. After the deposition, he reviewed the medical examiner's report. His opinion now is that the evidence is more consistent with the shooter being six feet tall or higher rather than someone who is five feet four inches (T. 172-174). Confessed participant Luis Rivera testified that he is 5'4", while Appellant is 6'1" (T. 820).

The defense then renewed its objection to Yao's opinion being admitted (T. 175). The court ruled that Appellant could retake Yao's deposition at the end of the day, and then Yao would testify the next day (T. 175). Any further objection would be heard after the deposition (T. 175-176). The court also said it would conduct a Richardson hearing the next morning (T. 285). During a Richardson hearing, the trial court must inquire as to whether the violation (1) was willful or inadvertent; (2) was substantial or trivial; and (3) had a prejudicial effect on the aggrieved party's trial preparation. *Andres v. State,* 254 So. 3d 283, 293 (Fla. 2018).

The next morning, the prosecutor stated that Mr. Yao was originally deposed by co-defendant Magbanua's attorney, and Appellant's attorney did not attend. Afterward, Yao reviewed additional information from the medical examiner and informed the State of his changed opinion (T. 295-296). The prosecutor then said, "I advised him to please notify the defense.

I did not specify, please notify both defense counsels." (T. 296). The prosecutor conceded that Appellant was not made aware of the new testimony and "[t]o the extent that I was required to make him aware, I didn't specifically do that" (T. 296). This occurred within the last two weeks, but Appellant was only informed several days prior to trial (T. 297).

Appellant's attorney said that he couldn't find his copy of the original deposition, but learned from the co-defendant's attorney a general overview of what transpired and believed that Yao's trial testimony would be limited to that (T. 298). Had he known of Yao's opinion sooner, he would have hired a firearm expert that specializes in trajectories to dispute Yao's testimony (T. 299).

Appellant therefore moved to exclude any testimony about the novel opinion because bullet trajectory is a huge issue in the case and the opinion creates an inference that Appellant, who is over six feet tall, was the shooter rather than the significantly more-diminutive Luis Rivera (T. 300). The State took no position (T. 300).

The court denied the unopposed motion to exclude Yao's opinion. First, the court found that there was a discovery violation, but it was not willful. Second, the court found that Appellant was not procedurally prejudiced (T. 301). The trial court did not address the second prong of a

Richardson inquiry, which is whether the violation was substantial or trivial. Yao then testified that in his opinion, the bullet trajectory indicated that the shooter was more likely the suspect who was 6'1" than the suspect who was 5'4" (T. 318).

As to willfulness, the trial court found as follows:

> The prosecutor asked the investigator to call the attorney. Understandably, he called the attorney who deposed him. I don't know, you know, what the discussion was between the prosecutor and Mr. Yao, whether he was asked to call both attorneys or just the one that deposed him. It doesn't seem shocking to me that he called the one who deposed him and had posed the question to him.

(T. 301).

The trial court's findings on willfulness are an abuse of discretion. The prosecutor specifically told the court that she did not ask Yao to notify both defense attorneys of the new testimony. Therefore, the court's finding that it was unknown what the discussion was between the prosecutor and Mr. Yao and whether he was asked to call both attorneys is not supported by the record and is the opposite of what the State said.

The State had the transcript of the original deposition and knew (or should have known) that Appellant's attorney did not attend. It was therefore foreseeable that Yao might not think to notify Appellant's counsel of the change in testimony unless specifically instructed to do so. The State

also knew that Yao's new opinion on bullet trajectory and height of the shooter only implicated Appellant, not co-defendant Magbanua.

It was the State's duty to comply with Fla. R. Crim. P. 3.220 and inform Appellant of this incriminating evidence. The State cited no authority allowing it to delegate its discovery obligation to one of its witnesses. Even if this is theoretically permissible, the prosecutor had at a minimum an affirmative duty to instruct Yao on whom to notify, and to follow up afterward to make sure that the party not present at the deposition but most affected by the change in testimony was informed. The prosecutor did neither.

Under Fla. R. Crim. P. 3.220(j), a prosecutor has a continuing duty to disclose material that becomes known after the initial discovery disclosure is made. See also ABA Criminal Justice Standards, § 11-2.6. Once a witness has given a recorded statement, the State must disclose to the opposing party any oral statement that constitutes a "material change" to the recorded statement. *Andres,* 254 So. 3d at 293 (citing *Scipio v. State,* 928 So. 2d 1138 (Fla. 2006). Failure to do so is a discovery violation. *Id; see also Neimeyer v. State,* 378 So. 2d 818 (Fla. 2nd DCA 1979) (holding that failure to disclose change in medical examiner's testimony bearing on defendant's self-defense claim was a discovery violation).

In *Scipio,* an investigator said in deposition that he recovered a firearm under the murder victim's body and turned it over to law enforcement. *Scipio,* 928 So. 2d at 1140. The defense intended to use this testimony to create doubt as to whether Scipio was the assailant. *Id.* At trial, the investigator stated for the first time that the object he recovered was actually a pager, not a firearm. The change was never disclosed to defense counsel. *Id* at 1140-41. The defendant was convicted and the Fifth District affirmed. *Id.*

The Florida Supreme Court quashed and remanded for a new trial. The Court noted that the investigator initially gave a statement helpful to the defense, and then at trial gave testimony contrary to the initial statement that was harmful to the defense and helpful to the State. *Id* at 1142. The Court reasoned that the purpose of the discovery rules is to assist the truth-finding function of the trial and avoid trial by ambush. *Id* at 1144. The Court then gave a scathing assessment of the State's non-disclosure of the change in testimony:

> The State's calculated failure to inform the defense of the important and dramatic change in testimony of its medical examiner's investigator not only violated the prosecutor's duty not to strike "foul" blows, but undermined the very purpose of the discovery rules as set out by this Court in *Kilpatrick* and *Evans,* since the State was fully aware that the defense intended to rely heavily on the testimony of

> the State's investigator and would be completely surprised by the witness's changed testimony at trial.

Id at 1145.

In this case, the prosecutor admitted that it was her duty to ensure that Appellant was informed of the new testimony that hurt his defense and she "didn't specifically do that" (T. 296). She also admitted that she failed to adequately instruct her witness to notify both defendants on her behalf (T. 296). The trial court's finding that the conversation between the prosecutor and Yao was unclear, and therefore the discovery violation was not willful, is an abuse of discretion and cannot stand.

The finding of no procedural prejudice is also error. The trial court reasoned that Appellant didn't attend the original deposition or review it, had only deposed one other witness in the case and none of the experts, and was given an opportunity to depose Yao about his new opinion the previous day (T. 301-302).

However, counsel said that he was aware of Yao's testimony in the first deposition because the co-defendant's attorney contacted him and gave him "a general overview of what transpired" (T. 298). His strategy was based on that information. It was therefore unnecessary for him to attend the deposition personally to know what Yao's trial testimony would be. He

also said that he would have sought to retain a defense expert on bullet trajectories to refute Yao's opinion had he known of it sooner.

This assertion is supported by the fact that the medical examiner testified that one of the bullets traveled on a trajectory that was only "very slightly down," and the other bullet actually traveled "slightly up" (T. 196). Here is Dr. Clark's testimony on what the autopsy revealed about bullet trajectory:

> A: Okay. The first shot to be fired in the autopsy report, again, is gunshot wound No. 2. I tend to start from top to bottom. That's the left cheek and face. That traveled from front to back, very slightly down, and very slightly right to left. So it's going this way into the face.
>
> Q: All right. And the next one?
>
> A: The one that I labeled as gunshot wound No. 1 to this area here, what we call the glabella, went from front to back, slightly left to right, and slightly up. So it's coming this way.

(T. 196).

Therefore, there would have been a legitimate basis for a defense expert to dispute Yao's opinion that the shooter must have been tall based on the medical examiner's report. The fact that one bullet traveled upward suggests that the shooter might have been short, but Yao made no mention of this contrary point in his testimony.

Whether defense counsel deposed other witnesses is irrelevant. Yao testified that his new opinion was based on the medical examiner's report (T. 173), and defense counsel clearly outlined what he would have done differently had he known about it. The defense theory was that Rivera committed the murder and then blamed it on Appellant to get a favorable plea deal. Evidence tending to identify Appellant as the shooter was devastating to that defense. As a result, the discovery violation was substantial notwithstanding the trial court's failure to consider this factor in its Richardson analysis, and trial counsel definitely would have prepared differently in order to deal with Yao's opinion had he been properly notified.

A defendant is entitled to a new trial if there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. Procedural prejudice exists if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. The error is harmless only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation. In the vast majority of cases, the record will be insufficient to support a finding of harmless error. *State v. Schopp,* 653 So. 2d 1016, 1020-21 (Fla. 1995); *Scipio,* 928 So. 2d at 1147.

Because there was a willful and substantial discovery violation that procedurally prejudiced the accused, the trial was unfair and the conviction must be reversed.

II. THE TRIAL COURT ERRED IN ITS RESPONSE TO JURY QUESTIONS DURING DELIBERATIONS

The trial court erred in its response to a question posed by the jury during deliberations. A response to a jury question is reviewed for abuse of discretion. Discretion is only abused when the judicial action is arbitrary, fanciful or unreasonable, or when the jury instructions are confusing, contradictory or misleading. *Cannon v. State,* 180 So. 3d 1023 (Fla. 2015). Error also occurs if a response to a jury question constitutes an impermissible comment on the weight, character or credibility of any evidence adduced. *Speights v. State,* 668 So. 2d 316, 318 (Fla. 4th DCA 1996) (quoting *Whitfield v. State,* 452 So. 2d 548 (Fla. 1984)).

During deliberations in this case, the jury posed a series of related questions to the court about the law of principals. The written jury questions and court answers are contained in the second supplemental record, but they are out of order. Therefore, all of them will be synchronized with the trial transcript to make the order clear.

The first jury question was in two parts:

1. If person B accompanies person A with a shared intent to commit a robbery together, and person A commits premeditated murder during the robbery, but person B did not know a murder was intended, is person B a principal to premeditated murder?

2. Does principal apply to conspiracy?

(T. 3177; R. 1776).

This question clearly applies to Appellant, as co-defendant Magbanua was not alleged to have been present at the scene when the crime was committed, and co-conspirator Luis Rivera was a cooperating witness who pled guilty and was not on trial. This question indicates that the jury believed Appellant did not intend for a murder to be committed.

As to the first part, the court answered without objection that it is not allowed to apply the law to the facts. The court answered the second question in the negative (T. 3177-3178, R. 1774).

The second jury question asked to see a cell tower map, which was a demonstrative exhibit and not in evidence (T. 3179, R. 1777). The court answered without objection that the jury could not see it (T. 3180-3182, R. 1775).

The third jury question was as follows:

> Can you be a principal to premeditation if you do not premeditate it yourself?

(T. 3190, R. 1779). Like the first question, this indicated that the jury believed Appellant did not have a premeditated intent to kill. After conferring with the parties, the court answered by saying it cannot answer hypothetical questions or apply the law to the facts, and referred the jury to

the instructions on first-degree premeditated murder, principals, and independent act (T. 3193, R. 1778).

The jury's fourth question, which was somewhat cryptic, was as follows:

> According to the law
> Are there any exceptions/exemptions
> to an individual being a principal
> to a criminal act -> Re: Instructions
> Instructions page 5: Principals ¶ 1
> "commit a crime -> ¶ 1 -> that the criminal
> act be done
> ie - Principal to Any act?

(T. 3194, R. 1781) (underlining, arrows and symbols in original).

The State proposed that the court answer that there are no exceptions to the law of principals (T. 3195).

The defense attorneys did not agree. They argued that, taking the jury questions as a whole, it seemed clear that the jury wanted to know if intending and aiding a robbery made you a principal to a premeditated murder that the other person committed. Counsel correctly argued that the answer to that question is "no" because felony murder wasn't charged. Therefore, they asked the court to explain in its answer that one cannot be a principal to any criminal act, but only to the crime charged (T. 3195-3197).

The court proposed to give a two-part answer that said there are no exceptions to the law of principals, but asked the jury to clarify the rest of the question (T. 3197). Defense counsel did not agree with this response:

> Yes, Judge, I still hold the position that when they ask "commit a crime" and they underline the word "a" and then they ask "that the criminal act be done," I think what they are asking is if one crime was planned and then another crime happened, are you a principal? Because you have to have the conscious intent to commit that crime, but I will defer to the Court; but that's Mr. Garcia's position.

(T. 3198). The co-defendant's attorney added that a principal must have knowledge that the charged crime is going to be committed, and that needs to be made clear to the jury. He argued that anything else would be a misstatement of the law because felony murder wasn't charged (T. 3198-3199).

The following exchange then occurred regarding what the answer would be:

> THE COURT: Well, I mean, wouldn't you agree we are kind of guessing what they are asking us?
>
> MR. ZANGENEH: Let's clarify.
>
> THE COURT: I don't see where it hurts anything to ask them to clarify their question.
>
> MR. ZANGENEH: That's fine, Judge.
>
> MR. KAWASS: That's fine, Judge.

> THE COURT: If y'all don't have a problem, I will go ahead and give them this answer while we are working on the next question.
>
> MR. ZANGENEH: Of course not, Judge. The next question--

(T. 3199).

Appellant asked the court to have the jurors clarify their question. The court said it would do that, to which both defense attorneys agreed. However, the court interpreted this as agreement with its proposed answer that there are no exceptions to the law of principals, followed by a request for clarification as to the second part of the question. Taking defense counsel's responses as a whole, it doesn't appear that he intended to agree to that answer, and there was no meeting of the minds. The State may disagree, but Appellant asserts that this issue was preserved for appeal and should be heard.

The trial court then gave the following answer:

> I have given you the full definition of principals. There are no exceptions/exemptions to an individual being a principal to a criminal act. I am not clear about the rest of your question. Please clarify your question for me.

(R. 1780).

The jury also asked a fifth set of questions about being hung as to one defendant and rendering a verdict on the other, and being hung on a single count but rendering verdicts on the other counts as to a single defendant (T. 3199-3200). These questions are not relevant to the appeal.

The trial court's response to the fourth jury question was a confusing misstatement of the law and invaded the province of the jury to decide the issue of intent and apply the law to the facts. Premeditated first-degree murder is a specific intent crime. *Neal v. State,* 854 So. 2d 666, 670 (Fla. 2nd DCA 2003). The intent required is the specific intent to kill a human being. *Delgado v. State,* 948 So. 2d 681, 687 n.8 (Fla. 2006). Thus, the intent to aid in the commission of a robbery is insufficient unless the defendant is charged with felony murder.

The specific intent to kill is inherent in premeditated murder, whether the defendant actually killed or was a principal. *Williams v. State,* 242 So. 3d 280, 289 (Fla. 2018); *see also Bailey v. State,* 277 So. 3d 173, 176 (Fla. 2nd DCA 2019). A person cannot be guilty of premeditated murder by being a "principal to any act", which is what the jury was asking (R. 1781).

The jury was obviously confused, and essentially asked the same question three different ways in an attempt to get an answer. First, the jury asked if intent to commit robbery made someone a principal to

premeditated murder (R. 1776). Second, the jury asked if you could be a principal to premeditated murder if you did not premeditate yourself (R. 1779). Finally, the jury asked if you could be a principal to premeditated murder by being a principal to any criminal act (R. 1781). This was a single question in need of a single answer, not multiple questions to be bifurcated as the trial court did.

If the trial court wasn't willing to answer the final question by saying that Appellant is only a principal to premeditated murder if he had the specific intent to kill, then it should have again referred the jurors back to the instructions on principals and independent act instead of telling them there are no exceptions. The independent act instruction specifically deals with the situation of a person intending one crime and a co-defendant or co-conspirator committing a separate crime that wasn't intended (R. 1692). However, the trial court's answer essentially directed a verdict against applying independent act in this case.

The conviction and sentence for first-degree murder should be reversed.

Conclusion

Based on the foregoing, the Appellant requests that the judgment of the circuit court be REVERSED, and this cause remanded for a new trial.

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Designation of Email Address

Pursuant to Fla. R. Jud. Admin. 2.516, the undersigned attorney designates his service email address as bayalaw@aol.com.

Certificate of Service

I HEREBY CERTIFY that I have furnished a true and correct copy of the foregoing initial brief by electronic service to the Office of the Attorney General at crimapptlh@myfloridalegal.com on January 14, 2021.

/s/ Baya Harrison
Baya Harrison

Certificate of Compliance

I CERTIFY that the foregoing document was prepared in Arial 14-point font and consists of 8,748 words, per Fla. R. App. P. 9.210.

/s/ Baya Harrison
Baya Harrison