IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

GABRIEL BRIAN NOCK,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 4D14-1240
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
17th Judicial Circuit of Florida,
In and For Broward County (Criminal Division)

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Court.

The symbol "T" will denote the Transcript on Appeal

The symbol "R" will denote the Record on Appeal.

The symbol "SR" will denote the Supplemental Record.

The symbol "ST" will denote the Supplemental Transcript.

The symbol "InB" will denote Appellant's Initial Brief.

The symbol "AnsB" will denote Appellee's Answer Brief.

STATEMENT OF THE CASE AND FACTS

Appellant takes exception to Appellee's "additions, corrections, clarifications and/or modifications" to the Statement of the Facts and Statement of the Case advanced in his Initial Brief. InB. 8-9, 18-20; AnsB. 2-4. Mr. Nock will reply on the Statement of the Facts and Statement of the Case as they were presented to this Court in his Initial Brief. InB. 1-27.

SUMMARY OF THE ARGUMENT

Point I: The trial court erred in denying Appellant's motion to suppress evidence concerning the BSO's use of real-time, cellular telephone signal strength tracking, which it used to locate and arrest Appellant in Miami Beach. It use of this technology without a warrant, premised on probable cause that the person who possessed a cell phone using the suspect number committed a crime, was illegal.

Point II: The trial court erred in denying Appellant's motion to suppress evidence concerning his arrest by the BSO, in Miami Beach, outside its jurisdictional authority. At the time Appellant was arrested, neither BSO detectives nor Miami Beach police officers observed or had probable cause to believe Appellant committed a crime in Miami Beach. Any probable cause for the BSO to believe that Appellant committed a crime was based on information obtained by the BSO under color of their office and the arrest was not pursuant to fresh pursuit or exigent circumstances.

Point III: The trial court abused its discretion and erred by denying Appellant's motion in limine and overruling his subsequent objections to compel the State to introduce exculpatory, in-context portions, of out-of-court recorded statements contemporaneously with inculpating portions. The State's omission of the exculpating portions was done purposefully, to mislead the jury concerning the actual context of Appellant's statement. After Appellant elicited the omitted portions, the trial court, again, erred by granting leave

to the State to impeach Appellant's credibility concerning the admission of the excluded portions with evidence of his prior felony convictions.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE, IN THAT BSO UTILIZED WARRANTLESS REAL-TIME CELLULAR TELEPHONE SIGNAL TRACKING IN ORDER TO LOCATE APPELLANT'S WHEREABOUTS.

Appellee wrongly asserts that there was no evidence supporting Mr. Nock's argument that a real-time tracking device, such as a Triggerfish or the like, was used to locate him in Miami Beach (AnsB. 8). Apparently, Appellee overlooked the parties' underlying stipulation, premised on Appellant's pre-trial motion seeking the compelled disclosure of the tracking devise software, upon which the trial court entered its order recognizing the stipulation (R. 220-227, 232; ST. 7, 15-7; InB. 18-9). Also, contrary to the trial court's conclusions, the parties' stipulation was the evidentiary proof that a Triggerfish-like device was used by the BSO at bar (SR. 4-6). See Farmer v. City of Ft. Lauderdale, 427 So.2d 187, 189 (Fla. 1983); see Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015, 1016-7 (Fla. 4th DCA 1982); c.f. State v. Foxworth, 757 So.2d 1270, 1271 (Fla. 4th DCA 2000); c.f. State v. Brugman, 588 So.2d 279, 279 (Fla. 2d DCA 1991). As previously discussed, the prosecutor's efforts to withdraw from its stipulation concerning the real-time tracking device was a nullity (InB. 29-30). Dortch v. State, 137 So. 3d 1173, 1176 (Fla. 4th DCA 2014); Henrion v. New Era Realty IV, Inc., 566 So. 2d 1295, 1298 (Fla. 4th DCA 1991). The prosecutor's

attempt to weasel out of his stipulation, as well as his effort to revise the meaning of "real-time" tracking devise (ST. 54) were merely contrivances advanced in an less than candid effort to disguise the truth; that the devise used to find Appellant in Miami Beach was the very same devise discussed by the Florida Supreme Court in Tracey v. State, 152 So. 3d 504 (Fla. 2014).

Appellant's discussion, which Appellee characterized as an unpreserved, "secondary argument" (AnsB. 9-11; InB. 31-3), was not such at all. It was an argument made to preemptively counter an anticipated "tipsy coachman" claim by Appellee. See Marquardt v. State, 156 So. 3d 464, 481-2 (Fla. 2015). Mr. Nock's purpose in making it was to illustrate that the trial court could not be right, but for the wrong reason, with regard to its denial of his initial motion to suppress evidence, grounded upon the facts and law existing in Tracey, supra.

This Court should reverse Appellant's convictions and remand to the trial court for a new trial, with directions to suppress all evidence against Appellant derived from the illegal tracking.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE, IN APPELLANT'S ARREST, THE SEIZURE OF ALL TANGLE EVIDENCE FROM HIS POSSESSION AND CONTROL AND HIS INTERROGATION STATEMENT WERE ILLEGAL OBTAINED, IN THAT THE BSO WAS WITHOUT JURISDICTIONAL AUTHORITY TO ARREST HIM IN MIAMI BEACH, MIAMI-DADE COUNTY.

There is no merit with regard to Appellee's contention that the inevitable discovery applied to evidence obtained and seized as a result of Mr. Nock's "cooperation" with BSO detectives at the time his arrest in Miami Beach (AnsB. 20-23).

Appellant was detained by Miami Beach police officers, at the behest of the BSO detectives. Based on the evidence at the suppression hearing concerning the extra-jurisdictional arrest issue, Mr. Nock was not free to leave (T. 84, 86-90, 1283). Mr. Nock's "cooperation" with the BSO detectives occurred after his arrest T. 18-9, 26, 1379, 1381). Before the arrest, no BSO detective, or anybody else then actively investigating the crimes with which Appellant was ultimately charged, knew who Mr. Nock was and, particularly, had no inkling that there was an outstanding warrant for his arrest in Delaware (T. 101, 105). While the BSO detectives were aware that a possible suspect of Ellison's homicide was from Delaware (T. 1093, 1103-5), there was no evidence that an effort was made to cull through the Delaware warrant postings to discover the identity of the suspect. While Appellee relies on Maulden v. State,

617 So. 2d 298 (Fla. 1993), in contending that the inevitable discovery rule applied at bar, it does not. Unlike Maulden, there was no parallel investigation which would have inevitably discovered Mr. Nock's identity and link him to Ellison's homicide. Id at 301. There was no basis to believe that Appellant's identity, his interrogation statement or the physical evidence seized as a result of his post-arrest "cooperation" would have been discovered independently, notwithstanding police misconduct. Jackson v. State, 1 So. 3d 273, 279 (Fla. 1st DCA 2009).

With regard to the issue of illegal arrest, Appellee makes hay out of the fact that the BSO detectives did not formally inform Appellant that he was under arrest when Miami Beach police officers detained and arrested him on the BSO's behalf (AnsB. 21). An official or formal announcement of an arrest is not the standard in determining whether a person was arrested or not; it is whether the accused believed that he was not free to leave law enforcement officers' presence. Garcia v. State, 88 So. 3d 394, 402 (Fla. 4th DCA 2012). The fact that Appellant asked the BSO detectives whether their presence in Miami Beach and his detention concerned, inter alia, an arrest warrant from Delaware, of which none of the detectives were aware at the time, reflected his reasonable belief that he was under arrest and not free to leave the detectives' presence (T. 18-9).

The trial court erred in denying Appellant's motion to suppress based on his detention and arrest by the BSO outside of their

jurisdictional authority and absent any grounds to justify it as a citizen's arrest. This Court should reverse Appellant's convictions and remand for a new trial.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN DENYING APPELLANT'S MOTION IN LIMINE AND OVERRULING HIS OBJECTIONS ON RULE OF COMPLETENESS GROUNDS AND FOR OVERRULING APPELLANT'S OBJECTION TO THE ADMISSION OF HIS PRIOR CONVICTIONS TO IMPEACH HIS CREDIBILITY REGARDING HIS ELICITING OF THE IN-CONTEXT PORTIONS OF HIS INTERROGATION STATEMENT THAT WERE PURPOSELY OMITTED BY THE STATE.

Appellee ironically asserts that:

> Defense counsel below made many arguments suggesting that the trial judge should require the State to introduce the video recorded [interrogation] statement into evidence. **This was apparently done as part of a defense strategy** to place the exculpatory comments appellant made during the statement before the jury without exposing appellant to impeachment with his prior felony convictions.

(AnsB. 24)[emphasis added]. The irony lies in the fact that Mr. Nock was merely seeking a fair trial and to have the jury consider the complete, relevant content of his interrogation statement in its true context; not in a manner contrived by the prosecutor. It was the prosecutor who advanced a prosecution strategy to omit critical, in-context information from Appellant's interrogation statement that was misleading as to the nature of Appellant's actions that lead to Ellison's death.

The critical portion omitted was the fact that the asphyxiation episode in the kitchen, after Mr. Nock and Ellison ate ice cream, was at Ellison's request and done while Ellison performed fellatio on Mr. Nock, just as he did in the bedroom earlier during their

encounter (T. 1413-9, 1493-6). Rivera, during the State's direct-examination, was asked questions in a manner which caused the purposeful omission of the consensual, sexual asphyxia aspect and, instead, was asked to testify that Appellant stated that he choked Ellison in the kitchen, that Ellison appeared to have lost consciousness and died. Rivera's direct-examination testimony provided no apparent reason why Appellant choked Ellison in the kitchen, leaving the jury to draw a conclusion that Appellant choked him just to kill him.

What the prosecutor did at bar is sort of evidence elicitation tactic that misleads a jury regarding the actual nature of the evidence. The rule of completeness exists as a remedy for a party's elicitation of misleading, out-of-context statements. Larzelere v. State, 676 So.2d 394, 401-2 (Fla. 1996). While the rule of completeness may apply to only written or recorded statements, see generally Hoffman v. State, 708 So. 2d 962 (Fla. 5th DCA 2010), as the Florida Supreme Court points out, the rule, section 90.108, Florida Statutes (2014), rests upon the same principle as does the doctrine of "opening the door;" which provides a party opponent a qualified right to admit the remainder of a statement when the statement, as initially elicited, is misleading. Larzelere v. State, supra at 401-2.

Where a party elicits misleading evidence, in any form, it is said that the party has "opened the door" for the opposing party to

elicit evidence to correct that which is misleading. Id; Foster v. State, 182 So. 3d 3, 4 (Fla. 2d DCA 2015); see Siegel v. State, 68 So. 3d 281, 288 (Fla. 4th DCA 2011). Appellant argued, below, that the manner the prosecutor would and did elicit Rivera's testimony concerning his interrogation statement was misleading and the misleading nature of that testimony entitled him to, in turn, elicit the complete context of the statement without penalty of impeachment by prior conviction. (R. 430-435; T. 558-560, 644-650, 652-3, 1003-6)

The prosecutor's behavior was a prime example of what Florida courts condemn as "gotcha tactics" done to "game the system." See, e.g., State v. Zackery, 181 So. 3d 1204, 1206 (Fla. 5th DCA 2015); see, e.g., Stratton v. 6000 Indian Creek, LLC, 95 So. 3d 334, 336 (Fla. 3d DCA 2012; see, e.g., Tyler v. State, 945 So. 2d 662, 663 (Fla. 4th DCA 2007). At bar, the prosecutor directed the interrogating detective to provide stylized testimony with the expressed purpose of omitting critical content of Mr. Nock's statement to mislead the jury concerning the actual nature of Appellant's acts leading to Ellison's death. It was done in order to force Appellant to elicit the in-context balance of the statement in order to force the admission of his nine prior felony convictions as impeachment evidence. He did so by advancing an incorrect reading of Llanos v. State, 770 So. 2d 725 (Fla. 4th DCA (2000). Llanos concerns the admission of exculpatory statements; not the correction

of misleading portions of statements elicited in a manner to cause them to appear to be inculpatory by means of the omission of critical content. Foster v. State, supra at 4.

This Court should reverse Appellant's conviction and remand for a new trial.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellant respectfully requests this Court to reverse the trial court's rulings and remand this cause with proper directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Initial Brief of Appellant has been furnished to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, by e-service at CrimAppWPB@myfloridalegal.com; and electronically filed with this Court on this 27th day of May, 2016.

/s Ian Seldin
Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this brief is written in 12 point Courier New font in compliance with Fla. R. App. P. 9.210(a)(2).

/s Ian Seldin
Of Counsel