IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 92402
	)	
KEVIN HICKS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE SANDRA C. MIDKIFF, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Kevin Hicks, was convicted following a jury trial in the Circuit Court of Jackson County of two counts of robbery in the first degree, Section 569.020,[1] five counts of forcible sodomy, Section 566.060, one count of attempted forcible rape, Section 566.030, and one count of forcible rape, Section 566.030. The Honorable Sandra C. Midkiff sentenced appellant to a total term of fifteen years imprisonment for the robberies, to run consecutively with a total term of thirty years imprisonment for the sexual offenses, all to run concurrently with the sentences that appellant was already serving. The Western District Court of Appeals affirmed eight of appellant's convictions *en banc* and vacated Count IX. This Court granted transfer after opinion. This Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 9, Mo. Const. (as amended 1976).

[1] Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

MJ met up with her ex-boyfriend, Christopher Moore, on the evening of August 4, 1992 (Tr. 282-283, 330-332). They went to his house in the early morning hours of August 5 (Tr. 283, 332-333). As Moore pulled up in front of the house, two cars pulled up alongside and blocked them in (Tr. 284, 333-334). Moore came around to MJ's side of the car to let her out, and then a man got out of one of the cars and pointed a shotgun at Moore (Tr. 286, 333-335). A total of six men approached them with weapons (Tr. 286-287, 336-337).

The men asked Moore and MJ if they had any money or jewelry (Tr. 287-288, 335-339). They took Moore's keys and took the two into the house, asking what valuables were there (Tr. 288). Moore said there was a microwave, an answering machine, and a VCR (Tr. 288). The house was being remodeled and much of it was full of debris, with plaster on the floors and lathe boards showing on the walls (Tr. 293-294).

The men told Moore to lie on the floor (Tr. 290, 339). He did, and they covered his head with a towel or a pillow case (Tr. 290, 339). Some of the men took MJ upstairs, while one or more of the men guarded Moore (Tr. 290-292, 341). They took MJ into one of the upstairs bedrooms and pushed her down on her knees (Tr. 293-294). At gunpoint, they compelled her to perform oral sex on three of the men (Tr. 295-299).

The men compelled MJ to perform oral sex on a fourth man while another attempted to penetrate her vaginally from behind (Tr. 299-300). Then she was

penetrated vaginally by a different individual, and forced to perform oral sex a fifth time, either on a fifth man or the fourth one again (Tr. 299-303, 322).

The six men present that night kept changing position – one would go downstairs and another would come up, but five men remained with MJ at all times (Tr. 298). After the last man finished, the five left the room hurriedly, saying that police were in the neighborhood (Tr. 303-305).

While the men were upstairs with MJ, a man was holding a gun to Moore (Tr. 342). It was not necessarily the same person the whole time (Tr. 342). He heard a person going into the back of the house as well (Tr. 342). One of the men took Moore's keys (Tr. 345). When they were gone, he discovered a VCR and a remote were missing as well (Tr. 309, 349).

After the men left, Moore went upstairs to check on MJ (Tr. 305, 346-347). She was sitting in the floor crying, and trying to dress herself (Tr. 305, 347). The two called the police, and MJ was taken to the hospital where a rape kit was performed (Tr. 306, 347-348, 363-368). At the scene, fingerprints were taken but none proved to be of any value (Tr. 374-375). A condom wrapper was seized from the bedroom (Tr. 378).

In 2008, the rape kit was found to match Elbert Hicks' DNA (Tr. 5, 397-400). The police then identified Elbert Hicks' associates in 1992 and came up with who they believed to be six suspects: Elbert Hicks, his cousin Kevin Hicks, Marcus Mitchell, Ryan Rouser and his brother Jerome Rouser, and Terrance Curry (Tr. 5, 407). These black males, who would have been between the ages of

seventeen and nineteen in 1992, were all potential suspects that year as well (Tr. 407-410).

Appellant, Kevin Hicks, was interviewed in the Department of Corrections, where he was incarcerated for a series of robberies, an attempted rape, and armed criminal action (Tr. 6, 54-55, 410-411). He was first interviewed on Friday, March 14, 2008, advised of his rights, and agreed to talk (Tr. 6-9, 55). About three hours into the interview, Kevin asked for some kind of agreement before he talked to them (Tr. 11, 56, P. Ex. 4).[2] So one of the detectives, Eikel, called the prosecutor's office in Jackson County (Tr. 13, 56-57). Kevin declined to talk to an attorney (Tr. 13). While Eikel was out of the room talking to the prosecutor, Kevin continued to talk to the other detective, Snyder (Tr. 16, 57). According to Snyder, Kevin was clear there was no deal in place yet (Tr. 16). Eikel kept going back to the room to tell Kevin and Snyder that she had not reached anyone yet (Tr. 57).

After about an hour and a half, Eikel was able to reach the prosecutor who offered an oral agreement over the phone to seek only a concurrent sentence with Kevin's current sentences if he provided information that led to charges against others (Tr. 16-17, 57-58). Kevin wanted the deal in writing, and it was too late to

[2] All of the interrogations were taped (P. Ex. 4, 5). There are pretrial exhibits (P. Ex.) and trial exhibits (Ex.) referenced.

have anything faxed, so Eikel and Snyder agreed to come back on Monday, March 17, with a deal in writing (Tr. 18-19, 58-59).

Snyder and Eikel returned March 17 and continued the interrogation (Tr. 18-20, 60-61). Exhibit 3 was a copy of the agreement (Tr. 20). It read:

> If Kevin Hicks provides information that leads to the filing of a criminal charge or charges against one or more individuals involved in criminal activities for which he has personal knowledge, in each of the instances in which he has such knowledge, including the August 5, 1992 crimes against [MJ] and Christopher Moore at 3410 Smart, Kansas City, Jackson County, Missouri, then the Jackson County Prosecutor's Office will agree that Kevin Hicks be sentenced to a term of imprisonment for his involvement and participation in these crimes to be served concurrently with Kevin Hicks' current prison sentences.

(P. Ex. 3).

Kevin wanted a more specific agreement, including a specific out date (Tr. 20-21, 61-62, P. Ex. 4). He said "it's open for interpretation and debate. I don't want that" (P. Ex. 4 at 13:19). The detectives tried to get hold of the prosecutor and reached him at a break in the interview (Tr. 21-24, 29, 62). The detectives told Kevin that the prosecutor did not know what he was going to say, which is why they could not give him an out date (P. Ex. 4 at 39:00, 49:40). Kevin said "I'm not talking about a murder or anything like that. I don't know anything about those types of things. The only thing I really know about is this case." (P. Ex. 4 at

1:19:03). The prosecutor said this was the entire deal, so Kevin continued to make a statement (Tr. 28-29, 63, P. Ex. 5 at 1:25, P. Ex. 13 at p. 1).[3] He told the detectives that he intended to plead guilty to the charges arising from this case (Ex. 13 at p. 31).

Kevin also made videotaped statements on July 9, 2008, and September 9, 2008 (Tr. 30-31, 65-67, P. Exs. 8, 9, 11, 12). He was charged with two counts of robbery in the first degree, six counts of forcible sodomy, attempted forcible rape, and forcible rape (L.F. 8-11).[4]

Prior to trial, defense counsel filed a motion to suppress statements, arguing that Kevin's statements were not voluntary, since he could not receive what he believed he was being promised – all concurrent time – since the sex offenses had to be run consecutively to the non-sex offenses, by operation of Section 558.026.1 (L.F. 19-22, Tr. 3, 74-75). The motion was overruled, after testimony from the

[3] P. Ex. 5 is transcribed in P. Ex. 13. P. Tr. Ex. 8 is transcribed in P. Ex. 11. P. Ex. 9 is transcribed in P. Ex. 12.

[4] One of the sodomy counts was dismissed after MJ's testimony at trial did not support six counts but only five (Tr. 455). In the second amended information, filed during the trial, the two robbery counts are charged as "forcibly stole keys in the possession of Christopher Moore" and "forcibly stole a video cassette recorder in the possession of C.M." (L.F. 16-18).

detectives (L.F. 23-28, Tr. 90). Kevin waived jury sentencing, and the cause proceeded to trial (Tr. 113).

The forensic criminalist testified that an oral swab taken from MJ matched Terrance Curry's DNA; Kevin was excluded as a contributor (Tr. 397). The vaginal swab matched Elbert Hicks' DNA, and Kevin was excluded from that sample as well (Tr. 398-400).

Snyder testified about Kevin's statements, and a DVD containing portions of the interviews was played for the jury (Tr. 411-433, Ex. 7). According to Snyder, Kevin was concerned about a condom wrapper and concerned that his fingerprints might be on it (Tr. 412-413). Kevin admitted the incident, and named the six individuals involved: himself, his cousin Elbert Hicks, Marcus Mitchell, Terrancy Curry, and brothers Ryan and Jerome Rouser (Tr. 417, 413).

Kevin said that the evening of August 4, he was at Elbert's house with Marcus (Tr. 414). Jerome and Ryan and Terrance came over and asked the others if they wanted to go and rob people with them (Tr. 414). They got in two separate cars and drove around the city looking for people to rob (Tr. 414). Five of the six were armed; Kevin had a sawed-off shotgun (Tr. 415-416).

They got to 3410 Smart, and all jumped out of the cars with their weapons (Tr. 417). They yelled at Moore and MJ and followed them into the house (Tr. 417). Kevin and Ryan and Jerome roughed up Moore and put him on the floor while the other three took MJ upstairs (Tr. 418). Kevin and the Rousers guarded

Moore and rummaged through the house looking for something to steal (Tr. 418-419).

Kevin went upstairs to see what was going on, and he saw Elbert raping MJ and either Marcus or Terrance in front of her forcing her to perform oral sex (Tr. 420). He went upstairs twice, and they had changed positions (Tr. 420-424). Then Elbert decided it was time to go and everyone left (Tr. 424). Kevin did not see anyone take a VCR (Tr. 425). He never admitted to personally committing sexual acts against MJ, but he knew that she was being raped and sodomized (Tr. 429).

The jury returned verdicts of guilty on all charges (Tr. 506-507, L.F. 90-98). On October 16, 2009, the Honorable Sandra C. Midkiff sentenced Kevin to two concurrent fifteen year sentences on the two counts of robbery, to run consecutively with seven concurrent thirty year sentences for the sodomy, attempted rape, and rape counts, for a total of forty-five years imprisonment (Tr. 512, 530-531, 129-131). The consecutive terms were ordered to run concurrently with Kevin's current sentences (Tr. 531, L.F. 129-131).

Kevin appealed and on January 17, 2012, the Western District Court of Appeals affirmed eight counts *en banc* and vacated one. ***State v. Hicks***, 2012 WL 117539 (Mo. App., W.D. 2012). This Court ordered transfer on May 1, 2012. ***Id***.

INTRODUCTION

The issue on which this Court took transfer was this:

Appellant confessed based on a promise that he would be "sentenced to a term of imprisonment for his involvement and participation in these crimes to be served concurrently with [his] current prison sentences." Appellant was charged with both sex and non-sex offenses, which meant that those sentences ran consecutively as required by Section 558.026.1. The Court of Appeals held *en banc* that this did not render appellant's confession involuntary, since his total sentencing package was concurrent with his earlier sentence. The dissent analyzed this as a breach of contract and would have reversed.

Appellant's brief in the Court of Appeals was based on the issue discussed by the majority – that the statements were involuntary under traditional Fifth Amendment analysis. Based on the question presented in the transfer application, appellant has added a separate argument raising the contract issue analyzed by the dissenting judges in the Western District.

POINTS RELIED ON

I.

The trial court erred in overruling defense counsel's motion to suppress Kevin's statements to Detectives Snyder and Eikel, and in admitting the statements into evidence, because the statements were taken in violation of Kevin's privilege against self-incrimination and right to due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution, in that the statements were involuntary, unknowing and unintelligent under the totality of the circumstances because Kevin was misled to believe that all of his sentences would be run concurrently if he cooperated with authorities, but in fact, the sentences for sexual offenses were required to be run consecutively by operation of law.

State v. Brown, 246 S.W.3d 519 (Mo. App., S.D. 2008);

State v. Clements, 789 S.W.2d 101 (Mo. App., S.D. 1990);

United States v. Pelton, 835 F.2d 1067 (4th Cir. 1987);

State v. Lytle, 715 S.W.2d 910 (Mo. banc 1986);

U.S. Const., Amends. V and XIV;

Mo. Const., Art. I, Secs. 10 and 19; and

Section 558.026.

II.

The trial court erred in overruling defense counsel's motion to suppress Kevin's statements to Detectives Snyder and Eikel, and in admitting the statements into evidence, because the statements were taken in violation of Kevin's privilege against self-incrimination and right to due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution, in that the statements were legally involuntary since the statements were obtained as part of a binding agreement that all of Kevin's sentences would be run concurrently if he cooperated with authorities, but in fact, the sentences for sexual offenses were required to be run consecutively by operation of law and the prosecutor therefore breached the contract when he prosecuted Kevin for both the sexual and non-sexual offenses.

State v. Hoopes, 534 S.W.2d 26 (Mo. banc 1976);

State v. Chatman, 682 S.W.2d 82 (Mo. App., E.D. 1984);

State v. Hicks, 2012 WL 117539, *13 (Mo. App., W.D., 2012);

Kells v. Missouri Mountain Properties, Inc., 247 S.W.3d 79 (Mo. App., S.D. 2008);

U.S. Const., Amends. V and XIV;

Mo. Const., Art. I, Secs. 10 and 19; and

Section 558.026.

III.

The trial court plainly erred in sentencing Kevin on two counts of robbery in the first degree, for forcibly stealing keys and a VCR in the possession of Christopher Moore, because conviction of two counts of robbery in the first degree with only one victim violated Kevin's right to be free from double jeopardy, protected by the Fifth and Fourteenth Amendments to the United States Constitution, in that robbery is a crime against a person, not property; the items were both in the possession of Moore and not MJ; and the jury was instructed that it was to find the items were both forcibly taken from the possession of Moore.

State v. Whitmore, 948 S.W.2d 643 (Mo. App., W.D. 1997);

State v. White, 14 S.W.3d 121 (Mo. App., W.D. 2000);

Spencer v. State, 805 S.W.2d 677 (Mo. App., E.D. 1990);

Benton v. Maryland, 395 U.S. 784 (1969);

U.S. Const., Amends. V and XIV; and

Sections 569.010 and 569.020.

ARGUMENT

I.

The trial court erred in overruling defense counsel's motion to suppress Kevin's statements to Detectives Snyder and Eikel, and in admitting the statements into evidence, because the statements were taken in violation of Kevin's privilege against self-incrimination and right to due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution, in that the statements were involuntary, unknowing and unintelligent under the totality of the circumstances because Kevin was misled to believe that all of his sentences would be run concurrently if he cooperated with authorities, but in fact, the sentences for sexual offenses were required to be run consecutively by operation of law.

Standard of review

The reviewing court defers to the trial court's factual findings and credibility determinations, but examines questions of law *de novo*. ***State v. Rousan***, 961 S.W.2d 831, 845 (Mo. banc 1998). Factual issues on motions to suppress are mixed questions of law and fact. ***State v. Werner***, 9 S.W.3d 590, 595 (Mo. banc 2000).

Prior to trial, defense counsel filed a motion to suppress statements, arguing that Kevin's statements were not voluntary, since he could not receive what he

believed he was being promised – all concurrent time – since the sex offenses had to be run consecutively to the non-sex offenses, by operation of Section 558.026.1 (L.F. 19-22, Tr. 3, 74-75). The motion was overruled, after testimony from the detectives (L.F. 23-28, Tr. 90). Counsel objected at trial during Detective Snyder's testimony, renewed the motion to suppress, and the objection was allowed to be continuing and overruled (Tr. 410-411). Counsel's exception to this ruling was contained in the timely filed motion for new trial (L.F. 119-123).

Facts

Appellant, Kevin Hicks, was interviewed in the Department of Corrections, where he was incarcerated for a series of robberies, an attempted rape, and armed criminal action (Tr. 6, 54-55, 410-411). He was first interviewed on Friday, March 14, 2008, advised of his rights, and agreed to talk (Tr. 6-9, 55). About three hours into the interview, Kevin asked for some kind of agreement before he talked to them (Tr. 11, 56, P. Ex. 4). So one of the detectives, Eikel, called the prosecutor's office in Jackson County (Tr. 13, 56-57). Kevin declined to talk to an attorney (Tr. 13). While Eikel was out of the room talking to the prosecutor, Kevin continued to talk to the other detective, Snyder (Tr. 16, 57). According to Snyder, Kevin was clear there was no deal in place yet (Tr. 16). Eikel kept going back to the room to tell Kevin and Snyder that she had not reached anyone yet (Tr. 57).

After about an hour and a half, Eikel was able to reach the prosecutor who offered an oral agreement over the phone to seek only a concurrent sentence with Kevin's current sentences if he provided information that led to charges against others (Tr. 16-17, 57-58). Kevin wanted the deal in writing, and it was too late to have anything faxed, so Eikel and Snyder agreed to come back on Monday, March 17, with a deal in writing (Tr. 18-19, 58-59).

Snyder and Eikel returned March 17 and continued the interrogation (Tr. 18-20, 60-61). Exhibit 3 was a copy of the agreement (Tr. 20). It read:

> If Kevin Hicks provides information that leads to the filing of a criminal charge or charges against one or more individuals involved in criminal activities for which he has personal knowledge, in each of the instances in which he has such knowledge, including the August 5, 1992 crimes against [MJ] and Christopher Moore at 3410 Smart, Kansas City, Jackson County, Missouri, then the Jackson County Prosecutor's Office will agree that Kevin Hicks be sentenced to a term of imprisonment for his involvement and participation in these crimes to be served concurrently with Kevin Hicks' current prison sentences.

(P. Ex. 3).

Kevin wanted a more specific agreement, including a specific out date (Tr. 20-21, 61-62, P. Ex. 4). He said "it's open for interpretation and debate. I don't want that" (P. Ex. 4 at 13:19). The detectives tried to get hold of the prosecutor and reached him at a break in the interview (Tr. 21-24, 29, 62). The detectives

told Kevin that the prosecutor did not know what he was going to say, which is why they could not give him an out date (P. Ex. 4 at 39:00, 49:40). Kevin said "I'm not talking about a murder or anything like that. I don't know anything about those types of things. The only thing I really know about is this case." (P. Ex. 4 at 1:19:03). The prosecutor said this was the entire deal, so Kevin continued to make a statement (Tr. 28-29, 63, P. Ex. 5 at 1:25, P. Ex. 13 at p. 1).[5] He told the detectives that he intended to plead guilty to the charges arising from this case (Ex. 13 at p. 31).

Kevin also made videotaped statements on July 9, 2008, and September 9, 2008 (Tr. 30-31, 65-67, P. Exs. 8, 9, 11, 12). The videotaped statements were presented to the jury at Kevin's trial, with some redaction (Tr. 432-433, Ex. 7).

Analysis

Miranda v. Arizona, 384 U.S. 436 (1966), requires that the waiver of constitutional rights must be given voluntarily, knowingly and intelligently. The decision also specifies that the burden is on the state to demonstrate a knowing and voluntary waiver of these rights. ***State v. Heather***, 498 S.W.2d 300, 304 (Mo. App., St.L.D. 1973).

[5] P. Ex. 5 is transcribed in P. Ex. 13. P. Tr. Ex. 8 is transcribed in P. Ex. 11. P. Ex. 9 is transcribed in P. Ex. 12.

A defendant is denied due process if his conviction is premised, in part or in whole, upon an involuntary confession. ***Miranda***, 384 U.S. at 464, n.33; ***State v. Clements***, 789 S.W.2d 101, 105 (Mo. App., S.D. 1990). Furthermore, not only must waivers of rights be voluntary, but they must also be a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances. ***State v. Bittick***, 806 S.W.2d 652, 658 (Mo. banc 1991).

The test for voluntariness is whether under the totality of the circumstances, the defendant was deprived of a free choice to admit, deny or refuse to answer, and whether physical or psychological coercion was of such a degree that the defendant's will was overborne. ***State v. Lytle***, 715 S.W.2d 910, 915 (Mo. banc 1986). General encouragement from an officer to cooperate is "far different from specific promises of leniency." ***Clements***, 789 S.W.2d at 107, quoting ***United States v. Pelton***, 835 F.2d 1067 (4th Cir. 1987).

In ***State v. Brown***, 246 S.W.3d 519 (Mo. App., S.D. 2008), the prosecutor wrote a letter to the defendant during the interrogation process. It said that the prosecutor agreed to charge the defendant with a class A misdemeanor if the defendant was not involved in killing the victim, and "if you lie to us now, this deal would be off." ***Id***. at 528. Brown raised on appeal that his confession was involuntary and coerced by the promises in the letter. ***Id***.

In affirming, the Southern District found that the promises in the letter were premised on two issues: whether the defendant was involved in killing the victim,

and whether the defendant lied to the police subsequent to signing the deal. ***Id***. "The answer is 'yes' to both questions." ***Id***. The Court held that there was substantial evidence that there was no coercion in the proffer of leniency and no allegation that the interviews were coerced in any other way.

Contrast that situation with this. Kevin fulfilled his end of the bargain: to provide information "that leads to the filing of a criminal charge or charges against one or more individuals" in the crimes against [MJ] and Christopher Moore (Ex. 3). The state acknowledged at trial that Kevin in fact lived up to his end of the agreement (Tr. 75). But Kevin did *not* receive what he bargained for: "a term of imprisonment for his involvement and participation in these crimes to be served concurrently with [his] current prison sentences." (P. Ex. 3).

The state argued that the sex counts were required to run consecutively to the non-sex counts, the two robbery charges, by operation of Section 558.026.1 (Tr. 3, 74-75). The state further argued that it fulfilled the agreement, because the entire sentencing package, concurrent and consecutive sentences on the nine counts, would run concurrently to Kevin's current prison sentence, which is what he bargained for (Tr. 75). The court agreed, and denied the motion to suppress statements (L.F. 23-28, Tr. 90). The court even found in its findings that Kevin was motivated by remorse and not the agreement in confession (L.F. 28). This is unsupported by the record. Kevin called the detectives over and over asking what his specific out date would be if he cooperated (Tr. 66-69). He was extremely anxious about it. It was his motivation to confess. While he expressed remorse

about the crimes, it was always preceded with "why are you telling us this?" (P. Exs. 13 at p. 29, Ex. 11 at p. 19). Of course that would be his answer. But whenever he brought up the subject, it was a question of the benefit he thought he would receive.

What the prosecutor's argument discounts is the wording of the agreement. The agreement clearly says that Kevin would "be sentenced to ***a term of imprisonment*** … to be served concurrently." (P. Ex. 3). Instead, Kevin was sentenced to *two* consecutive terms of imprisonment running concurrently with his prior sentences: one of fifteen years, consisting of concurrent sentences on the two robbery counts, and one of thirty years, concurrent sentences on the sodomy and rape counts. These two terms of imprisonment run consecutively as required by Section 558.026.1.

Any ambiguity in this agreement should be held against the state, who was represented by counsel, who drafted the agreement. ***Kells v. Missouri Mountain Properties, Inc.***, 247 S.W.3d 79, 86 (Mo. App., S.D. 2008). And the state's argument that Kevin has in fact received concurrent time is disingenuous: if the agreement really meant what the state has argued, then the trial court would have been free to run all nine sentences consecutively, rather than packaging the sex and non-sex counts separately. The state and court both knew that the agreement should be fulfilled inasmuch as it could be. It was only Kevin who was misled.

Appellant was misled and the promise of leniency was unfulfilled. His confessions were coerced and involuntary. This Court should therefore reverse his

convictions and remand for a new trial, without the coerced and involuntary confessions.

II.

The trial court erred in overruling defense counsel's motion to suppress Kevin's statements to Detectives Snyder and Eikel, and in admitting the statements into evidence, because the statements were taken in violation of Kevin's privilege against self-incrimination and right to due process of law, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 19 of the Missouri Constitution, in that the statements were legally involuntary since the statements were obtained as part of a binding agreement that all of Kevin's sentences would be run concurrently if he cooperated with authorities, but in fact, the sentences for sexual offenses were required to be run consecutively by operation of law and the prosecutor therefore breached the contract when he prosecuted Kevin for both the sexual and non-sexual offenses.

Standard of review

The reviewing court defers to the trial court's factual findings and credibility determinations, but examines questions of law *de novo*. ***State v. Rousan***, 961 S.W.2d 831, 845 (Mo. banc 1998). Factual issues on motions to suppress are mixed questions of law and fact. ***State v. Werner***, 9 S.W.3d 590, 595 (Mo. banc 2000). The contract construction issue is an issue of law. ***State v. Hicks***, 2012 WL 117539, *13 (Mo. App., W.D., 2012) (Smart, J., dissenting).

Prior to trial, defense counsel filed a motion to suppress statements, arguing that Kevin's statements were not voluntary, since Kevin had reached an agreement with the State to give the statement as part of a cooperation agreement and "[t]he State is now attempting to use the statements made by the defendant under terms that violate the agreement under which the statements were given." (L.F. 20). The motion was overruled, after testimony from the detectives (L.F. 23-28, Tr. 90). Counsel objected at trial during Detective Snyder's testimony, renewed the motion to suppress, and the objection was allowed to be continuing and overruled (Tr. 410-411). Counsel's exception to this ruling was contained in the timely filed motion for new trial (L.F. 119-123).

Facts

More complete facts underlying the agreement can be found in Point I. But because this is presented as a contract issue, the discussion leading up to the agreement is less than relevant. As the dissent in the Western District pointed out,

> the question here is not what the assistant prosecutor meant in offering this written proposal. Nor is the question what *Hicks* understood was meant. The question is what a reasonable person would ordinarily understand by the contract proposed. It is our duty to properly construe the contract and enforce it.

Hicks, 2012 WL 117539 at *13 (Smart, J., dissenting).

Exhibit 3 was a copy of the agreement (Tr. 20). It read:

> If Kevin Hicks provides information that leads to the filing of a criminal charge or charges against one or more individuals involved in criminal activities for which he has personal knowledge, in each of the instances in which he has such knowledge, including the August 5, 1992 crimes against [MJ] and Christopher Moore at 3410 Smart, Kansas City, Jackson County, Missouri, then the Jackson County Prosecutor's Office will agree that Kevin Hicks be sentenced to a term of imprisonment for his involvement and participation in these crimes to be served concurrently with Kevin Hicks' current prison sentences.

(P. Ex. 3).

Honor its commitments.

As Judge Smart recognized, "This is strictly a case about (1) whether the State will honor its commitments and (2) whether the judiciary will force the State to honor its commitments." ***Id***. Missouri courts have analyzed these cases as policy cases and have ruled that the courts will compel the state to abide by its agreements. ***Id***.

In ***State v. Hoopes***, 534 S.W.2d 26 (Mo. banc 1976), the defendant signed an affidavit confessing to one charged offense in exchange for a guilty plea to that offense and the dismissal of a second. The prosecutor reneged on the deal, took both charges to trial, and used the signed affidavit against the defendant at trial. ***Hoopes***, 534 S.W.2d at 28-34. This Court held that once the prosecutor refused to

perform his part of the bargain, the affidavit became "involuntary in law" and was not admissible on the trial of the case for any purpose whatever, not even for impeachment. ***Id***. at 36-37.

In ***State v. Chatman***, 682 S.W.2d 82 (Mo. App., E.D. 1984), the agreement at issue was that the defendant would cooperate fully in the prosecution of his codefendants in exchange for being prosecuted for a robbery but not a murder. 682 S.W.2d at 84. After the agreement was signed, the prosecutor instructed the police to subject the defendant to a polygraph exam. ***Id***. The defendant refused, and the prosecutor thereafter charged him with the murder. ***Id***. The defendant's motion to suppress his statement made in reliance upon the agreement was overruled. ***Id***. The Eastern District Court of Appeals reversed, finding that a reasonable person in the position of the defendant would not have known that he was required to undergo a polygraph test as a condition of the agreement. ***Id***. at 85.

No reasonable person faced with the agreement in this case would interpret the language as requiring concurrent time only insofar as a statute did not require consecutive time. *Concurrent* has a clearly understood meaning. The agreement clearly says that Kevin would "be sentenced to ***a term of imprisonment*** … to be served concurrently." (P. Ex. 3). Instead, Kevin was sentenced to *two* consecutive terms of imprisonment running concurrently with his prior sentences: one of fifteen years, consisting of concurrent sentences on the two robbery counts, and

one of thirty years, concurrent sentences on the sodomy and rape counts. These two terms of imprisonment run consecutively as required by Section 558.026.1.

Any ambiguity in this agreement should be held against the state, who was represented by counsel, who drafted the agreement. ***Kells v. Missouri Mountain Properties, Inc.***, 247 S.W.3d 79, 86 (Mo. App., S.D. 2008). And the state's argument that Kevin has in fact received concurrent time is disingenuous: if the agreement really meant what the state has argued, then the trial court would have been free to run all nine sentences consecutively, rather than packaging the sex and non-sex counts separately.[6] The state and court both knew that the agreement should be fulfilled inasmuch as it could be. It was only Kevin who was misled.

Remedy

In ***Chatman***, the Court of Appeals found that to enforce the parties' agreement, the defendant was not entitled to a dismissal of the murder charge that was the original bargain, but that he was entitled to a new trial on whichever charge the state wishes to prosecute.

> If the state chooses robbery it may use the statement because that was the defendant's reasonable expectation in giving the statement, which constitutes a waiver of the privilege against self-incrimination. If it chooses murder the statement and whatever may have flowed from it may not be

[6] See Judge Smart's cogent discussion of this question at *14-*15.

used as that was not agreed and the use of such evidence would be in violation of defendant's right against self-incrimination.

Judge Smart in his dissent would similarly allow the state to choose, but rather than remand for a new trial, would then order dismissal of either the robbery charges (of which there only presumably remains one, see Point III) or the sex offenses. ***Hicks***, 2012 WL 117539 at *17 (Smart, J., dissenting). Under the terms of this agreement, this makes more sense as a remedy than that in ***Chatman***. However, the trial court's ruling that is appealed here is to the admission of Kevin's statements into evidence. If that is the error, a new trial is warranted.

Wherefore, appellant respectfully requests that this Court reverse his convictions and remand for a new trial, or in the alternative, to vacate the sentences and remand to the trial court with instructions that the state may seek to sentence appellant to seven concurrent terms for the sex crimes or concurrent terms for the robbery or robberies, but not both. The other counts must be dismissed with prejudice. *See* ***State v. Roe,*** 6 S.W.3d 411 (Mo. App., E.D. 1999) (where there was an improper murder first instruction, remedy was either a new trial or the state could elect to accept lesser conviction for second-degree murder).

III.

The trial court plainly erred in sentencing Kevin on two counts of robbery in the first degree, for forcibly stealing keys and a VCR in the possession of Christopher Moore, because conviction of two counts of robbery in the first degree with only one victim violated Kevin's right to be free from double jeopardy, protected by the Fifth and Fourteenth Amendments to the United States Constitution, in that robbery is a crime against a person, not property; the items were both in the possession of Moore and not MJ; and the jury was instructed that it was to find the items were both forcibly taken from the possession of Moore.

The State of Missouri conceded this issue in the Court of Appeals and the Court of Appeals agreed.

Standard of review

Defense counsel did not raise this issue at trial or in the motion for new trial. Review is for plain error. ***State v. Stephens,*** 88 S.W.3d 876, 880 (Mo. App., W.D. 2002). However, a claim of double jeopardy is an assertion of a constitutional grant of immunity which is significantly different than other constitutional guarantees pertaining to procedural rights. ***State v. Cody***, 525

S.W.2d 333, 335 (Mo. banc 1975).[7] A double jeopardy claim is not waived, therefore, by failure to object, where the reviewing court can determine from the face of the record that the court had no power to enter the conviction. ***Hagan v. State***, 836 S.W.2d 459, 461 (Mo. banc 1992); ***State v. Elliott***, 987 S.W.2d 418, 421 (Mo. App., W.D. 1999).

Facts

The original information charged Count I, robbery, by alleging that appellant "forcibly stole keys in the possession of Christopher Moore" and Count X, "forcibly stole a video cassette recorder owned by M.J." (L.F. 12-13, 15). In the second amended information, the second robbery count, renumbered as Count IX, charged that appellant "forcibly stole a video cassette recorder in the possession of C.M." (L.F. 18). The evidence at trial was that MJ had never been to Christopher Moore's current house before, and the VCR was in fact owned by his ex-girlfriend, not MJ (Tr. 350). The verdict directors for the two robbery counts instructed, as to Count I, "that … defendant or other persons, took keys which were property in the possession of Christopher Moore" and as to Count IX, 'that … defendant or other persons took a video cassette recorder which was property in the possession of Christopher Moore." (L.F. 64, 85).

[7] In ***State v. Heslop***, 842 S.W.2d 72 (Mo. banc 1992), this Court abrogated the single larceny rule of ***Cody***.

Analysis

Robbery is committed when a person forcibly steals from another person. Section 569.020, RSMo 2000. It was similarly committed in this fashion in 1992 when this robbery occurred. Section 569.020, RSMo 1986. A person "forcibly steals" when he uses or threatens the immediate use of physical force against a person to prevent resistance to the taking. Section 569.010, RSMo 1986 and Section 569.010, RSMo 2000. Robbery is an offense against the right to possession. ***White v. State***, 694 S.W.2d 825 (Mo. App., E.D. 1985). "Ownership by a specific person of the property taken is not material to and does not affect the offense of robbery, so long as it is shown that it was not the property of the accused." ***Id***.; *citing* ***State v. Manns***, 533 S.W.2d 645, 648 (Mo. App., St.L.D. 1976).

In ***White***, the robber threatened an employee with a gun, and took the employee's billfold as well as money from the business. 694 S.W.2d at 827. The Court of Appeals reversed the denial of White's motion for postconviction relief, holding that White was improperly convicted of both the robbery of the business and the employee individually. ***Id***. at 828. However, in ***Spencer v. State***, 805 S.W.2d 677 (Mo. App., E.D. 1990), there were four separate robberies where there were four victims, even though all were employees of the restaurant where the robbery took place. Although all the money belonged to the restaurant, the offense was "against the right of possession." ***Id***. at 680. All the employees had the right of possession of the restaurant's money. ***Id***.

Here there was one victim of the robberies: Christopher Moore. Conviction of two counts of robbery violated appellant's right to double jeopardy. Amends. V and XIV, U.S. Const.

The Fifth Amendment provides that no one shall be subject for the same offense to be twice put in jeopardy of life or limb. ***State v. White***, 14 S.W.3d 121, 125 (Mo. App., W.D. 2000). The Fifth Amendment is incorporated in and made applicable to the states by the Fourteenth Amendment. ***Id***.; ***Benton v. Maryland***, 395 U.S. 784, 794 (1969).

The United States Supreme Court has determined that defendants shall be free from multiple punishments for the same offense. ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969), *overruled on other grounds by* ***Alabama v. Smith***, 490 U.S. 794, 802 (1989). Doubt will be resolved against turning a single transaction into multiple offenses. ***Bell v. United States***, 349 U.S. 81 (1955).

In ***State v. Whitmore***, 948 S.W.2d 643 (Mo. App., W.D. 1997), the defendant was convicted of three robberies at a flower shop: one of the flower shop and two of the two employees. The counts alleged force against the two employees to accomplish the robberies of them individually, as well as to forcibly steal property belonging to the flower shop. ***Id***. at 649. Whitmore challenged this on double jeopardy grounds, and the Court of Appeals summarized the argument as follows:

> In essence, Mr. Whitmore claims that when only two individuals are threatened with or subjected to force and robbed of property in their

possession or control, the fact that some of the property taken was actually owned by a third entity, i.e., their employer, does not transform the criminal conduct into three separate robberies.

The ***Whitmore*** Court cited ***White***, 694 S.W.2d 825, and reversed the conviction of the robbery of the business. ***Id***. at 650. "In Mr. Whitmore's case, there were two separate victims who were threatened with physical force and made to surrender property at gunpoint, and thus Mr. Whitmore was properly convicted of two counts of first-degree robbery and two counts of armed criminal action. His conviction of an additional count of first-degree robbery and an additional count of armed criminal action, pertaining to the taking of the property owned by Teefey Flower Shop from the same two victims, was in violation of his right to be free from double jeopardy." ***Id.***

There was only one robbery of Mr. Moore. Appellant therefore respectfully requests that this Court reverse his conviction of Count IX and discharge him from that sentence.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his convictions and remand for a new trial, or in the alternative, to vacate the sentences and remand to the trial court with instructions that the state may seek to sentence appellant to seven concurrent terms for the sex crimes or concurrent terms for the robbery or robberies, but not both. The other counts must be dismissed with prejudice. Appellant requests that this Court reverse Count IX outright and discharge him from that sentence.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,472 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 7th day of June, 2012, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Ellen H. Flottman

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Ellen H. Flottman