No. SC92402

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

KEVIN HICKS,

Appellant.

Appeal from Jackson County Circuit Court
Sixteenth Judicial Circuit, Division One
The Honorable Sandra C. Midkiff, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Kevin Hicks ("Defendant") was charged in Jackson County Circuit Court with two counts of first-degree robbery (§ 529.020),[1] five counts of forcible sodomy (§ 566.060), one count of forcible rape (§ 566.030), and one count of attempted forcible rape (§§ 564.011, 566.030) (L.F. 16-18).[2] In August 2009, Defendant was tried by a jury on these charges before the Honorable Sandra C. Midkiff (L.F. 5-6; Tr. 85).

Defendant does not challenge the sufficiency of the evidence to sustain his convictions. Viewed in the light most favorable to the verdicts, the evidence showed:

In the early morning hours of August 5, 1992, C.M. and his female companion M.J. had just arrived at C.M.'s house when they were approached on the sidewalk by six men, all of whom carried firearms (Tr. 282-87, 301-02, 331-34). One man pressed a shotgun against the back of C.M.'s head and demanded money and guns (Tr. 335). C.M. replied that he did not have any (Tr. 336). One

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[1] All statutory references herein are to RSMo Cum. Supp. 1991 unless otherwise noted.

[2] Originally, Defendant was also charged with a sixth forcible-sodomy count, but the prosecutor voluntarily dismissed that count before the case was submitted to the jury (Tr. 455).

of the men asked M.J. if she had any jewelry (Tr. 288). She held up her hands to show that she had nothing (Tr. 288). The men instructed C.M. to open the front door to his house and led the two victims inside (Tr. 288-89, 338).

Once inside, the men ordered C.M. to lie face-down on the floor (Tr. 290, 340). When he was lying on the ground, one of the attackers draped a towel over C.M.'s head and pressed a gun against it, saying, "Don't move or I'll blow your brains out" (Tr. 292, 340-42).

Meanwhile, one of the men grabbed M.J. by the hair and pulled her toward the stairs (Tr. 290-91). Holding a gun to her back, the men prodded M.J. up to the second floor and into the center bedroom (Tr. 292-93). The house was undergoing renovation, so there was no furniture in the room; there was debris and plaster scattered all over the floor (Tr. 293-94). Five men surrounded M.J. and forced her to her knees (Tr. 294-95).

The three men in front of M.J. unzipped their pants and told her that she was "going to give them all head" (Tr. 295). With his gun pointed at M.J.'s head, one man forced his penis into M.J.'s mouth and told her, "If you hurt me, I'll blow you away" (Tr. 296-97). M.J. performed oral sex on the first man until he ejaculated in her mouth (Tr. 296, 311). When he was finished, he pushed M.J. over to the second man, who also forced M.J. to perform oral sex (Tr. 296-97). Then the third man took a turn (Tr. 297). As the men rotated, M.J. begged for her life (Tr. 297). The first man went downstairs to relieve his partner, who had

stayed on the first floor to guard C.M., and the sixth man went upstairs to join the others (Tr. 298, 312, 342).

After M.J. had been forced to perform oral sex on three men, a fourth man stepped in and shoved his penis into M.J.'s mouth (Tr. 299-300). At the same time, someone behind M.J. pressed her down onto all fours and pulled her pants down (Tr. 299-300). The man tried to penetrate her vaginally, but was unsuccessful (Tr. 300). One of the other attackers pulled her back onto her knees, and a fifth man forced her to perform oral sex on him (Tr. 300-01).

When the fifth man was finished, M.J. tried to pull her pants back up (Tr. 302). But the men took hold of her, tore off all of her clothes, and threw her back down onto her hands and knees (Tr. 302-03). One of the men took a position behind her and penetrated her vaginally (Tr. 303). The man had sexual intercourse with M.J. until he ejaculated; then he stood up and all five men left the room (Tr. 303-04). As the six intruders left the house, someone took the car keys from C.M.'s hand (Tr. 345, 358). Additionally, one of them stole a VCR, which belonged to C.M.'s ex-girlfriend (Tr. 289, 309-10, 350).

The case remained unsolved for nearly two decades until, in 2008, a DNA test conducted on the vaginal swab taken from M.J.'s rape kit matched a sample taken from Defendant's cousin, Elbert Hicks (Tr. 398). Detectives identified Defendant as a known associate of Elbert Hicks, so they traveled to Jefferson City Correctional Center to interview Defendant, where he was incarcerated for

a series of robberies, an attempted rape, and armed criminal action unrelated to the assaults on M.J. and C.M. (Tr. 5-6, 54-55, 407-11).

Defendant cooperated with the detectives and provided a video-recorded statement (Tr. 411-12). He admitted that he, his cousin Elbert, and four other men had accosted and robbed C.M. and M.J. that night in 1992 (Tr. 413-30; St. Ex. 7). He also said that he had been armed with a shotgun and had held onto it throughout the incident (Tr. 415-16; St. Ex. 7). He denied that he had sexually assaulted M.J., but acknowledged that he saw his cousin and several other men raping and sodomizing her on the floor of the upstairs bedroom (Tr. 420, 429; St. Ex. 7). He claimed that he focused on guarding C.M. and rummaging through the house for things to steal, but said that he went upstairs once to find M.J. crying and pleading as she was being raped and sodomized by his cousin and associates (Tr. 418-20; St. Ex. 7). He said that he went back downstairs, waited for awhile, and then went back up later to see if his accomplices had finished with M.J. (Tr. 429; St. Ex. 7).

After hearing the evidence and argument, the jury returned guilty verdicts on all nine counts (Tr. 506-07; L.F. 90-98). Before trial, Defendant waived his right to jury sentencing (Tr. 268). The court sentenced Defendant to 15 years of imprisonment for each robbery count and 30 years of imprisonment for each sex offense; the robbery sentences were run concurrently with each other and the sex-offense sentences were run concurrently with each other, but the robbery

sentences were run consecutive to the sex-offense sentences for a total term of imprisonment of 45 years (Tr. 530-31; L.F. 129-30). Pursuant to a pre-trial agreement, the State recommended that the sentence be run concurrently with the sentence Defendant was already serving for prior offenses (Tr. 525-26; Supp. Ex. 3).[3] The court honored the agreement and sentenced Defendant accordingly (Tr. 531).

[3] "Supp. Ex." refers to exhibits admitted at the pretrial suppression hearing.

ARGUMENT

I. The trial court did not clearly err in overruling Defendant's motion to suppress the statements he gave to police. Defendant voluntarily spoke to police after reaching an agreement with the State regarding sentencing, and the State honored that agreement. (Responds to Defendant's Points I and II).

In his first point, Defendant complains that the trial court erred in overruling his motion to suppress his statements to the police, arguing that the statements were involuntarily made because he confessed with the understanding that whatever sentences he might receive for the crimes he committed against C.M. and M.J. would run concurrently with one another, and the State deprived him of the benefit of his bargain. App. Sub. Br. at 17-24. In his second point, Defendant recasts the State's alleged failure to honor the agreement as a "breach of contract." App. Sub. Br. at 25-30.

Defendant's argument, whether presented in constitutional or contract terms, is without merit. In exchange for the information that Defendant provided, the prosecution agreed, in writing, that Defendant 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" (Supp. Ex. 3). The State honored this agreement. The term of imprisonment

Defendant received—a 45-year span composed of seven concurrent 30-year sentences run consecutively to two concurrent 15-year sentences—was ordered to run concurrently with the term of imprisonment Defendant was already serving. The State never promised that whatever sentences he might receive for the new charges would run concurrently with one another. And there is nothing in the record to suggest that Defendant was confused about the agreement or that his statement was given based upon a misunderstanding of the bargain. Defendant voluntarily and intelligently chose to cooperate with the police, and his statements were properly admitted at trial.

A. Additional facts

Investigators first approached Defendant to talk about this case on March 14, 2008 (Tr. 6). At the beginning of the interview, the investigators advised Defendant of his rights as required by *Miranda*[4] (Tr. 9). Defendant signed a written waiver and agreed to talk (Tr. 9-10; Supp. Ex. 1). During this first interview, Defendant admitted some involvement in the 1992 incident, but did not provide many details (Tr. 11, 14-15). He told the detectives that he wanted to help them out and give closure to the victim, but he also wanted to get the best deal possible (Tr. 12-14, 56). At first, the detectives thought that Defendant would need an attorney to negotiate a deal with the prosecutor, and they told

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

him so (Tr. 12-13). But Defendant said that he did not want an attorney because he thought that then he would have to stop talking to the police (Tr. 13).

The detectives contacted the prosecutor, who told them that if Defendant provided information that led to criminal charges being filed against the perpetrators of this offense, the State would agree that whatever sentence he received for his participation would be served concurrently with the time he was already serving (Tr. 16-18, 20, 56-57; Supp. Ex. 3). Defendant said that he was still willing to talk, but wanted an agreement in writing (Tr. 18). The detectives said that they'd return the following Monday with a written agreement (Tr. 18-19).

When the investigators returned, they repeated the *Miranda* warning, and once again Defendant waived his rights and agreed to talk (Tr. 23-24; Supp. Ex. 6). They presented the following written offer from the prosecutor's office:

> 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 [M.J.] and [C.M.] 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.

(Tr. 20, 58; Supp. Ex. 3).

At first, Defendant said that he was not happy with the wording of the agreement; he explained that he did not want to do any extra time and wanted a guarantee that he would keep his current "out-date" (Tr. 21, 27, 61-62). The detectives took a break while they tried to contact the prosecutor (Tr. 27, 62). Defendant emphasized that he wanted to talk, but he also wanted to get the best deal that he could for himself (Tr. 27-28).

The detectives resumed the interview that afternoon after speaking with the prosecutor (Tr. 28, 62). They told Defendant that the written agreement that they had offered that morning was the only deal on the table—the prosecutor would not change anything and would not offer a specific "out-date" (Tr. 28-29, 63). The detectives reiterated exactly what the deal would be, and Defendant agreed to cooperate based upon the terms in the written agreement:

[Detective] SNYDER: Okay, we made phone contact with another Prosecutor um 'cause Ted's not there. Got ahold of the person who's right under him. She was able to contact [Jackson County Prosecutor] Kanatzer. His deal is the same one that he agreed to on Friday and that is that your sentences, whatever your sentence is to run concurrent with the one that you got for the original charges.

. . . .

But the thing is they're not gonna specify a date or anything like that because they don't know exactly what you're gonna tell us. So that's what the deal is.

[Defendant] HICKS: Alright.

SNYDER: So as it is the agreement that we have the one that you read this morning that's the agreement. Are you willing to go ahead and talk to us based on that?

HICKS: Yeah.

(Supp. Ex. 13 at P706).

Defendant went on to admit involvement in the attacks on C.M. and M.J. on August 5, 1992 (Supp. Ex. 13 at P707-712, P716-29). He identified each of his five accomplices, admitted that he and his friends "roughed up" C.M. during the robbery, and acknowledged that Elbert and two others had sexually assaulted M.J. (Supp. Ex. 13 at P707-12, P716-29). He denied, however, that he had any sexual contact with M.J. (Supp. Ex. 13 at P720).

Near the end of the interview, the detectives asked Defendant why he told them "all this" (Supp. Ex. 13 at P734). Defendant replied that during his years in prison he had taken classes and participated in 12-step programs advising inmates to take responsibility, and that he was ashamed and wanted to be a better person (Supp. Ex. 13 at P734-35). He agreed that cooperating with the

police was his way of helping himself heal from the wrongs that he had done to others (Supp. Ex. 13 at P735). He said that he knew he could get a lawyer and refuse to talk, but he decided that he had to admit his wrongs and deal with it (Supp. Ex. 13 at P737). Before the investigators left, Defendant said that he was "glad to have this off [his] chest" (Supp. Ex. 13 at P741).

After the March 17 interview, the detectives talked to Defendant twice more, videotaping his statement each time (Tr. 30-37). Before each interview, the detectives advised Defendant of his *Miranda* rights, and Defendant signed a written waiver (Tr. 30-31, 34-36; Supp. Ex. 7, 10). At the end of the first video-recorded interview, Defendant reiterated that he was cooperating because "it's the right thing to do" (Supp. Ex. 11 at P704). He said that, thanks to the victim-impact classes he'd taken in prison, he had come to empathize with the victims and felt ashamed for what he and his friends had done to them (Supp. Ex. 11 at P704). During the final interview, a portion of which was played for the jury at trial, Defendant confirmed that he had been advised of his *Miranda* rights and had signed the waiver (Supp. Ex. 12 at P461, P491).

During each of the interviews, just two detectives were present with Defendant (Tr. 7, 54). Neither of the detectives were armed, and they never threatened or coerced Defendant in any way to try to induce him to speak (Tr. 36, 55-70). And, aside from the written agreement from the prosecutor, the

detectives made no promises to Defendant regarding any benefit that he might receive from cooperating (Tr. 37, 63).

Before trial, Defendant filed a motion to suppress the statements that he had made to the investigators (L.F. 19-22). In the motion, Defendant alleged that "the State promised to recommend concurrent time with other charges the defendant is serving time on in exchange for his cooperation" (L.F. 20). He argued that because a plea offer was subsequently made and then later withdrawn, his statement was inadmissible at trial (L.F. 20-21). Defendant did not allege that the State's original cooperation agreement was ambiguous or that he did not understand its terms (L.F. 19-22).

The trial court held a hearing regarding Defendant's motion to suppress, at which the two detectives who interviewed Defendant testified (Tr. 3-72). Defendant presented no evidence at the hearing (Tr. 3-72).

During argument, defense counsel propounded a new theory regarding why the statements should be suppressed (Tr. 78-80). She argued that when Defendant spoke with police his understanding was that he would "get concurrent time on this case and the cases that he is currently doing" (Tr. 78). She said that Defendant expected that he would get "one sentence that goes concurrent with what he is—with all of the various sentences that he is doing" (Tr. 79). And counsel argued that because Missouri law requires that sentences for certain sex offenses be run consecutively, the State would be unable to fulfill

its part of the bargain (Tr. 79). Thus, counsel concluded, Defendant's statements were involuntarily made because they were motivated by an agreement that the State could not honor (Tr. 79-80).

The prosecutor responded by pointing out that the State had never agreed to any particular sentence arising from the charges in this case; the State only promised that it would recommend that whatever the sentence was, it would run concurrently with the sentence he was already serving for other offenses (Tr. 80). She explained that the law requires only that sentences for sex offenses be run consecutive to other felonies committed at the same time, and that the State could and would honor its agreement to recommend that whatever sentence Defendant might receive for the charges in this case be run concurrently with the sentence for his prior, unrelated offenses (Tr. 80-84).

The trial court issued written findings and conclusions overruling Defendant's motion to suppress (L.F. 23-28). The court specifically concluded that Defendant's statements "were voluntary and were not made as a result of coercion or any false promise of leniency" (L.F. 24-26). Defendant's cooperation, the court found, was motivated by personal reasons, including his participation in 12-step programs, rather than by a plea offer or agreement by the State (L.F. 24-25, 28). The court also found that "there was no deception on the part of the State" (L.F. 27). The court observed that "[n]one of the negotiations made any reference to any particular offenses, or any particular statutory sentencing

requirements of specific offenses. This was because the State didn't know what [Defendant] was going to say in his statements, and [Defendant] didn't know what he would ultimately be charged with" (L.F. 27). The agreement, the court noted, "was simply that the state would recommend that any new sentence he received would run concurrent to the one which [Defendant] is now serving" (L.F. 27). The court concluded, "Even though sentences on some counts may run consecutive to sentences on other counts, the State still maintains the position that the sentence should run concurrent to [Defendant's] current sentence. There has been no deviation from that position by the State" (L.F. 27-28).

B. Standard of review

In reviewing the trial court's ruling on a motion to suppress, this Court considers the evidence presented at the suppression hearing and at trial to determine whether sufficient evidence exists to support the trial court's ruling. *State v. Gaw*, 285 S.W.3d 318, 319-20 (Mo. banc 2009). The facts and reasonable inferences therefrom must be viewed in the light most favorable to the trial court's ruling. *State v. McNeely*, 358 S.W.3d 65, 68 (Mo. banc 2012). The trial court's decision overruling a motion to suppress will be reversed only if it was clearly erroneous. *Id*.

Defendant's attempt to reframe his constitutional complaint about the voluntariness of his statements as a common-law breach-of-contract issue is not

preserved. His contention at the suppression hearing and in his motion for new trial was that his statements were involuntarily elicited because the State made an offer that it did not honor, and thus as a matter of constitutional law the statements must be suppressed (Tr. 79-80; L.F. 119-22). Defendant never argued to the trial court that principles of contract law required that the statements be suppressed or that certain charges be dismissed, and the trial court never considered or decided that issue. Therefore, the "breach of contract" argument is not preserved for appeal. *See State v. Davis*, 348 S.W.3d 768, 769 (Mo. banc 2011) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review.").

Moreover, as Defendant candidly admits in his brief, the breach-of-contract issue was not included in the brief he filed with the Missouri Court of Appeals, Western District, and has been added here for the first time. App. Sub. Br. at 13. Adding entirely new legal arguments to a substitute brief is prohibited by Rule 83.08(b), which states that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief."

Because Defendant's breach-of-contract argument is not preserved for review and is improperly introduced in his substitute brief, the argument is, at best, subject to plain-error review.[5] *E.g. State v. Letica*, 356 S.W.3d 157, 167 (Mo.

[5] Defendant has not requested plain-error review.

banc 2011). "Plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." *Id*. (citing Rule 29.12(b)).

C. Analysis

1. Defendant's statements to police were voluntarily made.

"The Fifth Amendment, which applies to the states by virtue of the Fourteenth Amendment, provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *Maryland v. Shatzer*, 130 S.Ct. 1213, 1219 (2010); U.S. CONST. amend V. A statement made by a suspect during a custodial interrogation is admissible against him at trial only if the State shows by a preponderance of evidence that the suspect "knowingly and voluntarily waived *Miranda* rights when making the statement." *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2260-61 (2010) (internal citations omitted). "The test for voluntariness is whether, under the totality of the circumstances, the defendant was deprived of free choice to admit, to deny, or to refuse to answer and whether physical or psychological coercion was of such a degree that the defendant's will was overborne at the time he confessed." *State v. Johnson*, 207 S.W.3d 24, 45 (Mo. banc 2006).

"Voluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good, essential to society's compelling

interest in finding, convicting, and punishing those who violate the law." *Shatzer*, 130 S.Ct. at 1222 (internal citations omitted). Where a defendant intelligently bargains for and receives a benefit from the State in exchange for his confession, the confession will not be considered involuntary simply because it was motivated, at least in part, by an offer of leniency. *See e.g. State v. Hutson*, 537 S.W.2d 809 (Mo. App. St. L. Dist. 1976); *State v. Chatman*, 682 S.W.2d 82 (Mo. App. E.D. 1984).

In *Hutson*, the prosecutor and sheriff visited the defendant in prison, where he was serving time on an unrelated charge, to talk about a murder investigation. 537 S.W.2d at 809. After the sheriff advised the defendant of his *Miranda* rights, the defendant asked the prosecutor what he would "recommend in the way of a sentence" if the defendant agreed to plead guilty to the murder and testify against his accomplices. *Id*. They negotiated briefly, and the prosecutor ultimately agreed that he would recommend a 20-year sentence in exchange for the defendant's statement and plea. *Id*. at 809-10. Once the agreement was reached, the defendant made an audio-recorded statement in which he confessed to the murder. *Id*. at 810. A month later, the defendant sent a letter to the prosecutor recanting his confession and informing the prosecutor that he would not testify in any case involving the murder. *Id*. The defendant was tried for first-degree murder; his audio-recorded confession was admitted at trial over objection. *Id*.

On appeal, the defendant argued that his inculpatory statements should not have been admitted because they were "the result of promises and illegal inducements offered by the prosecuting attorney and for that reason were 'involuntary' and 'not binding' upon him." *Id*. The court of appeals disagreed, concluding that, in view of the totality of the circumstances, the confession was voluntary. *Id*. at 814. The court observed that "there was no improper questioning, no threats, no false promises, and no failure or refusal of the prosecution to carry out its part of the agreement." *Id*. at 813. The court emphasized that the defendant had initiated the possibility of getting a deal in exchange for his cooperation, and reasoned that because the promise for leniency was solicited by the defendant, he "'cannot be heard to say that in accepting the promise [he was] the victim[] of compelling influences.'" *Id*. at 812 (quoting *Taylor v. Commonwealth*, 461 S.W.2d 920, 922 (Ky. App. 1970)).

In *Chatman*, the defendant refused to speak with investigators unless the prosecutor would offer some "consideration" in exchange for a statement. 682 S.W.2d at 84. The prosecutor pledged that if the defendant fully cooperated with the prosecution of the other suspects, then the defendant would be charged only with the robbery arising from the case, but not the murder. *Id*. The defendant agreed and gave a statement. *Id*. Later, the prosecutor tried to void the bargain, believing that the defendant had breached the agreement by refusing to take a polygraph test. *Id*. He charged the defendant with capital murder. *Id*.

On appeal, the defendant alleged that his taped confession was improperly admitted against him in the murder trial because it was obtained as part of an agreement that he would be prosecuted for the robbery but not the murder. *Id*. The Eastern District agreed with the defendant's argument, holding that "a confession is not admissible if given to obtain a particular agreed upon result and that result is aborted." *Id*. at 85-86 (citing *State v. Hoopes*, 534 S.W.2d 26, 37 (Mo. banc 1976)). But the court added that if the State wished to prosecute the defendant for the robbery, it could use the confession against him in that trial. *Id*. at 86. The court explained that the defendant had a "reasonable expectation" that he would be prosecuted for robbery after he made his statement, and he had waived his privilege against self-incrimination with respect to the robbery charge. *Id*.

Defendant's case is analogous to *Hutson* and *Chatman*. Here, Defendant, not the detectives, suggested the possibility that he might be able to receive a benefit of some sort in exchange for his cooperation (Tr. 12-14, 56). The detectives were initially reluctant, suggesting that Defendant might want to get a lawyer (Tr. 12-13). But Defendant insisted that he did not want a lawyer; he wanted to talk and he wanted a deal (Tr. 13). The prosecutor made an oral offer, but Defendant insisted that he get something in writing (Tr. 18-19). When the written offer was presented to him, Defendant made a counteroffer, trying to extract still better terms from the prosecutor (Tr. 21-27, 61-62). But when the

prosecutor said that the written offer was as far as he would go, Defendant decided that the deal was good enough and made a statement (Supp. Ex. 13 at P706).

Nothing about Defendant's confession was involuntary. He received the *Miranda* warnings before every interview and signed a written waiver each time (Tr. 9-10, 25-26, 30-31, 34-36; Supp. Ex. 1, 6, 7, 10). The tone of each interview was friendly and conversational; no threats were ever made (Tr. 19, 36, 55-70). Indeed, Defendant appeared eager to cooperate so that he could relieve himself of the guilt he carried for his part in this horrific offense. He said more than once that he was trying to be a better person, that he felt empathy for the victims thanks to classes that he had taken in prison, and that he was glad to get everything "off [his] chest" (Tr. 12-14, 18; Supp. Ex. 11 at P704; Supp. Ex. 13 at P734-35, P736-37, P741). And Defendant was plainly savvy in dealing with the detectives. He had experience with police interviews and knew that his information was valuable (Tr. 12). Defendant intelligently bargained with the prosecutor and voluntarily gave his statements pursuant to the cooperation agreement that he made. The trial court did not clearly err in refusing to suppress Defendant's statements.

2. Defendant received the benefit of his bargain.

Defendant does not argue that his confession was *per se* involuntary simply because it was motivated by an agreement for leniency. Instead, he

insists that he did not get the benefit of the bargain, and thus he was tricked into cooperating. App. Sub. Br. at 22-24, 27-29. He claims that when the deal was made, he believed that any sentences he might receive, including sentences for any charges arising from the crimes in this particular case, would run concurrently with each other. App. Sub. Br. at 22-24, 27-29. Defendant argues that because that did not and could not happen—the sex-offense sentences had to run consecutively with the robbery sentences, as required by section 558.026—his confession was motivated by a false promise and should be deemed involuntary. Alternatively, he argues that the State breached the contract and he should receive relief as a result.

Defendant's arguments mischaracterize the cooperation agreement. The written agreement expressly states that in exchange for Defendant's cooperation, the State agreed 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" (Supp. Ex. 3). The agreement made no representations about what specific sentences Defendant would receive as punishment for the crimes in the present case or whether those sentences would run concurrently with or consecutively to one another. Indeed, no such representation would have been possible because, before Defendant made his statements, the prosecutor did not know what he would say and thus did not know what the charges would be (Supp. Ex. 13 at P706). The agreement was

directed at the relationship between the new charges (whatever they would be) and the sentence Defendant was already serving. Whatever new sentence he received, it would run concurrently with his current prison sentences (Supp. Ex. 3).

Defendant's argument that the State breached its agreement rests exclusively on his claim that the phrase "term of imprisonment," as used in the written agreement, necessarily means a set of sentences that run concurrently. App. Sub. Br. at 23, 28. He claims that he did not receive a *term* of imprisonment. App. Sub. Br. at 23, 28. Instead, he insists, he was sentenced to *two terms* of imprisonment that ran consecutively to one another. App. Sub. Br. at 23, 28.

Defendant cites no authority for this argument. And his narrow definition of the phrase "term of imprisonment" is contrary to the manner in which the phrase is commonly used. It is possible, despite Defendant's insistence otherwise, to have a single "*term* of imprisonment" that is composed of multiple sentences run consecutively. *See e.g. Clark v. State*, 42 S.W.3d 685 (Mo. App. W.D. 2001) (noting that a 30-year sentence run consecutively to a 15-year sentence composed a "term of imprisonment" of 45 years); *State v. Collins*, 188 S.W.3d 69, 79 (Mo. App. E.D. 2006) (the "term of years" to which the defendant was sentenced comprised twenty separate sentences run consecutively). Thus, the language in the agreement stating that Defendant would be sentenced to a

"term of imprisonment for his involvement and participation in these crimes" reveals nothing about whether that term would be composed of concurrent or consecutive sentences. The agreement's silence on that point does not render it ambiguous. It simply does not speak to that issue. The manifest purpose of the agreement was that the new term, whatever it would be, would run concurrently with the prison sentences Defendant was already serving (Supp. Ex. 3).

The conversation between the detectives and Defendant reflected that understanding. One of the detectives described the offer as follows: "[Y]our sentences, whatever your sentence is to run concurrent with the one that you got for the original charges" (Supp. Ex. 13 at P706). Defendant said that he wanted to cooperate (Supp. Ex. 13 at P706). Although Defendant claims in his brief that he subjectively believed that all sentences for the new charges would run concurrently, nothing in the record supports that allegation and the trial court was not obligated to accept it.

Defendant and the State reached a voluntary cooperation agreement, and the State honored its part of the bargain—the 45-year "term of imprisonment" that Defendant received for his participation in the August 5, 1992 attack on C.M. and M.J. was ordered to run concurrently with the sentences for which Defendant was already serving time (Tr. 525-26, 531). The trial court did not clearly err in finding that, considering the totality of the circumstances, Defendant's decision to bargain with the prosecutor, reach a cooperation

agreement, and then make a series of inculpatory statements was voluntary, knowing, and intelligent. Points I and II should be denied.

II. Defendant is entitled to relief from one of his two first-degree robbery convictions because his conviction for two counts of first-degree robbery, as the offenses were charged, violated his right to be free from double jeopardy. (Responds to Defendant's Point III).

In his third point, Defendant argues that his conviction on Count IX—first-degree robbery of C.M. for stealing a VCR—should be reversed because that conviction in addition to his conviction for Count I—first-degree robbery of C.M. for stealing car keys—violated his right to be free from double jeopardy. App. Sub. Br. at 31-35.

Respondent agrees. As charged and instructed in this case, only one victim—C.M.—was actually robbed by Defendant and his accomplices (L.F. 16-18, 64, 85-86). Through the use of a single, continuous act of force, Defendant and his cohorts stole two things that were in C.M.'s possession—C.M.'s car keys, and an ex-girlfriend's VCR (Tr. 309-10, 345, 358).[6] It is well-settled that "a defendant who forcibly took from a single victim the victim's property as well as

[6] The facts of this case would, in fact, support two counts of first-degree robbery. Defendant and his accomplices used force against *two* victims—C.M. and M.J.—to steal property from the residence. But because C.M. was the only victim included in the charging document and the instructions, the State agrees that, under the circumstances, only one of the robbery convictions can stand.

property owned by another in the victim's possession committed only one act of robbery." *State v. Bohlen*, 284 S.W.3d 714, 718 (Mo. App. E.D. 2009). Defendant was properly convicted of one count of robbery, but not two. His third point should be granted.

CONCLUSION

For the foregoing reasons, Defendant's conviction on Count IX should be reversed. In all other respects, the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 5,704 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 6th day of July, 2012, to:

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