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SUPREME COURT OF ARKANSAS

No. CR-17-303

	Opinion Delivered: February 15, 2018
LORENZO LAMAR KELLON APPELLANT	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. 35CR-15-448]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE BERLIN C. JONES, JUDGE
	AFFIRMED.

SHAWN A. WOMACK, Associate Justice

Lorenzo Kellon was convicted of capital murder for killing Hardip Singh, a convenience store clerk. The state waived the death penalty, and Kellon was sentenced to life in prison without the possibility of parole plus a 40-year term for aggravated robbery and a 15-year sentencing enhancement for the use of a firearm. Kellon makes two arguments for reversal on appeal. He argues that (1) the trial court erred in admitting the confession he made while in police custody and (2) the trial court incorrectly declined to adopt his suggested modifications of, and omissions from, the submitted model jury instructions. We affirm.

Police detained Kellon after finding him driving a car identified on the surveillance footage from the scene of the crime. Kellon was taken to the Pine Bluff Police Department, where he was questioned by two detectives. During the course of

approximately one hour of interrogation, Kellon confessed to killing Singh and offered to assist the police in recovering the murder weapon.

The State has the burden of demonstrating by a preponderance of the evidence that custodial statements are given voluntarily and are knowingly and intelligently made. *See, e.g.*, *Jones v. State*, 344 Ark. 682, 687, 42 S.W.3d 536, 540 (2001). In reviewing the trial court's determination of voluntariness, we review the totality of the circumstances; we will reverse only if the trial court's decision was clearly erroneous. *Id*. We have adopted a two-stage inquiry for instances in which defendants allege that false promises by police officers induced their custodial statements. First, we look to the nature of the officer's statement. If the officer made an unambiguous, false promise of leniency, then the statement elicited from the defendant is automatically inadmissible; if the officer made no promises of leniency, the statement is admissible. *See Pyles v. State*, 329 Ark. 73, 77–78, 947 S.W.2d 754, 756 (1997). If the officer's statements were of an ambiguous nature, however, we proceed to the second step of the analysis to examine the defendant's vulnerability along a number of dimensions: age, education, intelligence, length of interrogation, experience with the justice system, and the delay between the defendant receiving *Miranda* warnings and the statement. *See Clark v. State*, 374 Ark. 292, 300, 287 S.W.3d 567, 573 (2008).

The comments from the detectives that Kellon highlights in this case fall into two broad categories. First, before Kellon's confession to the murder, the officers made several comments about the desirability of telling the truth. They said that Kellon could "get help" for any problems he was going through, that the officer could "go and tell the

judge, this man came in here. He was truthful. He was trying to be a provider for his family. He was trying to help someone that, you know, he considered as a [*sic*] family. I can get on the stand and say that versus saying, he came up in here and he flat out lied to me." They indicated that they "give opportunity" and that coming clean might allow him to "start over again" and become a better person. Kellon confessed between this and the second group of comments in which the detectives claimed they did not want Kellon to lead them to the murder weapon for "any other reason" than to prevent the gun from remaining on the streets and causing an unsafe situation.

Kellon argues that these statements were unambiguous promises of leniency, but this contention is simply not supported by our case law. For promises to be considered unambiguous offers of leniency, we have demanded a degree of specificity lacking here. In *Teas v. State*, 266 Ark. 572, 574, 587 S.W.2d 28, 29 (1979), we reversed the trial court's decision not to suppress a confession after reviewing evidence that the detaining officers offered to reduce the defendant's bond and to make recommendations to the prosecutor up to and including dismissal of the case. These were specific promises in exchange for the defendant's confession and cooperation in other investigations. In *Freeman v. State*, 258 Ark. 617, 620–21, 527 S.W.2d 909, 911 (1975), we similarly reversed when a deputy prosecuting attorney claimed he had no authority to make promises but nevertheless speculated with undue specificity that, if the detained individual had committed a crime, it was "probably one that would not result in more than 21 years' incarceration." *Id*. In contrast, the statements in this case are much closer to those in *Goodwin v. State*, 373 Ark. 53, 62, 281 S.W.3d 258, 266 (2008). There, the

officers told the defendant that it was "best for [the defendant] to be truthful" and that they would convey news of the defendant's honesty to the prosecutor. We held that such general promises were, at most, ambiguous. *Id*. So too here. The detectives made no specific representations to Kellon. In context, the comments read more as general exhortations to be truthful for the sake of Kellon's own conscience than as promises to exercise official authority.

As in *Goodwin*, because the statements were plausibly ambiguous, we proceed to the second step of determining whether Kellon was particularly vulnerable to "having his will overborne." *Id.* Here as well, though, we find no cause for concern sufficient to reverse the judgment of the trial court. Going through the factors listed above, Kellon was 23—well into adulthood—at the time of the confession. He was Mirandized shortly before questioning began, and his confession came less than halfway in to his approximately one-hour interrogation. The trial court commented on Kellon's poor articulation, but swiftly added that noticing an unfamiliar speech pattern alone was an insufficient reason to reach a conclusion about Kellon's intellect. While Kellon had no prior experience with the criminal-justice system, the test is holistic; inexperience with interrogation alone does not mandate a conclusion that the defendant is particularly vulnerable. *See, e.g.*, *Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998). Reviewing the totality of the circumstances, we cannot say that the trial court clearly erred in refusing to suppress Kellon's confession.

For Kellon's second point on appeal, he argues that the trial court incorrectly declined to adopt his suggested modifications of, and omissions from, the submitted

model jury instructions. Specifically, he requested that the trial court strike (1) language in AMI Crim. 2d 301 and 302 indicating that the jury should consider the greater offense of capital felony murder before first-degree felony murder[1] and (2) the entirety of AMI Crim. 2d 8103 instructing the jury not to discuss or consider punishment during the guilt phase of the deliberations.[2] The trial court's decision to submit or modify a jury instruction is accorded great weight. It will not be reversed absent an abuse of discretion. *Grillot v. State*, 353 Ark. 24, 318, 107 S.W.3d 136, 150 (2003).

Kellon argues that, given that the elements of capital felony murder and first-degree felony murder are identical, requiring that the charges be considered seriatim is incompatible with the law. He posits that the jury could never honestly convict on the lesser included first-degree charge because the jurors would first have to acquit the defendant of the greater capital charge on the exact same elements. Kellon cites *Sanders v. State*, 305 Ark. 112, 805 S.W.2d 953 (1991), for the proposition that, in cases where the greater and lesser offenses are identical, the jury must be able to reject the greater offense merely by convicting of the lesser rather than requiring acquittal on the greater charge first. This reading is not supported by the holding in *Sanders*, however. *Sanders* turns entirely on a glaring error in the crime instructed to the jury. Sanders was charged

[1] The sentence Kellon requested struck from AMI Crim. 2d 301 reads, "If you have a reasonable doubt of the guilt of the defendant on the greater offense, you may find him guilty only of the lesser offense." The requested strike from AMI Crim. 2d 302 reads, "If you have reasonable doubt of the defendant's guilt on the charge of capital murder, you will then consider the charge of murder in the first degree."

[2] AMI Crim. 2d 8103 reads, "In your deliberations the subject of punishment is not to be discussed or considered by you. If you return a verdict of guilty, the matter of punishment will be submitted to you separately."

with capital felony murder, but the jury was instructed that the lesser included offense was simple first-degree murder (rather than first-degree felony murder). Sanders was therefore convicted of a crime with which he was not properly charged. *Sanders* does not say anything about the order of deliberations. To the extent it weighs on this case, it is only to strengthen the chorus of our precedent explicitly approving jury deliberations over multiple offenses with overlapping elements but divergent levels of severity. *See, e.g.*, *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001) (overturned on other grounds). Kellon's argument is an attempt to relitigate a thoroughly settled legal tension by other means. As such, we hold that the trial court did not abuse its discretion in declining Kellon's proposed modifications of, and omissions from, the submitted model jury instructions.

As required by Ark. Sup. Ct. R. 4-3(i) (2017), the record has been examined for reversible error. None has been found.

Affirmed.

WYNNE, J., concurs.

HART, J., concurs in part; dissents in part.

ROBIN F. WYNNE, Justice, concurring. I join the majority on the first point, but write separately on the second point because Kellon's argument regarding his proffered jury instructions merits a more thorough examination. Kellon argues, as he did to the trial court, that modifications to the model jury instructions were warranted in his case. Specifically, Kellon contends that in situations where the elements of the greater and lesser included charges are identical, the jury should not be instructed on the order of jury

deliberations, nor should the jury be instructed that it must acquit the defendant of the greater offense before moving on to the lesser included offense; he further contends that the jury should not be instructed that the subject of punishment may not be discussed or considered This argument is different from a challenge to the constitutionality of our capital felony-murder statute, which this court has previously rejected. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001) (argument that capital felony-murder charge should have been quashed by the circuit judge because it was unconstitutionally vague); *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980) (void-for-vagueness challenge, court held "no constitutional infirmity in the overlapping of the [capital felony murder and first-degree felony murder statutes], because there is no impermissible uncertainty in the definition of the offenses"). In looking at the specific argument made in this case, I see an inherent conflict in the model instructions when the elements of the two offenses are identical. As stated in Kellon's brief: "In order to find Appellant guilty of felony murder in the first degree, the jury would first have to unanimously determine that the State had not proven each of the elements of capital felony murder, and then without more added or taken away, turn around and determine that the State had proven each of those very same elements with regard to first degree felony murder." When there is a basis for giving a lesser-included instruction, surely the jury instructions must allow for meaningful consideration of the lesser-included offense.

In sum, while I am not convinced that reversible error occurred here, I believe that the Committee on Criminal Jury Instructions should consider revising the instructions

relating to first-degree felony murder as a lesser-included offense of capital felony murder.

JOSEPHINE LINKER HART, Justice, concurring in part and dissenting in part. I agree with the majority's discussion and disposition of Kellon's first argument. The trial court did not commit reversible error by declining to suppress Kellon's confession. However, I disagree with the majority's discussion and disposition of Kellon's second argument, for many of the reasons set out in Justice Wynne's concurrence. The jury instructions in this case are problematic, and their use warrants reversal.

The majority characterizes Kellon's second argument as "an attempt to relitigate a thoroughly settled legal tension by other means." Justice Wynne points out that this is not the case; Kellon is not arguing that the offenses with which he is charged are unconstitutionally vague (*see, e.g.*, *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001); *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980)) or that the jury was instructed on a crime with which he has not been properly charged (*see, e.g.*, *Sanders v. State*, 305 Ark. 112, 805 S.W.2d 953 (1991)). Instead, Kellon is arguing that the jury instructions in this case negated the jury's ability to convict him of first-degree felony murder instead of capital felony murder. The jury instructions in question read as follows:

> Lorenzo Kellon is charged with capital murder. This charge includes the lesser offense of murder in the first degree. You may find the defendant guilty of one of these offenses or you may acquit him outright.
>
> If you have a reasonable doubt of the guilt of the defendant on the greater offense, you may find him guilty only of the lesser offense. If you have a reasonable doubt as to the defendant's guilt on all offenses you must find him not guilty.

> Lorenzo Kellon is charged with the offense of capital murder. To sustain this charge, the State must prove the following things beyond a reasonable doubt:
>
> First, that Lorenzo Kellon committed or attempted to commit the crime of aggravated robbery; and, second, that in the course of and in furtherance of that crime or attempt, or in the immediate flight therefrom, Lorenzo Kellon caused the death of Hardip Singh under circumstances manifesting an extreme indifference to the value of human life.
>
> If you have reasonable doubt of the defendant's guilt on the charge of capital murder, you will then consider the charge of murder in the first degree.

These instructions would not be problematic, except that the elements of capital felony murder, an offense with more weighty punishment[3] than first-degree felony murder, are exactly the same as the elements of first-degree felony murder. The very next lines in the jury instructions were as follows:

> To sustain [the charge of murder in the first degree], the State must prove the following things beyond a reasonable doubt:
>
> First, that Lorenzo Kellon committed or attempted to commit the crime of aggravated robbery; and, second, that in the course of and in furtherance of that crime or attempt, or in the immediate flight therefrom, Lorenzo Kellon caused the death of Hardip Singh under circumstances manifesting an extreme indifference to the value of human life.
>
> In your deliberations, the subject of punishment is not to be discussed or considered by you. If you return a verdict of guilty, the matter of punishment will be submitted to you separately.

The problem is readily apparent. While the first paragraph of the instructions purported that the jury could convict Kellon of either capital felony murder or first-

[3]Ark. Code Ann. § 5-10-101(c)(1) provides that capital murder is punishable by death or life imprisonment without the possibility of parole. Ark. Code Ann. § 5-10-102(c) provides that first-degree murder is a Class Y felony. Ark. Code Ann. § 5-4-401(a)(1) provides that a conviction for a Class Y felony is punishable by a sentence of "not less than ten (10) years and not more than forty (40) years, or life[.]"

degree felony murder, the later paragraphs made it clear that the only way the jury could even get to first-degree felony murder would be to first acquit Kellon of capital felony murder. As such, there was no scenario in which the jury could convict Kellon of first-degree felony murder, as the elements of capital felony murder, which the jury was required to address before it could consider first-degree felony murder, are exactly the same as the elements of first-degree felony murder.

Kellon spelled this out at length for the circuit court, yet the circuit court refused to accept Kellon's proposed modifications to the jury instructions. Kellon's proposed modifications were reasonable and would have taken nothing away from the prosecutor's ability to argue that the elements of the offenses had been established. I feel that the circuit court failed to give Kellon's argument and proposed instructions due consideration, and that this error was extremely prejudicial to Kellon's rights.

I respectfully dissent.

Janice W. Vaughn, Arkansas Public Defender Commission, for appellant.

Leslie Rutledge, Att'y Gen., by: *Michael A. Hylden*, Ass't Att'y Gen., for appellee.