SUPREME COURT OF LOUISIANA

No. 98-KA-2460

STATE OF LOUISIANA

versus

RICHARD D. HOBLEY

KNOLL, JUSTICE, concurring in part, dissenting in part, and assigning reasons.

I concur with the majority that all of the defendant's claims of error during the guilt phase of his trial lack merit and that his conviction for first-degree murder should be affirmed. However, I disagree with the majority's reversal of defendant's death sentence on grounds that his voluntary confession of an unadjudicated and unrelated crime in Houston, Texas was not clear and convincing, and competent and reliable.

This Court has consistently held that the State may introduce evidence of unrelated and unadjudicated criminal conduct in the penalty phase of a first-degree murder trial. *See, e.g.*, *State v. Connolly*, 96-1680 (La. 7/1/97), 700 So. 2d 810, 819-21. The only limitations imposed under our jurisprudence are that: (1) the evidence must be clear and convincing; (2) the evidence must be competent and reliable; (3) the unrelated conduct must have relevance and substantial probative value to prove the defendant's character and propensities; and (4) the evidence must involve violence against the person of the victim of which the period of limitation for instituting prosecution has not run. *Id.*; *State v. Jackson*, 608 So. 2d 949, 955 (La. 1992); *State v. Brooks*, 541 So. 2d 801, 814 (La. 1989). What our jurisprudence has not established, absent today's ruling, is that each material element of an unadjudicated and unrelated crime need be corroborated by facts independent of the confession. I cannot agree in the majority heightening the burden imposed upon the State and requiring a more stringent showing by the State. More compelling to me is the fact that the United

States Supreme Court has declined to establish such a stringent requirement under the federal Constitution. *See, e.g.*, *Miranda v. California*, 486 U.S. 1038 (1988) (Marshall &Brennan, JJ., dissenting).

The majority reasons that evidence of defendant's connection with the Houston homicide was not clear and convincing and that the "state has not demonstrated that defendant's statement describing his participation in the Houston incident was reliable and trustworthy." In making this determination, the majority concludes that the State failed to offer any extrinsic evidence that the Houston shooting actually occurred, that defendant's actions resulted in the victim's death, that Big Riley was killed, or that defendant was present at the scene of the alleged murder. As such, the majority reasons that they "cannot say that defendant's admission to the unadjudicated crime was neither the result of braggadocio nor, as his sister suggested in her testimony, an attempt to protect a sibling."

By focusing on these facts, the majority mistakenly focuses on facts necessary to establish the *corpus delicti* of a charged crime. The facts listed by the majority are all relevant to the determination of whether the evidence is sufficient to find guilt of a crime beyond all reasonable doubt. However, in this case, defendant has already been found guilty of the charged crime, and the jury's focus in the penalty phase, where the State introduced evidence of the unadjudicated and unrelated crime, is focused on what penalty should be imposed. The mere fact that defendant's confession, which the majority concedes was freely and voluntarily given, was allegedly uncorroborated does not mean it was unreliable and untrustworthy. Indeed, nothing in the record suggests that defendant's confession is plainly unreliable and untrustworthy.

Moreover, the majority errs by concluding that the record lacks such corroborative evidence. Although the State, in response to defendant's motion to quash

aggravating circumstances, introduced and made part of the record a copy of an outstanding warrant from Harris County, Texas, charging defendant for the murder of the individual named Riley, (R. 261), in preparing and lodging the record with this Court the warrant has mistakenly been omitted. The State provided the defense and the trial court copies of this warrant. (R. 261). Nonetheless, this omission could be easily corrected under LA. CODE CRIM. P. art. 914.1(D)[1] and would save precious judicial time and expense of a new penalty phase trial.

Further, as in *State v. Hamilton*, 92-1919 (La. 9/5/96), 681 So. 2d 1217, defense counsel corroborated defendant's confession. Although the majority contends that the confession in *Hamilton* was reliable and clear and convincing evidence because defense counsel conceded to the crime in closing arguments, the law of this State has long been that arguments and statements made by counsel and the trial court in closing argument are not considered evidence. Notwithstanding, similar to the concession in *Hamilton*, during the penalty phase of the present trial, defense counsel stated that a shootout in Texas had taken place and that someone got hit by a bullet. (R. 782). In opening statements during the penalty phase of the present trial, defense counsel stated that defendant had confessed on the tape that there had been a shooting in Texas, a lot of people had guns, Big Riley got shot, and that defendant fled Houston because police were trying to question him about Big Riley. (R. 788). Thus, just as in *Hamilton*, here defense counsel conceded many of the facts that the majority asserts the State failed to corroborate. Given the holding in *Hamilton*, I can find no meaningful distinction between the facts and circumstances of that case and the case *sub judice*.

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[1] LA. CODE CRIM. P. art. 914.1(D) provides:

> The trial court or the appellate court may designate additional portions of the transcript of the proceedings which it feels are necessary for full and fair review of the assignment of errors.

Secondly, taking defendant's confession as a whole and not just that portion of his confession to the Houston crime, there was sufficient corroboration to determine that the confession was reliable. In this case, the defendant in a single confession confessed to the charged murder and to the Houston murder. The State presented to the jury sufficient evidence to prove beyond all reasonable doubt that defendant committed the charged crime. Thus, contrary to the majority's assertion, by providing the jury with sufficient evidence to find defendant guilty of the charged offense the State has provided sufficient proof that the defendant's entire confession provided clear and convincing and competent and reliable evidence of the unadjudicated and unrelated crime.

Of significant concern is the majority's conclusion that the defendant's admission to the unadjudicated crime was possibly an attempt to protect a sibling. The defendant's sister testified at the penalty phase of the trial for her brother. In response to the questions, "What about the other children, are they all alive? You said you had six . . . or seven?", defendant's sister, obviously unresponsive to the questions asked, answered with the following self-serving testimony:

> Um....[defendant] covered for his little brother when he admitted to that....that robbery, or....wanted in Houston. His little brother deceased now. Why he carrying on the lie, he don't have to. William committed it. He got killed last year. [Defendant] didn't have nothing to do with that. I don't know why he carrying it on and saying he did.

The jury heard this testimony and was obviously not convinced or impressed. I cannot agree that her testimony places a veil of serious concern over defendant's voluntary confession or raises a warning flag that defendant was possibly confessing to protect the guilt of a deceased brother.

Finally, this case does not present the same fear of braggadocio or exaggeration by the defendant that we faced in *State v. Brooks*, 92-3331 (La. 1/17/95), 648 So. 2d

366. In *Brooks*, the defendant confessed to four murders for which he had been convicted, two murders for which he was being prosecuted, two murders for which he was under indictment, and twenty-seven other unadjudicated offenses. In the guilt phase of the trial, the State offered no evidence to corroborate the fact that twenty-three of the unadjudicated offenses had even taken place. We held that the State had failed to demonstrate any guarantees of trustworthiness of the defendant's confession given (1) the inability of the police to verify even the occurrence of many of the purported offenses; (2) the relative likelihood that the defendant voluntarily inflated the scope of his crime spree during the confession given that he knew retribution was nigh; and (3) the fact that the police knew defendant had been under psychiatric care because of his mental retardation and erratic and unpredictable behavior and therefore should have raised a warning flag. *Brooks*, 648 So. 2d at 376-77. Here, we are not presented with such circumstances. First, defendant's confession extensively detailed his role in <u>two</u> crimes, the murder for which he was found guilty and the Houston murder, not some thirty-five crimes as in *Brooks*. Thus, I cannot say with any reason that defendant is voluntarily inflating the scope of his actions. Second, there was no evidence that the State knew defendant suffered a psychiatric deficiency that would have raised a warning flag as to the veracity of his confession. Unlike *Brooks*, this is simply not a case where the risk of fabrication or inaccuracy of the defendant's voluntary confession required, as a predicate to the admission of that confession, corroboration of the unadjudicated crime.

In my view, before the imposition of such a burden on the State, the record must suggest the need for a more stringent requirement for the introduction of a voluntary confession of an unadjudicated and unrelated crime. There is no evidence in the record before us to support this stringent requirement. For these reasons, I respectfully dissent

from the reversal of the penalty phase of defendant's trial and would affirm the imposition of his death sentence.