IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
Respondent,	)	
	)	
v.	)	**WD71650**
	)	
KEVIN E. HICKS,	)	**FILED: January 17, 2012**
Appellant.	)	

Appeal from the Circuit Court of Jackson County
The Honorable Sandra Carol Midkiff, Judge

Before: Lisa White Hardwick, C.J., and James M. Smart, Jr., Joseph M. Ellis, Victor C. Howard, Thomas H. Newton, James E. Welsh, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin, and Gary D. Witt, JJ.

After a jury trial, Kevin Hicks was convicted in the Circuit Court of Jackson County of two counts of first-degree robbery, one count of forcible rape, one count of attempted forcible rape, and five counts of forcible sodomy. Hicks appeals, raising two arguments. First, he contends that the trial court erred in failing to exclude from evidence his inculpatory pretrial statements because those statements were involuntary, and were made to police detectives in reliance on an agreement the State has failed to honor. Second, Hicks argues that the facts here do not support conviction of two separate counts of first-degree robbery. The State concedes that Hicks is entitled to relief on this second claim. We reject Hicks' arguments concerning the admission of his pretrial statements. Based on the State's concession, we vacate Hicks' conviction and sentence on the second robbery count.

Factual Background

In the early morning hours of August 5, 1992, Hicks and five other men, armed with firearms, accosted a male and female adult couple on the street outside the male's home.[1] Hicks and his compatriots ordered the couple into the house. The men kept the male victim downstairs at gunpoint, and forcibly stole keys and a videocassette recorder from him. The assailants took the female victim to an upstairs room, where multiple members of the group took turns sexually assaulting her.

The crimes went unsolved for many years. In 2008, DNA testing revealed a match between Elbert Hicks, a cousin of Appellant Kevin Hicks, and DNA collected from the female victim shortly after the incident. Police were aware that the August 1992 offense involved six African-American male perpetrators. They developed a list of six suspects – including Appellant Kevin Hicks – based on information they possessed concerning Elbert Hicks' known associates in 1992. Five of the six men police identified as suspects in 2008, including both Elbert and Kevin Hicks, had been suspects in the crimes in 1992.

Hicks had been arrested for unrelated offenses the day after the August 5, 1992 incident. He had been convicted and sentenced for a series of robberies, an attempted rape, and armed criminal action. Hicks was scheduled for release on his existing convictions in 2018.

On Friday, March 14, 2008, Kansas City police detectives visited the Jefferson City Correctional Center to interview Hicks. At the beginning of the interview Hicks was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). He signed a written waiver and agreed to talk. He admitted some involvement in the 1992 incident, but was vague and did not provide details. Hicks also provided information indicating that he had knowledge of other

[1] We withhold the names of the victims pursuant to § 566.226, RSMo.

unresolved crimes, including a rape, and a murder in Kansas. He told the detectives he wanted to help them and give closure to the victims, but that he also wanted to get the best deal possible for himself.

The detectives, unfamiliar with the sort of agreement Hicks was proposing, initially told him that he would have to have an attorney to negotiate a deal with the prosecutor. Hicks said he did not want an attorney because he thought that would mean that he would have to stop speaking with the police. The detectives ultimately contacted an assistant prosecutor, who told them that if Hicks provided information that led to criminal charges being filed against other perpetrators of the crimes of which he had knowledge, the State would agree that "the term of imprisonment" Hicks received "for his involvement and participation in these crimes" would "be served concurrently with [his] current prison sentences." Upon being informed of this, Hicks stated that he was still interested in talking, but wanted an agreement in writing. The detectives were unable to have a written agreement faxed to the prison on March 14. They told Hicks that they would return the following Monday (March 17, 2008) with a written agreement in hand.

When the investigators returned, they again gave Hicks his *Miranda* warnings, and he once again waived his rights and agreed to talk. The detectives presented Hicks with a letter from the prosecutor's office, which memorialized the agreement the State had offered the previous Friday.

Hicks was dissatisfied with the agreement as presented. He explained that he did not want to serve any additional time as a result of the offenses in which he was now prepared to implicate himself, and wanted a guarantee from prosecutors that he could keep his current "out-date" (*i.e.*, the date he would be released from prison), scheduled for 2018. The detectives took a

break to contact the prosecutor's office for clarification. Hicks again stated that he wanted to talk, but that he also wanted to get the best deal he could.

After speaking further with the prosecutor's office, the detectives told Hicks that the written agreement offered to him that morning, which was identical to the oral agreement offered on March 14, was the only offer prosecutors were willing to make; "and that is that your sentences, whatever your sentence is to run concurrent with the one that you got for the original charges." The detectives stated that "they're not going to specify a date or anything like that because they don't know exactly what you're gonna tell us." The detectives then asked:

> [Detective]: 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.

Hicks then gave the detectives a detailed account of the August 5, 1992 incident, including the identity of his five accomplices. Hicks acknowledged being armed with a shotgun. He stated that he guarded the male victim downstairs and looked for things to steal. Hicks said that he observed his cousin and two others rape and sodomize the female victim, although he denied personally engaging in any sexual contact with her.

Toward the end of the interview, the detectives asked Hicks why he had given them this information. Hicks said he had taken classes and participated in programs while in prison that advised inmates to take responsibility for their actions, and that he felt empathy for the victims, was ashamed of his conduct, and wanted to be a better person. He agreed that by cooperating he could "help [himself] heal from the wrongs [he] had done to others." He said he knew he could have gotten a lawyer and refused to talk, but decided he had to admit his wrongdoing and deal with it. Hicks said he was "glad to have this off [his] chest."

On two later occasions, in July and September 2008, the detectives spoke to Hicks and videotaped his statements. Before each interview, Hicks was advised of his *Miranda* rights, and signed a written waiver. At the end of the first of these interviews, Hicks again stated that he was cooperating because "it's the right thing to do" and because he had come to empathize with the victims.

The detectives were not armed during the interviews, and testified that they never threatened or coerced Hicks. Aside from the written agreement from the prosecutor, the detectives made no promises regarding any benefit Hicks might receive by cooperating.

On October 24, 2008, Hicks was charged by indictment with two counts of first-degree robbery, six counts of forcible sodomy (one of which was dismissed before submission), one count of forcible rape, and one count of attempted forcible rape.

Subsequent to his indictment, it became apparent that, if convicted on all counts, Hicks' sentences for any sexual offenses would have to run consecutively to his sentences for the robbery counts by operation of § 558.026.1, RSMo. *See generally Williams v. State*, 800 S.W.2d 739, 740 (Mo. banc 1990). Hicks filed a motion to suppress his pre-trial statements, claiming such mandatory consecutive sentencing would violate his agreement with the State.

The trial court held a hearing on Hicks' suppression motion. The only testimony offered at the suppression hearing was by the two detectives who negotiated the agreement with Hicks in March 2008; Hicks did not testify. Sound recordings of the entirety of the officers' encounters with Hicks on March 14 and 17 had been made, and the recordings, as well as a transcript of the March 17 afternoon recording, were also offered into evidence.

Defense counsel argued that Hicks made his statements because he expected that, in return for his cooperation, he would receive "one sentence that goes concurrent with . . . all of

the various sentences that he is doing." Because § 558.026.1, RSMo requires that sentences for the sex offenses run consecutively to the other offenses, Hicks' counsel argued that the State would be unable to fulfill its part of the bargain. Accordingly, Hicks contended that his statements were involuntary because they were induced by an agreement the State could not honor.

In response, the State argued that there was no agreement as to any particular sentence arising from the charges in *this* case. The State contended that the only agreement was that the aggregate sentence from this case would run concurrently with the sentences Hicks was already serving, and that the State stood ready to comply with that agreement.

The trial court made an oral ruling denying Hicks' motion to suppress before trial; after trial, the court issued a written order memorializing its decision. The court's written order found that "[a] review of the recorded statements made by the defendant leads to the inescapable conclusion that defendant made each statement voluntarily." The court found no evidence that Hicks had been coerced, and found that "[t]here was no attempt to mislead Mr. Hicks in any way." The court emphasized that "Mr. Hicks was given a Miranda warning at or near the beginning of each of the recorded statements which he gave," and "voluntarily waived his right to remain silent." The court also noted that Hicks spoke at length with one of the detectives on March 14 and 17, including about the underlying offenses, while they awaited final word from the prosecutor's office. "It is obvious from the tape-recorded statements that Mr. Hicks felt very comfortable speaking freely to [this] Detective," and that these pre-agreement "statements were not made in response to any promise of leniency or any plea agreement."

Turning to the written agreement specifically, the circuit court found that it did not make any commitment as to Hicks' punishment in connection with the August 5, 1992 incident:

> Nothing in the negotiations between Mr. Hicks and the prosecutor referenced any particular offenses on which Mr. Hicks may have ultimately been charged or convicted. Additionally, there was nothing to suggest that Mr. Hicks was offering to plead guilty to any particular offense, and not to others. The conversation between [the detective] and Mr. Hicks on March 17 made it clear that there were uncertainties on both sides.
>
> The court finds, based upon the surrounding circumstances that existed at the time of Mr. Hicks' statements, that there was no deception on the part of the State. None 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 Mr. Hicks was going to say in his statements, and Mr. Hicks didn't know what he would ultimately be charged with. There was no deception or false promise made by either side. The agreement was simply that the state would recommend that any new sentence he received would run concurrent to the one which Mr. Hicks is now serving.
>
> When examining the sentence that must be imposed in this case, given Mr. Hicks' conviction on both sex and non-sex felonies, the State's position has not changed. 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 Mr. Hicks' current sentence. There has been no deviation from that position by the State.

The court's written order also found that "Mr. Hicks articulated independent personal reasons for making his statements. These motivations were based upon his working the 12 Steps, and not based upon any plea offers or agreements made with the State."

Hicks was convicted on all nine counts submitted to the jury.[2] He was sentenced to fifteen years for each of his two first-degree robbery convictions, with those sentences to run concurrently to each other. The court sentenced Hicks to thirty-year sentences for each of the seven sexual offenses. Those sentences were ordered to run concurrently to one another, but consecutively to the sentences for the two first-degree robbery convictions (as required by § 558.026.1, RSMo). The court ordered that Hicks' term of imprisonment for the present convictions run concurrently to the other sentences he was then serving.

[2] Consistent with the charging instrument, the jury was instructed on all counts on both direct liability and accessory liability under § 562.041, RSMo.

Hicks appeals.

Analysis

I.

In his first Point Relied On, Hicks argues that the trial court erred in denying his motion to suppress the inculpatory pretrial statements that he made to the police, and in admitting those statements into evidence at trial.

> The State has the burden of showing by a preponderance of the evidence that a motion to suppress should be denied. Appellate review of motions to suppress is limited to a determination of whether sufficient evidence exists to sustain a trial court's ruling. A trial court's ruling on a motion to suppress will be reversed only if clearly erroneous. We defer to the trial court's factual findings and determinations of credibility. In reviewing the evidence, we consider all evidence and reasonable inferences in the light most favorable to the trial court's ruling. If the ruling is plausible, in light of the record viewed in its entirety, we should not reverse, even if we would have weighed the evidence differently.

State v. Dixon, 332 S.W.3d 214, 217 (Mo. App. E.D. 2010) (citations and footnote omitted); *see also State v. Johnson*, 316 S.W.3d 390, 394 (Mo. App. W.D. 2010). Despite the deference we owe to the trial court's factual findings, we examine questions of law *de novo*. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998).

"The due process clause forbids convictions based in whole or in part on an involuntary confession." *State v. Brown*, 246 S.W.3d 519, 528 (Mo. App. S.D. 2008). "'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 defendant's will was overborne at the time he confessed.'" *Id.* (quoting *Rousan*, 961 S.W.2d at 845).

"'A promise to a defendant in custody does not *per se* make any statement he gives thereafter involuntary.'" *Dixon*, 332 S.W.3d at 218 (quoting *State v. Stokes*, 710 S.W.2d 424,

428 (Mo. App. E.D. 1986)).[3] "'[W]hether a statement is admissible hinges on its voluntariness in light of the totality of the circumstances, not on whether a promise was made.'" *Id.* (quoting *Stokes*, 710 S.W.2d at 428); *see also Brown*, 246 S.W.3d at 528-29; *State v. Hutson*, 537 S.W.2d 809, 813-14 (Mo. App. 1976). In gauging the voluntariness of an inculpatory statement made in reliance on a promise,

> [a]ll the circumstances surrounding the statement must be considered in determining if the defendant's will was overborne by the promise. The nature of the promise must be considered. . . . [¶] . . . The waiver of *Miranda* rights, while not dispositive of the question of voluntariness, is an important consideration. Other factors to consider include the defendant's physical and mental state, the length of questioning, the presence of police coercion or intimidation, and the withholding of food, water, or other physical needs.

Dixon, 332 S.W.3d at 218 (citations and internal quotation marks omitted).

[3] Immediately prior to the statement quoted in the text, *Dixon* makes another statement, frequently repeated in Missouri cases: "It is well settled that a statement is not voluntary and is inadmissible if it was extracted by promises, direct or implied." *Id.* (*citing State v. Simmons*, 944 S.W.2d 165, 175 (Mo. banc 1997); *State v. Chandler*, 605 S.W.2d 100, 116-17 (Mo. banc 1980)). This latter statement derives from *Bram v. United States*, 168 U.S. 532 (1897), in which the United States Supreme Court stated that "[a] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, *nor obtained by any direct or implied promises, however slight*, nor by the exertion of any improper influence." *Id.* at 542-43 (emphasis added). While such statements in the caselaw are arguably intended to refer only to promises which law enforcement *fails to keep*, the language of these cases, read literally, would appear to prohibit *any* confession that is based, to any degree, on a promise by the police or prosecutors. However, as the quotation from *Dixon* in the text illustrates, "the *Bram* statement . . . has not been applied with 'wooden literalness.'" *State v. Harvey*, 609 S.W.2d 419, 423 (Mo. banc 1980); *see also State v. Clements*, 789 S.W.2d 101, 106 (Mo. App. S.D. 1990) ("Missouri courts have recognized that the language from *Bram* does not require literal compliance."); *Stokes*, 710 S.W.2d at 428. Indeed, *Arizona v. Fulminante*, 499 U.S. 279 (1991), explicitly states that "under current precedent [the quoted statement from *Bram*] does not state the standard for determining the voluntariness of a confession." *Id.* at 285; *see also, e.g., United States v. Montgomery*, 555 F.3d 623, 630-31 (7th Cir. 2009) (*Bram* "is inconsistent with the current totality of the circumstances approach"). Under current caselaw, the fact that promises were made to a defendant does not categorically render the defendant's subsequent statements involuntary and inadmissible; instead, the totality of the circumstances, including the nature of the promise, must be considered.

A.

Putting the written agreement (momentarily) to one side, consideration of the other surrounding circumstances supports the trial court's determination that Hicks' pretrial statements were voluntary.

Hicks read and explicitly waived his *Miranda* rights on multiple occasions, and explained why he did not want an attorney involved in the interview process. Hicks' knowing and voluntary *Miranda* waiver is a significant consideration in the voluntariness inquiry.[4]

Hicks appears to have been of sound mind and in a normal physical state at the time of the statements. There is no indication he was under the influence of any drugs. Hicks appears articulate and fully capable of comprehending the proceedings in the transcripts and recordings provided to this Court. The interviews were conducted during normal daytime hours and were not of excessive length. Breaks were taken when Hicks requested them, so that he could use the restroom, smoke, or get something to eat or drink.

The record on appeal contains no signs of duress or coercion by the officers. They testified that they were not armed during the interviews, that they made no threats or promises beyond those reflected in the prosecutor's letter, and that the interviews were conducted in a calm, conversational tone throughout.

The record supports the trial court's finding that "Hicks felt very comfortable speaking freely" and "volunteered much information" even before an agreement was in place. Further, as the trial court found, Hicks stated on multiple occasions that he had his own motivations for

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[4] *See, e.g. Missouri v. Seibert*, 542 U.S. 600, 609 (2004) (plurality opinion) ("maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid [*Miranda*] waiver"); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (in gauging the voluntariness of inculpatory statements, "[t]he fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative").

making a full disclosure: his new-found empathy for the victims, and his desire to take responsibility for his past misdeeds as part of his rehabilitation.

Another important consideration is that Hicks had prior experience with the criminal justice system. *Dixon*, 332 S.W.3d at 218-19 (quoting *Stokes*, 710 S.W.2d at 430). Hicks' sophistication is illustrated by the fact that he suggested a form of pre-statement agreement with which the detectives were themselves unfamiliar until obtaining further guidance from prosecutors. Further, Hicks was able, on March 14, to insist that the initial meeting be adjourned until the detectives could obtain a document memorializing his agreement with prosecutors. This demonstrates convincingly that Hicks was fully capable of asserting his own interests, and choosing for himself whether, when, and under what circumstances he would provide self-incriminatory information.

B.

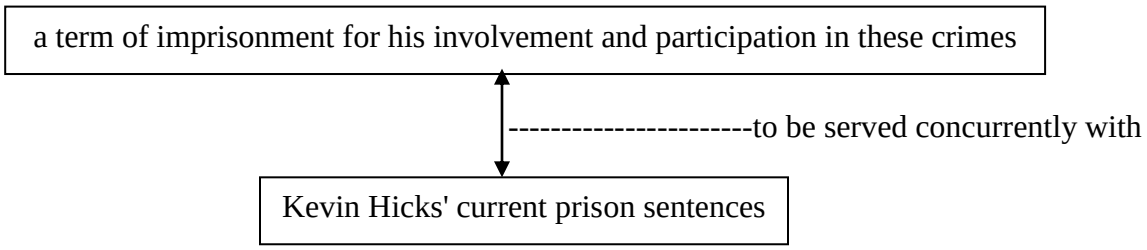
Hicks' voluntariness argument focuses on the State's compliance with the agreement memorialized in the prosecutor's March 2008 letter. That letter reads, in full:

> 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 [the male and female victims] at [their address], 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.

Hicks argues that the agreement promised him that any new sentences he received would not only run concurrently *to the sentences he was then serving*, but would run concurrently *to one another*. We disagree.[5]

[5] We note that the March 2008 letter states that Hicks would "*be sentenced* to a term of imprisonment . . . to be served concurrently with [his] current prison sentences." The prosecutors, of course, could not promise Hicks any particular sentence. Sentencing is *the court's* responsibility; the

The letter's statement that certain sentences would "be served concurrently" does not aid Hicks' argument. The agreement promises only that the new "term of imprisonment" Hicks received – *whatever it might be* – would "be served concurrently with Kevin Hicks' current prison sentences." The agreement makes no commitment as to the nature or length of that new "term of imprisonment." The phrase "to be served concurrently with" specifies only the relationship between Hicks' new "term of imprisonment" and his existing prison sentences; it says nothing concerning the relationship among the multiple sentences which might make up any new "term of imprisonment." At the risk of belaboring the obvious, we offer the following illustration, which makes clear that the phrase "to be served concurrently with" refers *only* to the relationship between Hicks' new and old sentences, not to the relationship among any new sentences:



Hicks also argues that the reference to "a term of imprisonment for his involvement and participation in these crimes," standing alone, somehow guaranteed him *either* a single sentence for any new convictions, *or*, at most, a series of sentences which would run concurrently to one another. We are unpersuaded.[6]

State can only *recommend* a sentence. Hicks does not rely on this inaccuracy in the wording of the prosecutor's letter, however, and we therefore do not further address it.

[6] The dissent makes a point of noting that "'two ten-year sentences'" cannot meaningfully be referred to as "*one* 'twenty year sentence.'" Dissent at 8. Even if true, that proposition is irrelevant here: the agreement does not refer to a "*sentence*" or "*sentences*," but to "a *term of imprisonment* for [Hicks'] involvement and participation in these crimes."

The State acknowledges in its Brief that the phrase "term of imprisonment" can be used to refer *either* to a single sentence, *or* to the aggregate period of incarceration resulting from a package of multiple sentences.[7] The context here makes clear which meaning was intended. The agreement refers to "a term of imprisonment for [Hicks'] involvement and participation in *these crimes*." (Emphasis added.) Thus, the agreement plainly refers to Hicks receiving, in the future, a single "term of imprisonment" for multiple "crimes." The agreement clearly uses the phrase "term of imprisonment" to refer to the aggregate period of incarceration resulting from multiple sentences, for multiple "crimes." "Term of imprisonment," as used in the March 2008 letter, cannot plausibly be read to refer to a single criminal sentence.

It is also significant that the agreement contemplates that Hicks might implicate himself, and others, in offenses unrelated to the August 5, 1992 attack. It refers to Hicks providing information relating to "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*." This passage confirms that the parties understood that the August 5, 1992 incident *itself* involved multiple "crimes"; it also contemplates that Hicks may provide information concerning *other*, wholly separate "criminal activities." It would be extravagant to contend, in these circumstances, that

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[7] The State's Brief argues:

> It is possible . . . 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). Moreover, multiple sentences, even if run concurrently, can correctly be referred to as "*terms* of imprisonment." *See e.g. Hastings v. State*, 308 S.W.3d 792, 796 (Mo. App. W.D. 2010) (defendant received "concurrent imprisonment terms" of five and three years); *State v. Richardson*, 304 S.W.3d 280, 282 (Mo. App. S.D. 2010) (defendant was sentenced to "varying concurrent terms of imprisonment" totaling ten years); *State v. Smallwood*, 303 S.W.3d 165 (Mo. App. E.D. 2010) (defendant received "concurrent terms of imprisonment" of eleven, ten, and ten years).

the phrase "term of imprisonment" committed the State to seeking only a single criminal sentence against Hicks, no matter what he told them, or in how many criminal incidents he implicated himself.

The manner in which the March 2008 agreement employs the phrase "term of imprisonment" – to refer to the aggregate of multiple sentences for multiple crimes – is a common usage.[8]

Perhaps recognizing that the phrase "term of imprisonment" cannot sensibly be read to promise him a single sentence, Hicks' Brief suggests that the phrase could refer to multiple individual sentences, *but only* if those sentences run concurrently to one another. According to his Brief,

> [Hicks] 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 [five] sodomy and rape counts. These two terms of imprisonment run consecutively as required by Section 558.026.1.

Under the common usage of the phrase "term of imprisonment," it could reasonably be said that Hicks was sentenced to *one* aggregate "term of imprisonment" in this case, *or* to *nine* individual "terms of imprisonment." We fail to see, however, how Hicks' sentencing package can sensibly be characterized as imposing *two* "terms of imprisonment." Hicks offers no

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[8] In addition to the cases cited by the State, *see supra* note 7, *see*, *e.g.*, *Burnett v. State*, 311 S.W.3d 810, 813, 815 (Mo. App. E.D. 2009) ("the plea court sentenced Movant to consecutive prison terms of twenty years for child kidnapping, twenty years for first-degree assault, ten years for forcible sodomy, and ten years for attempted forcible rape"; later stating that "[t]he plea court . . . sentenced Movant to a term of imprisonment totaling sixty years"); *Riggs v. State*, 231 S.W.3d 840, 840-41 (Mo. App. E.D. 2007) ("Movant was sentenced to an aggregate term of imprisonment for life plus forty-five years [on three convictions]."); *Patterson v. State*, 216 S.W.3d 703, 703 (Mo. App. E.D. 2007) ("The trial court sentenced Movant to concurrent terms of twenty-two years for the assault and thirty years for the armed criminal action for a total thirty year term of imprisonment."); *State v. Howard*, 204 S.W.3d 327, 328 (Mo. App. E.D. 2006) ("The trial court sentenced Defendant to a 240–year term of imprisonment" based on his conviction on ten individual counts); *State v. Fields*, 194 S.W.3d 923, 924 (Mo. App. E.D. 2006) ("The trial court sentenced Defendant to a term of imprisonment totaling 227 years" based on his conviction of 24 offenses).

authority to support his claim that a "term of imprisonment" can be read to refer to multiple sentences *only* where those sentences run concurrently, and we are aware of none. Instead, depending on the context the phrase "term of imprisonment" can be used to refer to a single sentence, *or* to a package of sentences that result in an aggregate period of incarceration (including where the individual sentences making up that package are to be served consecutively). Moreover, innumerable cases refer to each individual sentence as a "term of imprisonment," even when those sentences run concurrently to one another.[9] No case of which we are aware draws the distinction for which Hicks argues, limiting the phrase "term of imprisonment," when applied to multiple sentences, to only those situations in which the multiple sentences all run concurrently.

Thus, the language of the prosecutor's March 2008 letter does not support Hicks' claim that he was promised that any new punishment would consist of a single sentence running concurrently to his existing sentences, or multiple new sentences that ran concurrently to his existing sentences *and* to one another. Moreover, because Hicks did not testify at the

[9] *See, e.g.*, *State v. Avery*, 275 S.W.3d 231, 232 (Mo. banc 2009) ("The two convictions resulted in concurrent terms of imprisonment for 15 and 35 years, respectively."); *State v. Almaguer*, 347 S.W.3d 636, 639 (Mo. App. E.D. 2011) ("The trial court sentenced Almaguer to three concurrent terms of imprisonment for seven years in the Missouri Department of Corrections for Counts I–III . . . ."); *Jack v. State*, No. SD30512, 2011 WL 3480951, at *1 (Mo. App. S.D. Aug. 9, 2011) ("Appellant was sentenced to serve concurrent, 15–year terms of imprisonment" on each of two charges to which he pled guilty); *State v. Turner*, 343 S.W.3d 361, 362 (Mo. App. E.D. 2011) ("Turner was sentenced to concurrent terms of imprisonment of twenty years and three years."); *White v. State*, 331 S.W.3d 742, 742 (Mo. App. W.D. 2011) ("Brandon White was convicted after a jury trial of two counts of delivery of a controlled substance near schools and sentenced to two fifteen-year terms of imprisonment, to be served concurrently."); *Hickey v. State*, 328 S.W.3d 225, 227 (Mo. App. E.D. 2010) ("The court sentenced the movant to concurrent terms of imprisonment of fifteen years for the robbery and three years for the armed criminal action."); *Edger v. Mo. Bd. of Prob. & Parole*, 307 S.W.3d 718, 719 (Mo. App. W.D. 2010) ("On June 26, 1998, Edger was sentenced, as a persistent offender, to two fifteen-year terms of imprisonment for two counts of stealing a motor vehicle and one ten-year term of imprisonment for resisting arrest. The sentences were to run concurrently.").

suppression hearing, we have no evidence in the record indicating that he *subjectively* attached that meaning to the agreement.

C.

The circumstances surrounding the negotiation of the March 2008 agreement also undercut Hicks' current reading of it. As an initial matter, we note that this case presents the relatively unique circumstance in which virtually the entirety of the discussions leading up to the March 2008 agreement were audio recorded. The recordings of those conversations were introduced as exhibits at the suppression hearing, and the trial court made specific reference to the information it gleaned from the recordings in its suppression ruling. Despite their obvious importance to Hicks' first Point, however, the recordings of his discussions with police detectives on March 14, 2008, and on the morning of March 17, 2008 – during which the agreement was negotiated – have not been provided to us as part of the record on appeal.

"It is the duty of an appellant to ensure 'the record on appeal includes all the evidence and proceedings necessary for determination of the questions presented'"; where the appellant fails to provide exhibits necessary to our review of the issues on appeal, "we will infer that they would be favorable to the trial court's ruling and unfavorable to [appellant]'s argument." *State v. Brumm*, 163 S.W.3d 51, 56 (Mo. App. S.D. 2005) (citation omitted); *see also, e.g.*, *State v. Osborn*, 318 S.W.3d 703, 713 (Mo. App. S.D. 2010); *State v. McCauley*, 317 S.W.3d 132, 135-36 (Mo. App. S.D. 2010). Here, Hicks' failure to provide this Court with the recordings of the discussions leading up to the prosecutor's March 2008 letter must weigh against his current claim that his statements were involuntary.

Despite the gaps in the record on appeal, the available evidence concerning the discussions which led to the prosecutor's written letter reveals at least three circumstances which undercut Hicks' current interpretation of the agreement. ***First***, the record reflects that Hicks was

prepared to implicate himself, and others, in at least two incidents in addition to the August 5, 1992 home invasion: an encounter near a Quik Trip convenience store which resulted in one of Hicks' associates raping a woman; and a murder in Kansas. As we explained in § I.B., above, the fact that Hicks had information concerning multiple separate criminal events makes it highly unlikely that the letter's reference to a "term of imprisonment" referred to a single sentence. It is also highly unlikely that prosecutors would have agreed, in advance, that any and all sentences Hicks could receive would run concurrently, given the multiple, serious criminal incidents in which Hicks was involved.

Second, the record also reflects that Hicks was aware that he could face conviction for multiple crimes – including both sexual and non-sexual offenses – arising out of the August 5, 1992 attack itself. The following exchange occurred at the suppression hearing, during cross-examination of one of the detectives who interviewed Hicks:

> Q. And there was – there was talk, wasn't there, about whether or not – because this was – this case involved a robbery and a sexual assault on a lady that he said he didn't have anything to do with; correct?
>
> A. Correct.
>
> Q. And so there was talk about him being charged with the robbery but not necessarily the sexual assault, because he didn't have anything to do with those; is that correct?
>
> A. No. In fact, he actually brought up the point, the part that he was going to be charged for the rape because he was there during its commission, and he understood that if he was there during the commission of a crime, that he will be charged and convicted of that same crime even if he didn't participate in the act.

The fact that Hicks was aware that he faced exposure for both sexual and non-sexual offenses arising out of the August 5, 1992 incident belies his present claim that he believed he would be subject to only a single sentence.

Third, and most importantly, the record reflects that Hicks sought law enforcement's agreement to a specific outcome with respect to any new charges filed against him; for their part, the detectives and prosecutors steadfastly refused to make *any* commitment as to the punishment Hicks would face for the offenses in which he was going to implicate himself. Hicks initially wanted the prosecutor's agreement that he would serve *no* additional time as a result of any additional offenses for which he was convicted, but would retain his existing "out-date" in 2018. Failing that, Hicks wanted the agreement to specify the date when he would be eligible for release from prison, and the time he would be required to serve for any new convictions. As one of the detectives testified at the suppression hearing, when Hicks was presented with the written letter memorializing the agreement, "[h]e was not happy with the wording in it and wanted it changed to include specific dates when he would get out of prison."

After taking a lunch break on March 17, 2008, the detectives told Hicks in no uncertain terms that prosecutors were unwilling to agree to a specific "out-date" or sentence for any new offenses to which Hicks confessed. The detectives told Hicks that "[t]hey're not going to specify a date or anything like that because they don't know exactly what you're gonna tell us." As one of the officers testified at the suppression hearing, "the prosecutor's office was not going to place anything else in writing nor were they going to give specifics about times that he was going to spend in jail or when he was going to get out." Immediately following this clarification, Hicks began to recount the details of the August 5, 1992 incident.

The detectives' statement to Hicks – that prosecutors were "not going to specify a date or anything like that" – clearly communicates, in easily understood language, that prosecutors were simply unwilling to make any commitment as to the punishment Hicks would face in connection with the August 5, 1992 incident (or any other criminal incidents of which he had knowledge).

The detectives also clearly communicated *why* prosecutors were unwilling to make such a commitment: "because they don't know exactly what you're gonna tell us."[10] In light of these explicit statements, Hicks cannot now plausibly claim that he believed the State had promised that *all* of his new sentences would run concurrently to one another, and concurrently to his existing sentences.

Although Hicks has contended at various points that he was misled or tricked by the police and/or prosecutors, nothing in the record supports these claims. Even if the agreement were to be interpreted as Hicks advocates, there is nothing to indicate that, on March 17, 2008, the State was not willing, and able, to comply with it.[11] Thus, there is no basis to find that the State knowingly or intentionally used false promises to induce Hicks' confession. Further, there is a more fundamental defect in Hicks' claim that he was misled: he did not testify at the suppression hearing as to his subjective understanding of the agreement. There is accordingly no evidence – as opposed to arguments of counsel – that he actually believed he had secured the deal he now seeks to enforce.

The dissent argues that the interpretation of the agreement we adopt is unreasonable, and one that "most likely no one even contemplated at the time." Dissent at 5. The dissent also asserts that, under our interpretation of the agreement, Hicks achieved very little for himself because – according to the dissent – "the normal or expected thing *is* for the courts *not* to stack all of the new sentences on the top of the old sentences." *Id.* at 10. However, circuit courts

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[10] In this regard we note that, until Hicks recounted the details of the August 5, 1992 incident and his own involvement in it, prosecutors would not have been in a position to determine whether he was criminally responsible for either the sexual or non-sexual offenses committed on that date, and therefore whether § 558.026.1, RSMo would come into play.

[11] Even if the agreement barred consecutive sentences for any new convictions, the State could have avoided the mandate of § 558.026.1, RSMo by charging Hicks either with only sexual or only non-sexual offenses.

plainly have the *power* to order that sentences for new convictions run consecutively to sentences previously imposed on a defendant for unrelated crimes, and a survey of recent appellate opinions suggests that such sentencing is not uncommon.[12] While reasonable minds may differ as to whether or not Hicks was an effective negotiator, he plainly achieved *some* meaningful benefit by foreclosing the prospect of a new term of imprisonment fully consecutive to his existing sentences.[13]

We must also disagree with the dissent's view that "*no reasonable person*" in Hicks' position could have knowingly entered into this agreement. Dissent at 10, 12 (emphasis added). Hicks had materially participated in a heinous series of crimes. He had unsuccessfully

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[12] *See, e.g., State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. banc 2010) (trial court's written judgment stated that sentence imposed was to run consecutively to defendant's existing sentence; consecutive sentence vacated where it differed from court's oral pronouncement of sentence); *State v. Royer*, 322 S.W.3d 603, 604 (Mo. App. S.D. 2010) (noting that judgment specified that new sentence was "to run consecutive to any other existing sentences"); *Hairston v. State*, 314 S.W.3d 356, 357 (Mo. App. S.D. 2010) (defendant "sentenced to ten years imprisonment to be served consecutive to any other sentence he was currently serving"); *Clay v. State*, 297 S.W.3d 122, 123 (Mo. App. S.D. 2009) (defendant sentenced to consecutive terms for murder and assault, "consecutive with a seven-year sentence he was serving at that time after a probation violation on an earlier charge"); *Trammell v. State*, 284 S.W.3d 625, 627 (Mo. App. W.D. 2009) ("The court followed the State's recommendation in sentencing Trammell to three years . . . but deviated from the recommendation by running the sentence consecutive to the sentence Trammell was already serving for the unrelated offense."; reversing denial of post-conviction relief where defendant claimed that plea was involuntary because he was unaware that he could not withdraw plea if court departed from State's sentencing recommendation); *State v. Garrison*, 276 S.W.3d 372, 373 (Mo. App. S.D. 2009) (affirming judgment where trial court ordered new sentence "to be served consecutive to other sentences Defendant is currently serving"); *Mosby v. State*, 236 S.W.3d 670, 676 (Mo. App. S.D. 2007) (affirming judgment which "stated that [sic] Mosby's sentences for first-degree assault and ACA were to be served consecutively to each other and to another sentence that Mosby was already serving"); *Collins v. State*, 228 S.W.3d 40, 41 (Mo. App. S.D. 2007) (judgment specified that new sentences "to run concurrently to each other but consecutive to a sentence he was already serving"); *Ashford v. State*, 226 S.W.3d 243, 247-48 (Mo. App. W.D. 2007) (affirming judgment which provided that multiple new sentences would run consecutively to sentences defendant was then serving); *Pettis v. State*, 212 S.W.3d 189, 192 (Mo. App. W.D. 2007) (trial court sentenced defendant to new sentence consecutive to sentence defendant then serving; sentence vacated on appeal due to affirmative misrepresentation by defense counsel as to effect of sentence on defendant's parole eligibility); *State v. Nichols*, 207 S.W.3d 215, 218 (Mo. App. S.D. 2006) (defendant new sentence "to run consecutive to a sentence he was already serving on a separate conviction"; conviction reversed where record failed to reflect defendant's knowing waiver of right to assistance of counsel at trial)

[13] As it transpires, roughly 22% of Hicks' new term of imprisonment will run concurrently to his existing sentences as a result of the March 2008 agreement.

attempted, over a multi-day period, to secure *some* commitment from prosecutors as to the length of his prison term for the August 5, 1992 offenses, first by asking that he be allowed to retain his *existing* "out-date," and then by requesting that he at least be promised a *specific* release date. These demands were repeatedly rejected, and the detectives explained in no uncertain terms that prosecutors were unwilling to make *any* commitment as to the new punishment he might face, until they heard what Hicks had to say. In these circumstances, Hicks' conclusion that he had achieved the best deal he could get is not so patently unreasonable that it would justify our refusal to enforce the agreement.[14]

Hicks' first Point is denied.[15]

II.

In his second Point, Hicks argues that he was subjected to multiple punishments for the same offense, in violation of the Double Jeopardy Clause of the United States Constitution, when he was convicted of two counts of robbery, one for stealing the male victim's keys, and the other for stealing a video cassette recorder from the male victim. Hicks argues that he cannot be subject to multiple convictions for taking multiple items of property from the male victim in the course of a single incident. Hicks cites *State v. Whitmore*, 948 S.W.2d 643, 649-50 (Mo. App. W.D. 1997), and *White v. State*, 694 S.W.2d 825 (Mo. App. E.D. 1985), in support of his arguments. *See also, e.g.*, *State v. Bohlen*, 284 S.W.3d 714, 718 (Mo. App. E.D. 2009).

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[14] We also note that Hicks made no agreement to testify against his fellow perpetrators, leaving him with some future leverage. The record reflects that Hicks was in fact later offered a favorable plea bargain, under which he would have pled guilty to a single count of first-degree robbery with a prosecutorial recommendation of a twenty-year sentence concurrent to his existing sentences. Hicks forfeited that deal, however, when he would not agree to testify against one of his accomplices.

[15] The result we reach is not inconsistent with *State v. Hoopes*, 534 S.W.2d 26 (Mo. banc 1976), or with *State v. Chatman*, 682 S.W.2d 82 (Mo. App. E.D. 1984). Both cases found that the prosecution had failed to honor an agreement which induced a defendant's inculpatory statements. That is not the case here. We also emphasize that we do not question that the agreement, and the specific terms it contained, were material to Hicks' decision to cooperate with authorities; we simply hold that the State has not violated that agreement.

With admirable candor, the State concedes Hicks' second Point, agreeing that he cannot be subjected to two separate robbery convictions where, "[t]hrough the use of a single, continuous act of force, [Hicks] and his cohorts stole two things that were in [the male victim's] possession."

In light of the State's concession, we grant Hicks' second Point.

Conclusion

We affirm Hicks' convictions and sentences for forcible rape; attempted forcible rape; forcible sodomy; and for first-degree robbery as charged in Count I. We vacate Hicks' conviction and sentence for first-degree robbery as charged in Count IX.

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Alok Ahuja, Judge

Chief Judge Hardwick, and Judges Howard, Welsh, Pfeiffer, Mitchell, Martin and Witt concur.
Judge Smart dissents in separate opinion, in which Judges Ellis and Newton concur.

In the Missouri Court of Appeals

WESTERN DISTRICT

STATE OF MISSOURI, **Respondent,**	)	
	)	**WD71650**
v.	)	
	)	**OPINION FILED: January 17, 2012**
KEVIN E. HICKS, **Appellant.**	)	

Dissenting Opinion

This is a case involving the issue of whether the courts will require the State to honor its contract entered into in the context of a criminal investigation and prosecution. It is neither more nor less.

Hicks argues on appeal that the trial court erred in denying his motion to suppress his inculpatory statement and in overruling his objections to the admission of the statement at trial because the court had a clear duty to compel the prosecution to comply with its agreement.

A source of confusion arises in this case to the extent one fails to draw a sharp distinction between Fifth Amendment-type involuntariness and involuntariness based on the breach of an agreement with the State. Hicks claims that his confession was legally "coerced" in that the confession was given in reliance on the State's promise that he would be sentenced to a term of imprisonment that would be served concurrently with his then current prison sentences.

This case is not about Fifth Amendment-type involuntariness. To analyze this case as a constitutional Fifth Amendment case involving some inspecific promise of leniency or of "protection"[1] is a mistake, because it overlooks the real issue – the contract issue.

The detectives approached Hicks, thinking he may have been involved because of the evidentiary link to Hicks' cousin, but they had no proof. Hicks said that he wanted a "deal," even though he expressed that he wanted to "do the right thing." It is no small thing to confess to very serious crimes and to implicate others. Hicks said he wanted to take responsibility, but he also wanted to negotiate for some mercy in the process. He was not satisfied with a verbal understanding; he wanted it in writing. The State, at his insistence, tendered him an agreement in writing, personally drafted and signed by an assistant prosecuting attorney, who was fully authorized to commit the prosecution to an agreement. Hicks accepted the agreement and provided the information requested, in the course of which he necessarily admitted his participation.

There is absolutely no warrant to speculate that the agreement did not matter to Hicks, and can therefore be treated as inconsequential. But even if theoretically the agreement mattered little to Hicks at the time (a proposition I do not agree with), should he not be entitled to expect that the agreement will be honored?

Did the State keep its bargain or not? That is the only question. The exact words of the contract prepared by the prosecutor's office and signed by an assistant prosecutor are as follows:

> 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 [the male and female victims] at [their address], then the Jackson County prosecutor's office will agree that Kevin Hicks be sentenced to a term of imprisonment for his involvement and

[1] *See, e.g., Arizona v. Fulminante*, 499 U.S. 279 (1991) (promise of protection).

> participation in these crimes to be served concurrently with Kevin Hicks's current prison sentences.

The parties thus formally agreed in writing that in return for his performance of the agreement, Hicks would "be sentenced to a term of imprisonment . . . to be served concurrently" with his then current sentences. Being comforted by the specific written, signed agreement, Hicks performed his part of the agreement. The State does not allege that he failed in any way to perform. Hicks presumably then awaited the filing of charges against him, knowing that those charges would be addressed pursuant to the agreement, providing some measure of a buffer against the possible severity of the sentences imposed.

A reasonable person in Hicks' shoes would anticipate that the State would or might charge him with a substantial number of offenses. But he would also have the comfort of knowing, in giving his confession and naming names, that no matter how many charges the State files, at least the sentences would run concurrent with his current sentences. Also, although the agreement itself did not address the concept of Hicks entering a guilty plea, I do not doubt that Hicks anticipated pleading guilty and relying on the terms of the agreement and the mercy of the court as to the sentencing.

Then, after the filing of charges and preliminary discussions between counsel and the State about a plea agreement, a hitch occurred. Hicks learned that the State's position was that the sentences for some of the newly charged offenses would *not* run concurrently with his current sentences (or with each other), because a statute, section 558.026, would not permit that result.[2] Hicks' counsel, in response, decided on the strategy of filing a motion to keep the State

[2] Section 558.026.1, RSMo 2000, provides as follows:

> Multiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively; except that, in the case of multiple sentences of imprisonment imposed for the felony of rape, forcible rape, sodomy, forcible sodomy

from reneging. The strategy was to move to suppress the confession altogether on the ground that the confession was legally involuntary in view of the fact that the State intended to prosecute all the charges, including both the robbery and sex offenses (which would result in some sentences being consecutive to others, in violation of the agreement). Strategically, the argument of Hicks had in view only one remedy: suppression of the confession.[3] However, there was an alternative remedy. The State could have averted the motion to suppress by deciding to dismiss either the two robbery charges or the seven sex charges. That action would have mooted any concern about the statutory prohibition in 558.026 and, therefore, would have mooted any issue about the State's ability to use the confession against Hicks and then run the sentences concurrently in fulfillment of the agreement.

The trial court was misled by the issue of whether the confession was entirely voluntary in the Fifth Amendment sense of the word "voluntary." Hicks' real contention was that it was not legally voluntary in the sense that the bargain was not kept. Further, the court was misled by the prosecution's effort to strain the ordinary meaning of the words of the agreement to produce an interpretation that, though having, perhaps, a surface plausibility, could not hold water -- an interpretation that most likely no one even contemplated at the time of the agreement.

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. The contract here consists

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> or an attempt to commit any of the aforesaid and for other offenses committed during or at the same time as that rape, forcible rape, sodomy, forcible sodomy or an attempt to commit any of the aforesaid, the sentences of imprisonment imposed for the other offenses may run concurrently, but the sentence of imprisonment imposed for the felony of rape, forcible rape, sodomy, forcible sodomy or an attempt to commit any of the aforesaid shall run consecutively to the other sentences.

[3] Also, on appeal, Hicks focuses on reversing the convictions and sentences and suppressing the confession. Hicks complains that the State did not comply with the agreement, and specifies a remedy, but if we find relief should be granted we are not limited to the specific relief requested.

of a contingent unilateral promise by the prosecution that was offered to Hicks, subject to Hicks' acceptance. The contingency was that if Hicks' information led to the filing of charges against others, the prosecution would agree that Hicks would "be sentenced to a term of imprisonment [for these crimes] to be served concurrently with [his then] current prison sentences." Hicks accepted, and performed.

Because this is a case involving construction of a contract, and contract construction is an issue of law, 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, on appeal, asks this court to apply the corrective action that he says should have been applied by the court below.

The Missouri courts have analyzed such cases as policy cases, and have ruled that the courts *will* compel the prosecution to comply with agreements made between the prosecution and a criminal defendant. *See State v. Hoopes*, 534 S.W.2d 26 (Mo. banc 1976); *State v. Chatman*, 682 S.W.2d 82 (Mo. App. 1984).

In *Hoopes*, the accused was charged with robbery and with a murder occurring during the course of the robbery. 534 S.W.2d at 28. The prosecutor offered to the accused that if the accused would confess to the robbery and plead guilty to the robbery, the prosecutor would dismiss the murder charge and recommend a ten-year sentence on the robbery. *Id.* at 33. The accused, being persuaded by his attorney, executed an affidavit waiving his right to a trial as to the robbery and admitting guilt as to the robbery but not to the murder. *Id.* The prosecutor decided to renege, however, and to take the case to trial on both the robbery charge *and* the first-degree murder charge; and the prosecutor also used the affidavit against the accused at trial. *Id.*

at 34, 37. Although the defendant objected in a pre-trial proceeding, the case was tried and defendant was convicted of both robbery and murder. *Id.* at 28.

At the hearing on the motion for new trial, defendant's counsel testified as to the deal offered by the prosecution: that if defendant would plead guilty to the robbery, the murder charge would be dismissed and that the prosecution would recommend a ten-year sentence. *Id.* at 33. It was admittedly understood that the court might not follow the recommendation as to the ten-year sentence, but, said Hoopes' counsel, "it was definitely understood that the murder charge would be dismissed." *Id.* The defendant accepted the offer and signed the affidavit admitting guilt of the robbery. *Id.*

Thereafter, the prosecution changed its mind and decided to take the case to trial. The prosecutor said, though, that he "wouldn't use [the] confession because . . . it was for the robbery alone"; but then the prosecutor also changed his mind on that and used the affidavit of confession during the course of the trial to impeach the defendant.[4] *Id.* at 33-34. Defendant raised the issue again after the conviction, moving for a new trial, which was denied.[5] *Id.* at 34.

The Court, in addressing the appeal in *Hoopes*, stated as follows:

> This court has considered all of the evidence in the transcript and holds that the affidavit and plea of guilty has been conclusively shown to be the product of plea negotiations between the prosecutor and defense counsel and was executed by the defendant pursuant to promises made by the prosecutor which were within his power and authority to perform; that the prosecutor withdrew from the arrangements after the affidavit was executed and filed and refused to perform his part of the bargain and, therefore, the affidavit and plea of guilty

[4] Defendant in *Hoopes* testified at trial and denied complicity in the robbery and the murder. 534 S.W.2d at 33. On cross-examination, defendant admitted that he had signed the statement agreeing to plead guilty to the robbery. *Id.*

[5] The trial court, in rejecting defendant's position, put emphasis on the fact that at the bottom of the affidavit, there was a statement that the defendant understood that the affidavit could be "used in a court of law." *Id.* at 34. Hoopes' counsel explained that he included that statement at the bottom of the affidavit to impress on his client that he needed to go through with the deal. *Id.* The court accepted the assertion that it was merely "an effort to keep the defendant tied to the agreement" (as opposed to a reformulation of the agreement in any way). *Id.*

> became involuntary in law and was not admissible on the trial of the case for any purpose whatever.

Id. at 36-37.

The *Hoopes* case was not analyzed as a Fifth Amendment voluntariness case involving consideration of all the circumstances, but as a contract case. It demonstrates clearly the commitment of the Missouri Supreme Court to enforce negotiated agreements between the prosecution and the defense. The Court said the defendant's confession was "involuntary in law." The confession should have been excluded because the State reneged on the bargain. This case is similar to *Hoopes*, in that here, the prosecution, after realizing that there was a statutory obstacle to sentencing Hicks concurrently on all counts, and *having the power* to dismiss either the robbery offenses or the sexual offenses (or to avoid the use of the confession) so as to comply with the agreement, chose to take the position that the agreement does not really mean what it says.

The State, in defending its position at the pre-trial hearing on the motion to suppress, took the position that the agreement does not in any way hinder use of the confession, because "whatever sentence [Hicks] receives in this case will run concurrent with what he already is doing." In an effort to try to explain this counter-intuitive statement, the prosecution hypothesized, as an example of what it meant, that if Hicks were charged with one robbery and one sex crime, and were convicted of both, and if he then "received two, ten-year sentences, and they run consecutive as required by law [section 558.026], that twenty-year sentence is running at the same time as what he is serving now." The prosecutor tried so hard to persuade the court of this doubtful proposition as to the meaning of the agreement that the prosecutor equivocated on the meaning of the word "sentence" by suggesting that "two ten-year sentences" is actually *one* "*twenty* year sentence." It is not.

Although the written agreement uses the phrase "term of imprisonment" rather than the word "sentence," the State's argument to the trial court is significant as a predictor of the faulty parallel argument the State would use on appeal -- the argument that the "term of imprisonment" resulting from the new offenses is running concurrently with the existing offenses because at least one sentence is running concurrently with the existing sentences. The prosecutor argued to the trial court that the only effect of the State's agreement with Hicks was that any "sentence" (and by this word the prosecutor again meant any *group of sentences*) imposed as a result of the pending charges should be viewed as a single unit, and that as long as *some part* of that "sentence" (*i.e.*, group of sentences) begins to run at the time sentence is imposed, the agreement is fulfilled. In other words, the agreement merely keeps the court from tacking *all of* the sentences on top of Hicks' then-current sentences (as consecutive to his current sentences). The trial court, thinking that sounded plausible, accepted that reasoning. The State now makes the same argument, contending that the "term of imprisonment" (as a package of sentences) begins to run concurrently with the existing sentences because the new sentences were not all tacked on top of the existing sentences.

The State has failed to realize that under that strained interpretation, the trial judge could have given Hicks *nine consecutive sentences* without any violation of the agreement, because all nine consecutive sentences (as a group) could be considered to be "concurrent" with his then-existing sentences. The State also does not realize that its willingness to have all sentences run concurrent with Hicks' existing sentences and with each other, subject only to the requirements of 558.026, shows that the State very well understood what the agreement was. Otherwise, it could have sought to make the new sentences consecutive to one another. Yet, tellingly, it was

willing to agree that all sentences should run concurrent to one another, subject only to the requirement of section 558.026.[6]

By operation of law, if not specified otherwise, the sentences commence service immediately upon imposition, and all new sentences imposed are also concurrent with each other unless specified otherwise. § 558.026. If the normal or expected thing *is* for the courts *not* to stack all of the new sentences on the top of the old sentences, and if the State's theory of the agreement *is* correct, then the State was actually offering very little to Hicks for admitting participation in very serious crimes and implicating others. It seems to me that no reasonable person would think that it would make sense to negotiate for what the State says Hicks negotiated for. A reasonable person would not have assumed that as long as *one* of the sentences was run *concurrent* at the start with his existing sentences (as opposed to beginning at the

[6] The language of the agreement speaks for itself as it would reasonably be understood. It is unnecessary to go into elaborate and adventurous semantical exercises to understand it. But because the State argues the semantics, we will demonstrate the flaws in the State's semantical arguments. To illustrate the flaw in the State's theory, let us picture several boxes next to each other in line on the floor. These boxes represent the existing sentences. The boxes attain a certain height (with the height representing length of time of imprisonment), with the tallest box reaching, say, for instance, 15 inches from the floor, indicating 15 years. Also on the floor *next to* those boxes (that is, the "existing sentence" boxes) is placed a box—representing a new sentence: 20 inches tall, indicating 20 years. *On top of* that new 20-inch box are placed eight other boxes, each on top of the other, also representing new sentences. Each of the eight other boxes is 15 inches tall, so that the entire stack of nine new boxes reaches 140 inches. The new boxes altogether amount to a stack of new sentences totaling 140 years of imprisonment run *consecutively* with each other (and not concurrently with each other) by the court. Because the bottom box is also on the floor, rather than on top of the existing sentences, the "term of imprisonment" represented by the boxes is actually, according to the State, running concurrently with the existing sentences.

If we relate that illustration to this case, we notice immediately that the State's theory of its agreement with Hicks is that the sentences thus illustrated would entirely comply with the State's agreement with Hicks because the new sentences, as a group, *begin to run concurrently* with the remaining 15 years of the existing sentences. In other words, as long as the new boxes (sentences) are not *all stacked on top of* the existing 15-inch box, everything is in compliance with the agreement. The State would be in violation only if all the new boxes were stacked on top of the 15-inch box representing the existing sentences. Is that a theoretically possible interpretation? Yes. But is that a ***strained*** interpretation? Yes, if my understanding is correct.

conclusion of his current sentences), the deal has been kept. But that is the State's theory of this agreement.

In *State v. Chatman*, 682 S.W.2d 82 (Mo. App. 1984), the defendant gave a statement based on an agreement under which he agreed to be completely truthful and "fully cooperate" with the State in the prosecution of others in exchange for the State's promise to prosecute him only for robbery but *not* for murder. *Id.* at 84. Later, the State asked the defendant to submit to a polygraph test, and the defendant refused. *Id.* The State then charged the defendant with both robbery and murder, and the defendant was convicted on both counts. *Id.*

On Chatman's appeal, the State argued that the phrase "full cooperation" meant submitting to a polygraph. That would have seemed to me like a "possible interpretation" of the phrase in question. *See id.* But the court found that the State failed to carry its burden of showing a legally voluntary confession, primarily because it offered no evidence that the defendant had reason to know at the time he gave his confession that he was agreeing to submit to a polygraph test. *Id.* at 85. The court dismissed the State's argument that "full cooperation obviously meant submitting to a polygraph." *Id.*

Suggesting that the State had reneged on the agreement, the court stated that "a confession is not admissible *if given to obtain a particular agreed upon result and that result is aborted*." *Id.* at 84 (citing *Hoopes*, 534 S.W.2d at 35) (emphasis added). The court held that it was error to admit the defendant's statement and reversed the convictions. *Id.* at 85. The court then instructed that

> [t]he defendant is 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 used, as that was not

> agreed and the use of such evidence would be in violation of defendant's right against self-incrimination.

Id. at 86.

In *Chatman*, the court observed that while submitting to a polygraph test "may have been routine to the state and a reasonable expectation on the part of the prosecutor and the police officer, [it had] not been shown to be of like significance to defendant."[7] *Id.* at 85. The court did not blindly accept the State's version of the meaning of the agreement's language. It did not even consider the language ambiguous. Instead, the court saw no reason that the defendant should have understood that he was required to undergo a polygraph test as a condition of the agreement. *Id.*

Here, no reasonable person in Hicks' place would have understood that he was agreeing to the possibility of multiple *consecutive* sentences which *begin* to run *concurrently* with his existing sentences. Nor do I think a reasonable person in Hicks' place would have considered the written offer to be ambiguous such that it needed further clarification.[8]

It was Hicks' reliance on a reasonable interpretation of the agreement that led to his confession. His confession was "given to obtain a particular result and the result was aborted." *Id.* at 84. The aborting here was due to the State's refusal to accommodate itself to the effect of section 558.026 by dismissing some charges. The State still controlled the charges it chose to

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[7] Although the court discusses what the *State* and the *defendant* might have thought, the court's comment that the State did not show the significance of the polygraph to the defendant is, I submit, really an attempt to gauge what a reasonable defendant would have understood as to the effect of the language of the agreement. It seems that, to the extent there was a vagueness or ambiguity, the court expected the State to show that a reasonable defendant would have understood the meaning of the phrase "fully cooperate" to include submitting to a polygraph. The State did not make such a showing. *Id.*

[8] But, of course, if the agreement is reasonably considered ambiguous, it must be construed *against* the State, because the agreement was drafted by the State, and the State was represented by its attorney.

prosecute against Hicks, but the State refused to bend for the sake of honoring the agreement. Hicks, like the defendants in *Hoopes* and *Chatman*, is entitled to have the agreement enforced.

I would vacate the sentences and remand to the trial court with instructions that, pursuant to the State's agreement with Hicks, the State may seek to sentence Hicks to seven concurrent terms for the sex crimes *or* two concurrent terms for the robbery offenses, according to the State's choice. I would direct that the court, at that point, should vacate the two robbery (or the seven sex offense) convictions and dismiss those charges with prejudice.[9]

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James M. Smart, Jr., Judge

Ellis and Newton, JJ., concur in Dissent

[9] Had the trial court found that the State was not honoring its agreement and that Hicks was entitled to some relief from the hitch caused by 558.026, the trial court could have allowed the State to retain one set of the charges -- either the seven sex charges or the two robbery charges. That would have fulfilled the agreement.