DA 6-3-86

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,419

THE STATE OF FLORIDA,

Petitioner,

vs.

MARIO DELGADO-SANTOS,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, MARIO DELGADO-SANTOS, was the Defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, and the Appellant in the Third District Court of Appeal of Florida. Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the district court. In this brief, the parties will be referred to as they appear before this Court.

The symbol "R" will be used, in this brief, to refer to the Record-on-Appeal and the symbol "T" will identify the transcript of trial court proceedings. The appendix to this brief will be referred to as "App." and by the Exhibit letter assigned. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

The respondent was charged by indictment with the crimes of first degree murder and armed robbery. (R.1).

The respondent was originally brought to trial in this cause in June, 1983. The trial court declared a mistrial when the jury deadlocked. (R.112)

The respondent again proceeded to trial, was found guilty as charged (R.266-267) and sentenced to life (with a 25-year minimum mandatory sentence) as to Count I and life as to Count II, the sentences to run consecutively. (R.268-271). The respondent appealed.

The Third District Court of Appeal issued its opinion reversing and remanding for a new trial on June 11, 1985 (App., Exhibit A). Petitioner filed its Motion for Clarification and Certification which was denied on July 8, 1985. A timely Notice to Invoke Discretionary Jurisdiction was filed.

STATEMENT OF THE FACTS

The following facts were elicited, during the trial of the action sub judice:

Brenda Hanzlick, the victim's daughter (T.299) was at the gas station before the incident. When she left, she saw a black male, whom she could not identify, standing behind the station. (T.301).

Beverly Davis, the victim's daughter, found the victim had been stabbed (T.307) when she went to the gas station to pick up her car. (T.306). When she ran into the station, the victim was on the phone, had his hand over his back, and said, "they had got him." (T.307). The victim said he was bleeding to death and he needed blood real fast. (T.310).

Frederick Stief, a deputy sheriff, was the crime scene investigator (T.312) who lifted latent fingerprints from the station (T.327), fingerprinted the bedroom (T.330) of a house in Homestead, and collected as evidence the victim's Texaco shirt which had one hole in it. (T.323-325, 336-337).

Detective William Miller, a fingerprint technician (T.339) testified that, of the ten latent prints taken from

the station, only one was of comparison value (T.345) and of the fourteen latent prints taken from the house where respondent stayed, only two were of comparison value (T.346). A comparison did not match either respondent's or the co-perpetrator's fingerprints (T.344, 346-347).

Sergeant Kenneth Russell of the Homestead Police testified that he went to the Bonano home, two blocks from the gas station, where the defendant and co-defendant were staying (T.357, 360) and found a knife, with what appeared to be blood on it, in the bedroom where the respondent and co-defendant had stayed. (T.361).

James Bullard, who had been the victim's partner, (T.367), testified that $379.87 was taken in the robbery. (T.368).

Lila Simmons, the victim's bookkeeper (T.370) stated that $379.87 was taken in the robbery (T.371).

Technician Martin, the lab technician at James Archer Smith Hospital draws blood and runs laboratory tests on those specimens. (T.372). She didn't remember drawing blood from the victim. (T.373), but did recall that she drew and labeled a tube of blood with the label "Rufus Lofton" (T.373-375).

John Klisiewics, the lab manager at James Archer Smith Hospital (T.377), does requested tests on blood. (T.380). He had no recollection of having given the victim's blood sample to Detective Greenup. (T.378).

Francisco Santos lives near the tire store (T.385) and was familiar with the two men living at Bonano's house (T.386) one of whom he identified as the respondent. (T.387). On the date of the incident, he was in front of his house (T.388) and saw the defendant and co-defendant "playing around the tires at the tire store. (T.389). Later, he saw the respondent and co-defendant walking fast down the street with money in the respondent's hand. (T.391-392). They went to the back of Bonano's house. (T.392-393).

Tomas Rodriguez testified that he was formerly with the Puerto Rico police department and was so employed when he met Detective Greenup at the airport in Puerto Rico (T.415-416). They contacted the respondent and advised him of his Miranda rights (T.416-417). Respondent denied going to the gas station with the co-perpetrator (T.426). He also denied having lived in Miami, but, after being asked if he knew "the other guy", admitted to knowing him and living in Miami. (T.425-426).

Juan Bonano testified that the respondent and co-defendant stayed with him at his home. (T.439). The respondent and co-defendant slept in the same room. (T.442). On the day the incident occurred, when Bonano came home from work, the respondent and co-defendant were at his house looking toward the garage where the stabbing took place and offered Bonano $20 or $25 to drive them away from the house. (T.441). Bonano went to the gas station to see what had happened. When he returned the respondent and co-defendant were gone. (T.442). Bonano identified the knife introduced into evidence as his which he usually kept in the kitchen. (T.443).

Jose Vega lived in the Bonano home (T.450). He saw Pizarro-Ortiz, the co-defendant, leave the house for the gas station (T.455) but didn't see the respondent (T.458). When he came back to the main house from the kitchen, he noticed both respondent and the co-defendant looking toward the station which was the stabbing scene (T.456). Subsequently, respondent and the co-defendant asked Mr. Bonano if he would take them to the airport (T.456). They were refused and then left through the back of the house, on foot with their luggage (T.456).

The summary of the testimony and evidence obtained from the co-defendant, Luis Orlando Pizzaro-Ortiz, who testified as a court witness over objection (T.465), was as follows:

A. That, at the time of his original plea-bargain, pursuant to which he pled to second-degree murder and armed robbery and was sentenced to life (T.466), he refused to testify truthfully against his co-defendat, even though it would mean a lesser sentence. (T.467).

B. That he refused to testify against his co-defendant a second time, in January, 1981. (T.469).

C. That he had told the police that the robbery was the defendant's idea, but it was a lie. (T.472).

D. That he had told police that the defendant took the knife, but it was a lie. (T.473, 474).

E. That he was 16 at the time of the robbery (T.474) and believes that the defendant was three years older. (T.474, 475).

F. That he told the police that the victim had already been stabbed when he first walked into the store, but it was a lie. (T.476).

G. That he gave the police a voluntary statement, which he was given a chance to make corrections to. (T.482).

H. That he told the police that his co-defendant had stabbed the victim "because when he went and told him to be still he went to grab something in the bathroom." (T.485).

I. That the statement the co-defendant made to the police is as follows: (T.485, R.250-260).

Q (By Detective Greenup) For the record, state your full name.
A Luis O. Pizarro-Pizarro-Orlando Pizarro.
Q How old are you?
A Sixteen.
Q Where do you live?
A At 98 S. West 5th Street, Homestead.
Q Are you employed?
A No.
Q How far did you go in School?
A Ninth.
Q Can you read and write English?
A No.
Q Can you read and write Spanish?
A Yes.
Q Do you understand the way that I'm talking to you right now?
A Yes.
Q Are you presently under the influence of any narcotics, medication or alcoholic beverages?
A No.
Q Do you know of any reason why you can not answer my questions intelligently?
A No.
A Are you aware that you're presently under arrest for First Degree Murder in connection with the death of Rufus Lofton?
A Yes.
Q Do you recognize this form I present to you now as being the same constitutional rights form that we went over earlier today?
A Yes.
DETECTIVE GREENUP: Would you read the first right to him?
MR. DE LA VEGA: Off the record.

(Thereupon, an off-the-record conversation was had.)

Q (By Detective Greenup) "You have the right to remain silent. You need not talk to me or answer my questions if you do not wish to do so."
Do you understand that?
A Yes.
Q Is that your initial by that statement?

A Yes
Q "Should you talk to me, anything which you can say can and will be introduced into evidence in court against you."
A Yes.
Q Do you understand?
A Yes.
Q Is that your initial by that one?
A Yes.
Q "If you want an attorney to represent you at this time or at any time, you are entitled to such counsel."
A Yes.
Q Do you understand?
A Yes.
Q Is that your initials next to that one?
A Yes.
Q Do you understand?
A Yes.
Q Is that your initials beside that one?
A Yes.
Q Do you fully understand the above statement of your rights?
A What? Tell me again.
Q Do you fully understand the above statements of your rights that I just said to you?
A Yes.
Q Are those your initials next to that statement?
A Yes.
Q Are you willing to answer questions without the presence of an attorney at this time?
A Yes.
Q Are those your initials by that statement?
A Yes.
Q Does your signature appear at the bottom of the form indicating that you fully understand all of your constitutional rights?
A Yes.
Q Do you know an individual by the name of Rufus Lofton?
A No.
Q Have you ever met an individual by the name of Rufus Lofton?
A No.
Q Calling your attention to Wednesday, July 29, 1981, at approximately 6:00 P.M., were you in the vicinity of 438 South Krome Avenue in Homestead, at the Homestead Tire Company?
A Yes.
Q At that time did anything unusual occur?
A What? What does that mean, what happened? A hold up.

Q Why did you go to the store?
A Because my--a friend of mine, you know, was talking to me, give me ideas, you know, for me to go with him to hold up.
Q What is your friend's name?
A Enrique. I know him by Enrique Llito.
Q Who planned the robbery?
A Enrique.
Q What happened when you got to the store?
A By the time I went in, I saw the man bleeding. And then Enrique had water in his hands --had dough in his hands or money.
Q Did you both go in the store together?
A No.
Q How did you go into the store?
A He came in by the rear and I through the front. Like--like a minute later.
Q Can you describe the area where the store is located?
A At the corner where I live, and it's next to a car dealer.
Q Can you describe the inside of the store?
A When I went in, I saw cigarettes over to the right hand side, and there was a window to the left. Then there was a table with the cash register and a door, there was a bathroom and another one, which is where Enrique went in.
Q What happened after you walked inside the store?
A I told him when he was bleeding, later I told him, "Hurry up, Hurry up! Open the box!"
Q Why was the victim bleeding?
A because of a stab wound.
Q How did he get that stab wound?
A I don't know because I didn't see.
Q Did Enrique tell you that he stabbed the victim?
A Yes.
Q Did he say why he stabbed him?
A Because when he went and told him to be still, he went to grab something in the bathroom.
Q Where did he stab him?
A (Indicating) I saw the blood down to the side here.
Q Do you know how many times he stabbed him?
A One.
Q Did either one of you take any money from the store?
A The two of us.
Q How much money did both of you take?
A Around four hundred and fifty.
Q Is that four hundred and fifty together or four hundred and fifty each?

A Together.
Q During the course of the robbery, did you stay in the building the whole time or did either of you go outside at any time during?
A The two inside.
DETECTIVE GREENUP: What was that again?
MR. DE LA VEGA: The two inside.
Q (By Detective Greenup) After the robbery, where did you go?
A To Juan Bonano's home.
Q And where is that located?
A At 98 S.W. 5th Street, Homestead.
Q What did you do there?
A Picked up the clothes.
Q How long did you stay there?
A About fifteen minutes.
Q Where did you go once you left Mr. Bonano's house?
A Took a taxi to the airport.
Q And what did you do at the airport?
A We went to Puerto Rico via Eastern Airlines.
Q What time was your flight?
A At night.
Q What did you do with the money?
A We bought the tickets and split the rest in the plane.
Q What did you and Enrique do with the knife?
A I don't know because he left ahead of me running. I know he left with it because I don't know what happened to the knife.
Q How long did you stay in Puerto Rico?
A For two weeks.
Q Why did you come back to Miami?
A To work.
Q Where in Puerto Rico did you go?
A Towards my grandmother's home in Trujillo, Bulon.
Q Where did Enrique go in Puerto Rico?
A Supposedly towards Ponce, La Cantera.
Q And who was he staying with there?
A Who?
Q Enrique.
A A girlfriend he had out there.
Q When you went into the store to rob it, what kind of clothing were you wearing and what color was it?
A I was wearing a short blue pair of pants with a t-shirt with a number 15 on it.

Q What was Enrique wearing?
A A pair of shorts with a t-shirt.
Q What was the victim wearing when you robbed the store?
A I don't remember.
Q Can you describe the inside of the store?
A Yes, yes.
Q Would you describe it for me, please?
A As I went through the front, there were cigarettes on my right hand side, and there was a window with a table in there, that's where the cash register was. Then the door to the bathroom, the rear door, which is where Enrique came in through.
Q Would you describe Enrique for me?
A Black hair, like five and seven, one-forty, black eyes.
Q What kind of complexion does he have?
A What's that? Oh, like cinnamon color, neither white nor dark.
Q Would you describe the victim for me?
A Well, he was white with white hair--black hair. And, well he was older.
Q Can you describe the knife for me?
A I don't know because I didn't see it. I just saw it at the house, and it was like this (indicating).
Q Do you remember what kind of handle it had?
A Like wood.
Q When you were inside the store, what did you say to the man?
A When I went in?
Q Yes.
A "Hurry up! Open the box!"
Q What did the man say?
A "Okay, okay."
Q Did the man in the store have anything in his hands at the time that you saw him?
A No.
Q Did you see any type of weapons in the store at all?
A No.
Q Has everything that you've stated been true and correct?
A Yes.
Q Has anyone threatened or coerced you in any way to give this statement?
A No.

Q Have you given this statement freely and voluntarily?
A Yes.
DETECTIVE GREENUP: Thank you.

(Thereupon, the statement was concluded at 1:04 A.M.)***

J. That the defendant is like his uncle. (T.487).

K. That he came to Miami to look for work and found work in a nursery making about $200 a week. (T.488).

L. That he only stabbed the victim once, he is sure. (T.492).

M. That after the robbery and stabbing, he changed clothes, he woke the defendant up and invited him to go to Puerto Rico. The defendant said nothing, but picked up his things and left with him. (T.492).

Dr. Erik Mitchell, the medical examiner (T.508), testified that there was one entrance wound, but two separate paths of injury found in the victim, indicating that an object was placed into the person, removed, and replaced in exactly the same spot; or that the object was partially removed and then replaced (T.513-514). This wound could have been caused by the knife found in the respondent's bedroom (T.516) and was the cause of death (T.513).

Detective William Greenup, the homicide investigator (T.525) obtained the vial of blood labeled "Rufus Lofton" from James Archer Smith Hospital and submitted it to the crime lab serology section (T.528-529). He traveled to Puerto Rico and obtained a statement from the respondent in which he said he'd never been to Homestead (T.551) and denied knowledge of the crime (T.554).

Kathleen Nelson, a serologist, testified that she tested the tube of blood drawn from the victim and determined that it was type "A", the same type as the blood on the knife (T.581-582). Forty percent of the population has type "A" blood (T.582).

Petitioner reserves the right to argue additional facts in the argument portion of its brief.

QUESTIONS PRESENTED

I

WHETHER THE ACCOMPLICE'S PRIOR INCONSISTENT STATEMENT MADE TO THE POLICE, UNDER OATH, IN FRONT OF AN INTERPRETER AND A NOTARY, WAS PROPERLY ADMITTED INTO EVIDENCE WHERE THE ACCOMPLICE TESTIFIED AT THE TRIAL AND WAS SUBJECT TO CROSS EXAMINATION?

II

WHETHER THE ADMISSION OF THE ACCOMPLICE'S PRIOR INCONSISTENT STATEMENT WAS, IF ERROR, HARMLESS, WHERE THE MATERIAL FACTS CONTAINED IN THE STATEMENT WERE ALREADY BEFORE THE JURY, WITHOUT ANY HEARSAY OBJECTION OR REQUEST FOR LIMITING INSTRUCTION HAVING BEEN MADE TO THEIR ADMISSION?

SUMMARY OF THE ARGUMENT

I

The accomplice's prior inconsistent statement which he made to the police during a homicide interrogation was properly admitted as substantive evidence where the accomplice was available at trial and the statement was made under oath, subject to perjury at a government proceeding. Law enforcement interrogations have been held to be "other proceedings" within the meaning of F.S. § 90.801(2)(a)(1981) where, as here, the out-of-court statement is clearly more reliable than the in-court testimony.

II

Even if the admission of the prior statement had been error, it was clearly harmless where the material facts contained in the statement had already been introduced to the jury without objection or request for limiting instruction, since it was merely cumulative to the previous testimony.

ARGUMENT

I

THE ACCOMPLICE'S PRIOR INCONSISTENT STATEMENT MADE TO THE POLICE, UNDER OATH, IN FRONT OF AN INTERPRETER AND A NOTARY, WAS PROPERLY ADMITTED INTO EVIDENCE WHERE THE ACCOMPLICE TESTIFIED AT THE TRIAL AND WAS SUBJECT TO CROSS EXAMINATION.

The admission of the statement concerned was not reversible error because the statement was not hearsay pursuant to the applicable statute.

Florida Statute 90.801 (2)(a) (1981) specifically provides:

> "(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition."

Pursuant to this statute, we must determine what an "other proceeding" is, as defined by the statute. In view of the fact that statutes must be interpreted with other statues with which they are in para materia pursuant to Goldstein v. Acme Concrete Corporation, 103 So.2d 202 (Fla., 1958) and subsequent cases, and since perjury is

specifically referred to in the cited portion of the evidence code, the perjury statutues should be useful. While these statutes do not define "other proceedings", they do, in F.S. § 837.011 (1)(1981), define "official proceedings" as follows:

> (1) "Official proceeding" means a proceeding heard, or which may be or is required to be heard, before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, master in chancery, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with any such proceeding.

This is a clearly broader definition that the traditional legal definition, which may be inferred from the following definitions of Black's Law Dictionary, Revised Fourth Edition (1968):

> PROCEEDING. In a general sense, the form and manner of conducting juridical (sic) business before a court or judicial officer; regular and orderly progress in form of law; including all possible steps in an action from its commencement to the execution of judgment. (citations omitted).
>
> OFFICIAL, adj. Pertaining to an office; invested with the character of an officer; proceeding from, sanctioned by, or done by, an officer. (citations omitted).

By including legislative, administrative or other governmental agencies, it seems clear that the legislature did not intend to limit the definition to judicial proceedings.

Other sections of the perjury statutes may also prove useful in order to determine what testimony is subject to perjury as mentioned in the non-hearsay statutes:

> 837.012 Perjury when not in an official proceeding. --
>
> (1) Whoever makes a false statement, which he does not believe to be true, under oath, not in an official proceeding, in regard to any material matter shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant's mistaken belief that his statement was not material is not a defense.
>
> F.S.§ 837.012 (1981).

> 837.02 Perjury in official proceedings. --
>
> (1) Whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding in regard to any material matter shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> F.S. § 837.02 (1981).

> 837.021 Perjury by contradictory statements. --
>
> (1) Whoever, in one or more official proceedings, willfully makes two or more material

> statements under oath when in fact two or more of the statements contradict each other is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. The prosecution may proceed in a single count by setting forth the willful making of inconsistent statements under oath and alleging in the alternative that one or more of them are false.
>
> (2) The question of whether a statement was material is a question of law to be determined by the court.
>
> (3) In any prosecution for perjury by contradictory statements under this act, it is not necessary to prove which, if any, of the statements is not true.
>
> (4) In any prosecution under this act for perjury by contradictory statements, it shall be a defense that the accused believed each statement to be true at the time he made it.
>
> F.S. § 837.021 (1981).

> 837.05 False reports to law enforcement authorities. -- Whoever knowingly gives false information to any law enforcement officer concerning the alleged commission of any crime is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> F.S. § 837.05 (1981).

It is respectfully submitted that Florida Statutes §837.02 and 837.021 were intended to apply to official proceedings other than judicial proceedings, including police investigations, where testimony is taken under oath before a notary. Additional support is found for this view from two other facts.

First, prior to 1974, Section 837.02 of the Florida Statutes was entitled "Perjury in Judicial Proceeding" and carried the penalty for a first or second-degree felony (depending upon whether or not it was in a capital case) instead of, as currently, for a third-degree felony.

Second, to hold otherwise would mean that police officers would have no encouragement pursuant to the perjury statutes, to place witnesses under oath and take their statements before a notary since giving false information to law enforcement authorities already carries the same penalties as perjury when not in an official proceeding (first degree misdemeanor), although less than perjury in official proceedings (third degree felony). Thus, a witness who lied to the police would be subject to no additional penalty whether the lie was under oath or not.

It is therefore submitted that, since the accomplice's statement involved in this case was in an "official proceeding" as expressly defined in F.S.§837.011 (1981), it was in an "other proceeding" pursuant to F.S. §90.801 (2)(a) (1981) and was properly admitted as non-hearsay.

There is case law, as well, which supports this position. It is well-settled, of course, that a prior inconsistent

statement made before a grand jury is admissible as substantive evidence, under the Federal Rule (which is identical to Florida's), 28 U.S.C. §801 (d)(1)(A); United States v. Coran, 589 F.2d 70 (1st Cir., 1978); United States v. Long Soldier, 562 F.2d 601 (8th Cir., 1977); United States v. Morgan, 555 F.2d 238 (9th Cir., 1977). This is also true in Florida. Moore v. State, 452 So.2d 559 (Fla., 1984); Webb v. State, 426 So.2d 1033 (5th DCA, 1983); Pet. for rev. den. 440 So.2d 354 (Fla., 1983). Previous inconsistent testimony at a preliminary hearing is also admissible as substantive evidence. United States v. Plum, 558 F.2d 568 (10th Cir., 1977). Such prior inconsistent statements made to a State Attorney have also, consistently, been held to be admissible as substantive evidence. Diamond v. State, 436 So.2d 364 (3d DCA, 1983); State v. Leighton, 365 So.2d 397 (4th DCA, 1979); See also, Slavens v. State, 614 S.W. 2d 529 (Ark., 1981).

While the issue of whether such prior inconsistent statements made during criminal investigations is only now appearing, there is authority for admitting such statements as substantive evidence, as well. See, United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir., 1976); Cert. denied, 429 U.S.983, 97 S.Ct. 501 (1976); United States v. Payne, 492 F.2d 449 (4th Cir., 1974); Cert. denied, 419 U.S. 876 (1974); State v. Smith, 651 P.2d 207 (Wash., 1982); Starchk v. Wittenberg, 411 So.2d 1000 (5th DCA, 1982). It is submitted that any

distinction made, for purposes of the non-hearsay statutes, between an immigration officer (as in United States v. Castro-Ayon), or investigator for the Department of Professional Regulation (as in Starchk v. Wittenberg) and a police officer are meaningless, and that the statement of Pizarro-Ortiz was properly admitted under the Florida Rules of Evidence. Even the distinction between an Assistant State Attorney and a police officer appears less than clear in a case such as this one, in which the procedure used during the taking of the statement was as protective of the declarant's rights as could be expected by any Assistant State Attorney.

However, even if the Fifth District is correct in Robinson v. State, 455 So.2d 481 (Fla., 5th DCA 1984) and a police interrogation is not necessarily an "other proceeding" pursuant to the statute, it should be so held in this case. The court in Robinson was primarily concerned with whether or not the previous inconsistent statement was more reliable than the in-court testimony. This was also the concern of the Washington Supreme Court in State v. Smith, previously cited, in which the court found an affidavit given during a police interrogation was an "other proceeding" pursuant to rules of evidence identical with those of Florida.

Although, as the Third District pointed out, the procedure leading to the interrogation shows certain indicia of unreliability (App., Exhibit A, 7), the out-of-court statement, itself, is so obviously more reliable than the in-court testimony that it must be considered to have passed the Robinson-Smith test.

Examining the reliability of the statement in the case sub judice from this point of view, which was done on pages 21 and 22 of Appellee's Answer Brief before the Third District;

> "The version that Pizarro-Ortiz told from the stand would have us believe that the defendant was asleep at home (T.490) at a time when Santos saw him at the tire store. (T.390). That the defendant was asleep at home when Santos saw him walking fast back from the tire store with money in his hand. (T.391,392). That the defendant was asleep when Vega says he was offering him money to get him out of the house (T.441, 442). That the defendant was asleep when Vega says he was trying to get Bonano to take him to the airport. (T.456). That he stabbed the victim only once, he is certain (T.492), when the victim was stabbed twice (T.513, 514). That the defendant left for Puerti Rico with him just because he woke him up and asked him to go to Puerto Rico. (T.492). The version that he had earlier given to the police, however (R.250-260), was completely consistent with all the other testimony."

Also, it must be remembered that the witness believed that the victim had only been stabbed once (R.255), that he was only sixteen years old at the time of the robbery (T.474), that the defendant was three years older than the witness

(T.475), that he came to Homestead to find work, and found a $200.00 a week job in a nursery (T.488), but the defendant was like an uncle to the witness (T.487), and knew his work and financial situation (T.489-490).

It is therefore submitted that in this case, the previous inconsistent testimony of the witness is inherently more reliable than his in-court testimony and, under the reasoning of Robinson and Smith, the prior statement should still be admissible as substantive testimony.

It is, therefore, clear that the accomplice's prior inconsistent statement was properly admitted.

II

THE ADMISSION OF THE ACCOMPLICE'S PRIOR INCONSISTENT STATEMENT WAS, IF ERROR, HARMLESS, WHERE THE MATERIAL FACTS CONTAINED IN THE STATEMENT WERE ALREADY BEFORE THE JURY, WITHOUT ANY HEARSAY OBJECTION OR REQUEST FOR LIMITING INSTRUCTION HAVING BEEN MADE TO THEIR ADMISSION.

Even if the court were to determine that it was error to admit the statement concerned since it was hearsay, it would still be only harmless error since all the material points were already before the jury, without hearsay objection. The accomplice testified, without a hearsay objection or a request for a limiting instruction, that he had told the police that it was the defendant's idea to go out and make some easy money (T.472), that the defendant book the knife to do the robbery (T.473,474), that he and the defendant went to the tire store together (T.475), that the victim had already been stabbed when he walked into the store (T.476), and that the defendant had told him that he stabbed the victim because, "when he went and told him to be still, he went to grab something from the bathroom" (T.485). He had also testified that these statements had been made freely and voluntarily and that he had been given an opportunity to make any corrections (T.482). There was no hearsay objection to any of this testimony nor was any limiting instruction asked for concerning it. Also, the

admission of this testimony was not a grounds in support of the Motion for New Trial (R.278-279).

Certainly, it is axiomatic that the admission of allegedly improper evidence may not be a basis for reversal where that evidence is merely cumulative or corroborative of other evidence already before the fact-finder. Partin v. State, 396 So.2d 273 (Fla. 3d DCA 1981); Trinidad v. State, 388 So.2d 1063 (Fla. 3d DCA 1980); cert. denied, 452 U.S.963 (1981); Casso v. State, 182 So.2d 252 (Fla. 2d DCA 1966); cert. denied, 192 So.2d 487 (Fla. 1966).

This policy is perfectly understandable given the provisions of F.S. §59.041 (1981) which provides;

> 59.041 Harmless error; effect.--No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

It is difficult to conceive how the admission of the accomplice's statement could have resulted in a miscarriage of justice where every material fact contained in the statement which was damaging to the respondent was already before

the jury, without objection or limiting instruction.

This position is supported by numerous Florida cases based on the premise that, where no objection is made for testimony, such testimony comes into evidence with a presumption of consent. Roseman v. State, 293 So.2d 64 (Fla. 1974). This premise specifically applies to hearsay testimony, to which any right to exclude is waived by failing to timely object. United States v. White, 493 F.2d 3 (5th Cir. 1974); Jalbert v. State, 95 So.2d 589 (Fla. 1957); Leonard v. State, 423 So.2d 594 (Fla. 3d DCA 1982); Rolle v. State, 416 So.2d 51 (Fla. 4th DCA 1982); Dowd v. Star Manufacturing Company, 385 So.2d 179 (Fla. 3d DCA 1980); Rev. denied, 392 So.2d 1373 (Fla. 1980). Otherwise stated, any error in admitting hearsay testimony cannot be reviewed on appeal in the absence of a timely objection below. McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980).

Even if the testimony to which the respondent failed to object was permissible impeachment testimony, a failure to object permits the jury to consider alleged hearsay for whatever value it may have. United States v. Pearson, 508 F.2d 595 (5th Cir. 1975). Thus, where the respondent failed to request a limiting instruction that the allegedly hearsay testimony was admissible only for impeachment purposes and

not as substantive evidence, he failed to preserve any alleged error in allowing the testimony into evidence for any purposes. United States v. Fleming, 594 F.2d 598 (7th Cir. 1979); Hills v. State, 428 So.2d 318 (Fla. 1st DCA 1983). It is, therefore, clear that respondent's failure to object or to ask for any limiting instruction when every material fact in the co-defendant's statement was admitted before the jury, made any alleged error in admitting the statement, itself, harmless because it was merely cumulative and corroborative of evidence already properly admitted.

The admission of the statement was, if error, harmless, where the material facts contained in the statement were already before the jury without objection or request for limiting instruction.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully submits that this Court should reverse the decision of the Third District Court of Appeal and affirm the judgement and sentence of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was furnished by mail to ARTHUR W. CARTER, Esquire, 1441 N.W. North River Drive, Miami, Florida 33125 and to JOHN H. LIPINSKI, Esquire, 1441 N.W. North River Drive, Miami, Florida 33125, on this 10th day of March, 1986.

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