IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,047

FELIPE BELTRAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

Certified Question from The Third District Court of Appeal

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

The Petitioner, FELIPE BELTRAN, was the appellant in the Third District Court of Appeal and the Defendant in the trial Court. The Respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court. In this brief, the parties will be referred to as they stood before the trial court.The symbol "R." will be used to designate the Record on Appeal before the Third District Court of Appeal. The symbol "TR." will be used to designate the trial transcripts. The symbol "A" will be used to designate the appendix. All emphasis is added, unless other wise indicated.

STATEMENT OF THE CASE

On November 27, 1985, a three count indictment was filed charging the defendant, along with Rolando Ocana and Jesus Fernandez, with : 1) first degree murder: 2) attempted first degree murder: and 3) robbery. (R.2-3a).

A jury trial was held for the defendant on February 25 - March 4, 1986, before the Honorable Judge Maginnis. (R.4-9). At the close of the state's case the court granted a judgment of acquittal as to counts two and three of the icdictment. (R.52).

On March 4, 1986, the jury found the defendant guilty of manslaughter with a firearm, a lesser included offense of the first degree murder as charged in count one of the indictment. (R.54).

On April 21, 1986, the defendant was sentenced to a term of ten years imprisonment. (R.76-78).

The defendant timely appealed his conviction to the Third District Ccurt of Appeal. On September 6, 1988, the Third District affirmed the defendant's conviction, finding the misjoinder of offenses herein to be harmless error. The Court certified the following question to this Court as being of great importance to the administration of justice:

Does the harmless error rule apply to cases in which offenses have been misjoined in a single information?

This appeal follows.

STATEMENT OF THE FACTS

The instant case involved the shooting of Miguel Perez on June 10, 1985, and the alleged robbery and attempted murder of Perez on June 9, 1985. It was the state's theory of prosecution that the defendant, upset by a $1,500 debt he owed to Perez, hired two individuals, Rolando Ocana and Jesus Fernandez, to kill Perez. According to the prosecution, Ocana and Fernandez robbed and attempted to kill Perez on June 9, and, when the attempt was unsuccessful, returned to his apartment on June 10 and murdered him.

Prior to trial the defendant filed a motion for Severance of offenses, alleging that the robbery and attempted murder counts of the indictment were improperly joined with the murder count, and that the improper joinder of these offenses prejudiced the defendant by allowing the state to unfairly argue that if the defendant was responsible for the crimes on June 9, he must also have been responsible for the murder on June 10. (R.24-25). The motion was denied.

The prosecution's case at trial began with testimony concerning the crimes on June 9. Officers Stephen Goldberg and Louis Dieppa observed Perez in the emergency room of Mount Sinai Hospital. Perez had numerous abrasions. (TR.608). Over defense counsel's hearsay objection, Dieppa testified that Perez told him he had been robbed of his gold chains at knifepoint earlier in the day by two individuals. (TR.621). Perez was able to describe one of his assailants. (TR.623).

Ernesto Rodriguez testified that he knew the

defendant through his (Ernesto's) sister Elena. (TR.627). He also knew Perez from a bar in the neighborhood. (TR.627). Perez was a drug dealer. (TR.628). Rodriguez testified that, approximately 15 days prior to Perez' death he heard the defendant and Perez discussing a $1,500 debt owed by the defendant to Perez. (TR.631). Three days later, at his sister's house, he heard the defendant complaining about the money he owed to Perez. (TR.634).

On the night Perez was murdered, Ocana and Fernandez came by Rodriguez' house and took him and his wife Angela to the defendant's house. (TR.635). The defendant gave him a chain wrapped in a handkerchief. (TR.639). Later that night, after he returned home, his sister and the defendant stopped by. (TR.641). The defendant told him that Ocana and Fernandez had killed Perez. (TR.642).

At the beginning of the trial's second day, the trial court reconsidered defense counsel's objection to Officer Dieppa's hearsay testimony that Perez told Dieppa at the hospital that he had been beaten and robbed. (TR.621). The court reversed its earlier decision, and struck the testimony. (TR.694). The defendant's motion for a mistrial was denied, and the court, instead, gave a curative instruction. (TR.694). The court instructed jurors to disregard the officers testimony. (TR.694).

As the evidence continued, the testimony indicated the following:

On June 10, 1985, at approximately 11:15 P.M., Perez was found shot to death in his apartment. (TR. 727). According

to Medical Examiner Dr. Rao, he had been shot six times. (TR. 957). Drugs were found in his apartment, along with spent casings and projectiles. (TR. 728-732).

Frank Peake, of the Belleville New Jersey Police testified that on June 28, 1985, Jesus Fernandez was arrested for an armed robbery in New Jersey. (TR.698). Criminalist Robert Hart confirmed that the firearm found by Fernandez in New Jersey was the weapon used to shoot Perez. (TR. 989-990).

Angela Gomez, Ernesto Rodriguez' common law wife, testified that she too had witnessed a dispute between the defendant and Perez over a $1,500 debt owed by the defendant to Perez. (TR. 839). A few days later, while she was bicycling, she saw the defendant with Ocana and Fernandez. (TR.843). According to Ms. Gomez the defendant was gesturing with his hands and telling them that he wanted them to kill Perez in exchange for what Perez had in his apartment. (TR.845). They agreed. (TR.847). The defendant told Ms. Gomez not to repeat what she had heard. (TR. 847). Out of fear, she did not. (TR. 847).

A few days later Ms. Gomez saw the defendant at Elena's house. (TR. 852). The defendant told her he had arranged for Perez to be killed. (TR. 852).

On the night of the shooting, Ocana and Fernandez picked her and Ernesto up at home and took them to the defendant's house. (TR.854). They were both armed. (TR. 859). Later that night, after they returned home, the defendant and Elena came by. (TR. 860). According to Ms. Gomez, the defendant told them that Ocana and Fernandez had

shot Perez. (TR. 861). Three days later,, the defendant told her that they had filled Perez with holes. (TR. 864).

At the close of the state's case the court granted the defendant's motion for a judgment of acquittal as to the robbery and attempted murder counts of the indictment. (TR. 998).

POINTS ON APPEAL

1

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN APPLYING A HARMLESS ERROR ANALYSIS TO THE MISJOINDER OF OFFENSES HEREIN?

II

WHETHER, EVEN IF THE HARMLESS ERROR DOCTRINE IS APPLICABLE, THE THIRD DISTRICT COURT OF APPEAL ERRED IN HOLDING THE MISJOINDER HEREIN TO BE HARMLESS, WHERE THE STATE FAILED TO PROVE THAT THERE WAS NO REASONABLE POSSIBILITY THAT THE MISJOINDER DID NOT AFFECT THE VERDICT?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal erred in applying a harmless error analysis herein. The decision of the Supreme Court in United States v. Lane, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed 2d 814 (1986), is not controlling herein as Florida is free to give a more expansive application to its misjoinder rule. Justice Stevens' dissent in Lane is consistent with the weight of authority in this state, and this Court's previous application of the harmless error rule. This Court should adhere to a presumptive prejudice rule for misjoinder and answer the certified question in the negative.

Furthermore, even if misjoinder is susceptible to a harmless error analysis, the state has failed to meet its burden under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), of proving that there was no reasonable possibility that the misjoinder contributed to the defendant's conviction.

ARGUMENT

I

THE THIRD DISTRICT COURT OF APPEAL ERRED IN APPLYING A HARMLESS ERROR ANALYSIS TO THE MISJOINDER OF OFFENSES HEREIN.

Rule 3.152(a)(1), Florida Rules of Criminal Procedure, provides that:

> In case two or more offenses are improperly charged in a single indictment or information, the defendant shall have a right to a severance of the charges upon timely motion thereof.

In the instant case, the third District Court of Appeal recognized the fact of misjoinder. However, relying upon United States v. Lane, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986), the Court held that misjoinder of charges no longer results in per se reversal, but instead is subject to a harmless error analysis.

Initially, it should be noted that this Court is not bound by the Lane decision, and is free to adopt a more expansive application of its own misjoinder rule than did the Court in Lane in interpreting its federal counterpart. See e.g. State v. Glosson, 462 So.2d 1082 (Fla. 1985). In this regard, Petitioner would adopt Justice Stevens' well reasoned dissent in Lane that harmless error analysis is inappropriate in this type of situation since: 1) the rule itself makes clear that it was not intended to be subject to such analysis; and 2) the harmlessness of a misjoinder cannot be measured with precision. Clearly, this has been the reasoning of the weight of authority in this state,

where prejudice has been presumed from an improper joinder of offenses. See e.g. Essex v. State, 478 So.2d 450 (Fla. 3rd DCA 1985); Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983).

Furthermore, strict adherence to a presumptive prejudice rule in this type of case would be consistent not only with the above line of cases and Justice Stevens' compelling dissent in Lane, but with this Court's own holdings that where the terms of a criminal rule are mandatory, and the violation thereof is so fraught with potential prejudice, that the harmless error doctrine will no be applied. See e.g. Ivory v. State, 351 So.2d 26 (Fla. 1977); Bradley v. State, 513 So.2d 112 (Fla. 1987).

Accordingly, the question certified herein should be answered in the negative, and the defendant's conviction reversed.

ARGUMENT

II

EVEN IF THE HARMLESS ERROR DOCTRINE IS APPLICABLE, THE THIRD DISTRICT COURT OF APPEAL ERRED IN HOLDING THE MISJOINDER HEREIN TO BE HARMLESS, WHERE THE STATE FAILED TO PROVE THAT THERE WAS NO REASONABLE POSSIBILITY THAT THE MISJOINDER DID NOT AFFECT THE VERDICT.

The harmless error test, as stated by this Court in State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986), "places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." The test requires a close examination by the Appellate Court of the permissible evidence on which the jury could have legitimately relied, and, in addition "an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." Id. at 1135. When the impermissible evidence in this case is "closely examined", it is difficult indeed to understand the Third District's finding of harmless error.

As correctly noted below, the State's avowed theory of prosecution of these misjoined offenses was that the defendant had hired two individuals to kill Perez, and that the individuals' efforts were thwarted on the 9th, but successful on the 10th. According to the Third District, however, "the proof concerning the robbery and attempted murder of Perez on the 9th so utterly failed to establish

that the two culprits of the 9th were the same as the manslaughterers of the 10th that the defendant can hardly be deemed to have been harmed by the jury having heard it." (App. 2)(emphasis added).[1]

The opinion of the Third District ignores reality. Simply stated, although the proof failed to establish that the two culprits of the 9th were the same as the manslaughterers of the 10th, this was clearly the state's theory as argued and presented to the jury prior to the those charges being dismissed. Thus, the implication to the jury was clear: Two individuals were involved on the 9th; two on the 10th - they must be the same, hired for the same purpose and by the same individual - **the** defendant. Similarly, although there was no **"proof"** that a gold chain the defendant gave to someone on the 9th was the same one taken from Perez earlier that day, that implication was equally present.

The state's argument, and the Third District's conclusion that there was "no possibility" of this impermissible evidence affecting the jury, is directly refuted by that portion of the state's brief as cited by the Third District, that argued that the offenses were properly joined since: "The same victim was involved. The same hit men were used. The motive was the same."

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[1] **Furthermore,** the court found that there was no "proof" that a gold chain given by the defendant to someone on the 9th was one taken from Perez earlier that day.

Certainly, if as the state's brief proved, the impermissible evidence and implications presented at trial were enough to convince the attorney general that the defendant must be responsible for the crimes on both the 9th and 10th, even in the absence of **"proof"** to that effect, how can the attorney general now be said to have met its burden under DiGuilio of proving that there was **no** reasonable possibility that the same impermissible evidence and implications could not even affect the jury?

Perhaps, unwittingly, the state has not only proved that the error in this case was indeed prejudicial, but it has also proved the wisdom of Justice Stevens' dissent in Lane and the reasoning of prior courts in this state that misjoinder is so fraught with potential for prejudice that it should never be considered harmless.

CONCLUSION

Based upon the foregoing cases and authorities, the Petitioner requests this Honorable Court to answer the certified question in the negative and reverse his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief of the Petitioner was mailed this 11th day of October, 1988 to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida 33128.

LAWRENCE E. BESSER