IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,047

FELIPE BELTRAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner was the appellant in the Third District Court of Appeal and defendant in the trial court. Respondent was the appellee and prosecution. The record on appeal will be designated by "R" and the trial transcript by "Tr."

STATEMENT OF THE CASE

Petitioner was originally charged with first degree murder, attempted first degree murder, and robbery.

The trial court entered judgments of acquittal on the attempted murder and robbery counts; Petitioner was convicted of manslaughter with a firearm (a lesser included offense of murder).

Petitioner appealed his conviction to the Third District Court of Appeal. That court affirmed his conviction, but certified a question to be of great public importance. Beltran v. State, ____ So.2d ____ (Fla. 3 DCA 1988), 13 F.L.W. 2088 (Sept. 6, 1988).

This appeal followed.

STATEMENT OF THE FACTS

The evidence established that the appellant owed $1,500 to the victim and that he (appellant) was in no mood to pay up. He procured the services of two others, Fernandez and Ocana, to kill the victim, thus eliminating the debt from the ledger.

The prosecution's case relied heavily on the testimony of two witnesses, Ernesto Rodriguez and his wife Angela Gomez. These two witnesses were well acquainted with both the appellant and the victim, a Mr. Miguel Perez.

Appellant was not afraid to openly discuss his plans. Approximately ten days prior to the murder, appellant told Ernesto Rodriguez and Angela Gomez that:

> "This fucking *so* and *so* got me *so* tired, now he wants me to pay him that money. He fucked up my whole business. I [cannot] do anything else." (Tr.634).

Angela Gomez later saw the appellant as she was riding her bicycle down the street. Appellant caught her attention because he was gesturing with his hands as he talked to Ocana and Fernandez. She went up to see what was going on (Tr.843). Appellant stated:

"That this son of a bitch this fucking one told me I had to pay the money." (Tr.844).

Gomez went on to state that appellant asked Ocana and Fernandez to kill the victim in exchange for whatever drugs or money they could get from the victim (Tr.845). Ocana and Fernandez agreed (Tr.847). Appellant turned to Gomez and told her not to say anything to anyone. She did as she was told out of fear for her life (Tr.848).

A few days later, Gomez and her husband went to the appellant's home. Appellant informed them that he had ordered that the victim be killed. (Tr.852).

The victim was robbed and beaten by two armed men early on June 9, 1985. He was taken to the hospital for treatment. He told a policeman who interviewed him in the emergency room that three gold chains were taken from his neck during the attack (Tr.621-622). (This testimony was later stricken by the trial court. It is included here only to present a chronological picture of, at least, the state's theory of the case below.)

On the evening of June 9, 1985, Gomez and her husband were in their apartment when Ocana and Fernandez came by to pick them up (Tr.854). They went by car to appellant's house. Rodriguez went inside where appellant gave him a gold chain (Tr.857). As the foursome was preparing to leave, appellant came out to the car and wished Ocana luck (Tr.858).

As Ocana and Fernandez was driving Mr. and Mrs. Rodriguez back to their home, Mrs. Rodriguez noticed that both were armed (Tr.859). Mrs. Rodriguez took a pill for her nerves and tried to sleep when she got home. Appellant arrived a couple of hours later (around 2:00 a.m.), and happily announced that the victim had been killed and that "he had taken a load from off himself" (Tr.861-862).

Three days later appellant again made statements about the killing. He told Mrs. Rodriguez how Ocana and Fernandez had killed the victim (Tr.863-864). He also stated that he ordered them to do so. (Tr.865).

All told, there were multiple references in the testimony to the contract-type nature of the killing (Tr.663, where Rodriguez tells how Ocana told him of the plan to kill the victim; Tr.669, where Ocana tells Rodriguez that appellant had ordered the killing).

The victim had indeed been killed late in the evening of June 9, or in the early morning hours of June 10, 1985. The gun which killed him belonged to Fernandez.

Appellant was charged in connection with the June 9 robbery and attack as well as the subsequent killing. The trial court granted appellant's motion to enter directed verdicts on the

robbery and attempted murder of June 9. The jury returned a conviction for manslaughter with a firearm for the killing.

ISSUE ON APPEAL

I.

WHETHER THE HARMLESS ERROR RULE APPLIES TO CASES IN WHICH OFFENSES HAVE BEEN MISJOINED IN A SINGLE INFORMATION?

SUMMARY OF THE ARGUMENT

This Court has recently ruled on the applicability of the harmless error rule to misjoinder of offenses, holding that the harmless error analysis is to be used in cases such as this one.

Based on the record, the Third District correctly applied the harmless error rule, as no prejudice could have accrued to petitioner below.

ARGUMENT

THE HARMLESS ERROR RULE APPLIES TO CASES IN WHICH OFFENSES HAVE BEEN MISJOINED IN A SINGLE INFORMATION.

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court thoroughly outlined the application of the harmless error rule in Florida. It was stated in that case "that automatic reversal of convictions is only appropriate when the constitutional right which is violated vitiates the right to a fair trial." DiGuilio, at 1134.

This Court went on to rely on United States Supreme Court precedent on the subject[1] and enunciated the law in Florida for dealing with trial court errors on the appellate level.

In the course of its analysis, this Court discussed the application of the per se reversal rule to errors which are not always harmful:

> "[I]f an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless. See, for example, [citations omitted], United States v. Lane, ___ U.S. ___, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986).

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[1] Chapman v. California, 386 U.S. 19 (1967).

DiGuilio, at 1135.

The respondent notes that this Court's favorable reliance upon Lane in the above-quoted passage is of special importance to this case, for the Lane decision was relied upon below by the Third District in finding the harmless error rule applicable to misjoinder of offenses. The respondent interprets this language from DiGuilio to mean that this Court was basically in agreement with the ultimate holding of Lane, and that it would be improper to categorize the error of misjoinder as being subject to automatic reversal.

If DiGuilio's language were not enough, this Court has since touched on this issue in more direct fashion in Livingston v. State, So.2d ___ (Fla. 1988), 13 F.L.W. 187 (Fla. March 10, 1988, case number 68,323).[2]

Livingston adopts the harmless error analysis of Lane.

> Even if we found that the court erred in granting the consolidation, we would not find that error to warrant reversal. In United States v. Lane, 474 U.S. 438 (1986), the Court held that the harmless error rule should be applied to

[2] As of this writing, the mandate in Livingston has not been issued, as a Motion for Rehearing is still pending.

> misjoinders and that reversal is required only if misjoinder causes actual prejudice by having a damaging effect or influence on the jury's verdict. In view of the overwhelming evidence of Lane's guilt the Court found any error harmless. We find the same in the instant case.
>
> Livingston, at **188.**

Respondent urges this Court to remain on the side of use of the harmless error rule in misjoinder cases. Such a position is fully supported by Lane and DiGuilio. It is also supported by this Court's recent holding in Bryan v. State, ___ So.2d ___ (Fla. 1988), **13** F.L.W. **575** (Fla. Sept. **22**, 1988), case number 68,803), which holds DiGuilio applicable to the improper use of "other crimes" evidence.[3] Both misjoinder and the improper use of other crime evidence involve the same evil --- putting before the jury other criminal acts of the accused which have no bearing on the crime for which he is being tried. If the use of improper Williams Rule evidence can be subject to harmless error analysis, so too should the misjoinder of offenses.

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[3] The "Williams Rule," Williams v. State, **110** so.2d 654 (Fla. **1959).**

Application of the rule

Respondent hereby adopts the reasoning of the Third District regarding the application of the harmless error rule to the facts of this case. Judge Pearson's text cogently explains why no prejudice could have accrued to petitioner:

> "But even as the offenses of the 9th and the 10th were so disconnected from each other as to create a misjoinder, 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. Indeed, it could well be argued that the State's wholly unsuccessful efforts to tie the defendant to the bungled crimes of the 9th might well have undermined its efforts to convince the very same jury that the defendant was tied to the crime of the 10th, thus making the joinder not only harmless but beneficial to the defendant. Needless to say, when it came time for closing argument, the State made no further mention of anything that occurred on the 9th and, it of course follows, any connection between the events of the 9th and 10th.
>
> Considering all of these circumstances--the lack of any bolstering effect of the erroneously admitted hearsay evidence concerning the robbery and attempted murder of the 9th, the court's acquittal of the defendant on these charges and instruction to the jury to disregard all reference to them, and the

> substantial direct evidence through the testimony of two witnesses that the defendant had indeed hired two men to kill Perez to avoid paying a drug debt--we are convinced that the error of the misjoinder is harmless."
>
> Beltran, at ___So.2d___ (Fla. 3 DCA 1988), 13 F.L.W. 2088 at 2088 (Fla. 3 DCA Sept. 6, 1988).

Respondent also points out that what happened below --- multiple charges followed by entry of a judgment of acquittal on some followed by a conviction on the remaining --- occurs with great frequency in criminal trials. Are we to glean from this the rule that all defendants so charged are entitled to new trials simply because the State was unable to prove all offenses? Surely no one would suggest that a defendant's acquittal on some pending charges means that he has been unfairly prejudiced regarding the remaining count(s) simply because the jury heard incriminating (but insufficient) evidence concerning those offenses. As Judge Pearson pointed out at the end of his opinion, all these offenses would otherwise have been properly joined had the state had more evidence to tie appellant to the events of June 9. There is no substantive difference between what happened here and the common scenario of a defendant who escapes conviction on some but not all of the crimes with which he is charged.

CONCLUSION

Based on the foregoing, the Third District's question should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF** OF **RESPONDENT** was furnished by mail to **LAWRENCE BESSER**, 1925 Brickell Avenue, Suite D-207, Miami, Florida 33129 on this 4th day of November, 1988.

STEVEN T. SCOTT
Assistant Attorney General

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