THE SUPREME COURT OF FLORIDA

FILED
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FEB 5 1990
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CASE NO. 73,075

HENRY GARCIA,
aka DAVID GARCIA, aka ENRIQUE JUAREZ

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE
THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

REPLY BRIEF OF APPELLANT

HENRY GARCIA

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STATEMENT REGARDING RULE 9.210 *(C)*

Rule 9.210 (c), Florida Rules of Appellate Procedure, provides that an appellee shall omit a statement of the case and facts "unless there are areas of disagreement, which should be specified." The state disagrees with the defendant's statement of facts and provides its own, but only once does the state specify an area of disagreement.

The state says that the defendant "completely omitted" the testimony of Helen McMakin, a letter carrier. (State's brief, at 8). Ms. McMakin testified she attended a party on a Saturday evening, which testimony, in turn, assisted the victims' neighbor, Xemina Evans, in remembering when she was awakened by a noise that may have been related to the crimes. (T.1210-1217, 1219-1225).

The defendant did not omit Ms. McMakin's testimony. The defendant's statement of facts provides:

> Mrs. Evans explained that her inconsistent testimony was based upon her recollection that the awakening happened after another neighbor's late night party. (R.1221-3). A party-goer testified the party was on Saturday. (R.1210-1217).

(Defendant's brief, at 8-9).

ARGUMENT

I

THE COURT ERRED IN EXCLUDING BUSINESS-EMPLOYMENT RECORDS WHERE THE RECORDS WERE AUTHENTICATED AND REBUTTED THE STATE'S PIVOTAL EVIDENCE BY SHOWING THAT THE DEFENDANT COULD NOT HAVE BEEN THE MIGRANT WORKER OVERHEARD IN A FIELD CONFESSING, "HEREBY DENYING THE DEFENDANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO COMPULSORY PROCESS.

This was a gruesome rape-multiple murder case. There was no physical evidence or eyewitness to even suggest an investigative lead **to** the perpetrator. The state does not dispute that the critical evidence was Rufina Perez-Cruz' identification of the defendant as the migrant worker who made a "bragging" confession in the fields shortly after the crimes. What the state disputes is what is agreed to be the principle issue in this appeal: whether the jury should have been denied what was the best, and only available, defense evidence discrediting Ms. Perez' identification--business-employment records which prove the defendant could not have been the braggart, and, therefore, that he was not the perpetrator.[1]

Ms. Perez, herself a migrant worker, testified that she had learned of the crimes from media reports. **(R.1360, 1362). A**

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[1] The crimes occurred on January 15 or **16, 1983. (R.1022-3, 1025, 1034).** The excluded records show that the defendant and Ms. Perez last worked together on January 7, **1983. (2SR.1, 2).** These dates are critical, and if believed by the jury would likely have resulted in acquittal. It is probably for this reason the state makes no argument that the records exclusion was harmless error. Indeed, given that there was no corroboration of Ms. Perez' identification, and the paucity of evidence without it, a harmless error argument would be impossible to make.

couple of days latter, in January, 1983, she was in the fields working for a "crew leader" named Trevino when she overheard a male worker bragging to other male workers that he was unconcerned about entering a home through jalousies, and "fucking up" two women, because the women were in "hell." (R.1365-7). Ms. Perez recognized the braggart as someone who was also working for Trevino. (R.1380). More than five years latter, at the trial, she identified the defendant as the braggart. (R.1363-5). She admitted she could not identify the workers who were party to the conversation because Trevino hired different people everyday. (R.1369). There is no evidence that Ms. Perez ever made an out-of-court identification of the defendant or his photograph before the trial. (R.1-1902).

Trevino kept contemporaneous payroll records in the ordinary course of his business. (R.1525, 1530). The defendant subpoenaed the 1983 records of Ms. Perez and himself. (R.1522-3). They showed that both worked for Trevino before the crimes, but that only Ms. Perez worked after the crimes. (2SR.1, 2). Thus, if the jury believed the records, they would have believed that Ms. Perez was incorrect in her identification of the defendant. But the evidence was excluded from the jury, and the jury, believing the identification, convicted the defendant.

The state now says that the business-employment records were rightly kept from the jury because 1) they were "inherently unreliable," 2) the misspelled labelling of the defendant's name made them not "relevant," and, 3) the defendant "failed to

present any reasonable theory upon which the [defendant's employment] record would exculpate him." (State's brief, pages 33, 41). These contentions are as erroneous as can be.

1. The employment records are not inherently unreliable and were properly authenticated and established to be business records

In the lower court the prosecutor admitted that the record custodian's testimony could not be **"questioned." (R.1537).** The custodian explained that the records were made in the regular course of business as each employee worked. **(R.1525, 1530).** Entries to the records were generally made by either the custodian or her sister; those for the defendant were actually made by the sister while those for Ms. Perez were made by both the custodian and the sister. **(R.1526-7).** The custodian and her sister were Trevino's daughters. **(R.1526).**

The custodian agreed, during leading questions asked by the prosecutor, that there was nothing "which would document these as authentic" and that there were no "documents to support the figures" on the records. **(R.1529).** The custodian acknowledged that she did not know the defendant **(R.1530);** she then agreed that there was no "authenticating information . . . that would tie this piece of paper . . . to any person in the entire world." **(R.1531).**

The prosecutor then argued to the judge that the Trevino records were not accompanied by "supporting" documentation, not in the witness' own hand, and thus, not "relevant" or "authen-

tic." (R.1532, 1533). The defendant wanted to call the custodian's sister to further explain the entries, but the prosecutor immediately responded that the sister's testimony would make no difference, because:

> So, for the following reasons so that the record is absolutely clear, it's not [the custodian's] problem or [the sister's] problem. The records ***themselves*** are inadequate to establish the requisite relevance and competency for these proceedings.

(R.1537) (emphasis added). The judge agreed and adopted the prosecutor's language nearly verbatim (R.1538), and then added that the records were not **"reliable"** and not "adequately authenticated." (R.1561).

In this Court the state drops any claim that the records were not authentic but still expands upon the prosecutor's rhetoric and designates it an "inherently unreliable" argument.[2] The state points out that the ***forms*** used by Trevino do not contain entries at the spaces ***allowing*** for a social security number, address, nature of work, and etc. Thus, the state concludes, the custodian's testimony only "further placed into doubt the reliability . . . ." (State's brief, at 36).

The state, however, overlooks the custodian's testimony that explained the absence of such information. According to the custodian, while social security numbers are sought, the migrants often delay, and then never provide, such information.

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2 The actual exhibits offered by the defendant were Trevino's originals; they have been transmitted to this Court and are designated the first supplemental record.

(R.1529). It is important to emphasize that the business-employment records were not offered as proof for any matter related to a social security number or other information about the defendant. The records were offered to show that the defendant and Ms. Perez did not work together for Trevino at any time after the crimes. The records clearly and unequivocally show this, regardless of the absence of the information the state says should be present. The state advances no argument which suggests that the absence of general information about the defendant overcomes the "unquestioned" testimony of the custodian which properly predicated the documents as business records from a disinterested employer which showed the days worked by the defendant and Ms. Perez.[3]

The state also overlooks that its current argument flies in the face of its position below. The prosecutor specifically accepted the custodian's testimony as "unquestioned" and acknowledged that her sister, if called, would have further explained the asserted uncertainties regarding the manner in which the records were made.

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[3] For some unknown reason the state does not argue that Ms. Perez' records are similarly faulted. In fact, her records suffer the same imperfections as the defendant's. Perhaps the state is reluctant to attack Ms. Perez' records because it wants to dim the light on her assertion that she was working for Trevino when she overheard the bragging confession. If it were disbelieved that she was then working for Trevino, then it could not be believed that the braggart was the defendant, since Ms. Perez made her in-court identification of the defendant ***because*** he was a Trevino worker. **(R.1368-70).**

The custodian's testimony was plain and unequivocal--*these* were the business-employment records contemporaneously made in the regular course of business. Just because the state can think of a better record keeping procedure does not mean that business records of a completely disinterested witness can be excluded. The state cites no authority which holds that business records, once properly predicated upon a custodian's testimony, can be excluded because an opponent thinks they were improperly made.[4] The state's contention is nothing more than a jury argument which goes to weight, rather than admissibility, of evidence.

The inherently unreliable argument is simply an attempt to support the trial court's initial ruling that the records "have [not] been established as a matter of law to be trustworthy." (R.1536). Since the custodian's testimony was uncontradicted (as well as unquestioned), the trial court's ruling is simply a

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4 The state correctly cites Specialty Linings, Inc. v. B. F. Goodrich, 532 So. 2d 1121 (Fla. 2d DCA 1988), LEA Industries, Inc. v. Raelyn Intern., Inc., 363 So. 2d 49 (Fla. 3d DCA 1978), and Mastan Co. V. American Custom Homes, Inc., 214 So.2d 103 (Fla 2d DCA 1968), for the general proposition that the trial court enjoys broad discretion in admitting business records. However, nothing in these cases, or any authority, allows a judge to disregard codified law and exclude business records when admissibility requirements are established by uncontroverted evidence. See Section 90.803 (6)(a), Fla. Stat. Holley v. State, 328 So.2d 224, 225-6 (Fla. 2d DCA 1976); McEachern v. State, 388 So.2d 244, 246 (Fla. 5th DCA 1980).

Moreover, regardless of how much discretion is afforded a trial judge, it is certainly an abuse of that discretion to exclude evidence necessary to effectuate an accused's right to compulsory process and to present a defense. That is precisely what occurred in this case when the business-employment records were excluded.

finding based upon its physical view of the "cold" documents. This Court is in the same position as the trial court to evaluate the "as a matter of law" reliability of the records. The ruling below differs from a factual finding upon contested testimony where witness credibility was weighed and is therefore entitled to a lesser, or even no, presumption of correctness. ***See, Dukes v. Dukes,*** 346 So.2d 544,545 (Fla. 1st DCA 1976) (lesser presumption); ***L & S Enterprises V. Miami Tile and Terrazzo, Inc.,*** 148 So.2d 299,300 (Fla. 3d DCA 1963) (same); ***Traub*** V. ***Traub,*** 135 So.2d 243,244 (Fla. 2d DCA 1961) (no presumption). ***See also Town of Palm Beach v. Palm Beach County,*** 460 So.2d 879,882 (Fla. 1984) (legal effect of evidence is a question of law where facts essentially undisputed).

The state is actually quite desperate in advancing its inherently unreliable theory. Nothing demonstrates this more than the remainder of its claim on this point. The state says that the Trevino business-employment records were properly excluded because they were not made in conformity with the requirements of various record keeping statutes and regulations designed to protect migrants from employer abuse. According to the state, Trevino failed to adhere to 29 U.S.C. § 1821 (1983), 29 C.F.R. 500.80 (1983), and Section 450.33(6), Florida Statutes (1987).

The state tells us that the rule for admissibility of business records, set forth in section 90.803(6) of the evidence code, is amended by worker protection statutes and a

bureaucratic regulation. The sole authority cited for this proposition is Harwell v. *Blake*, 180 So.2d 173 (Fla. 2d DCA 1965). With great detail the state explains that the *Harwell* court found that the offered evidence, judicial records, failed to adhere to a statute and was therefore inadmissible. However, the state fails to mention that the statute in question, former section 90.10, Florida Statutes, was a forerunner of our present evidence code and was specifically designed to govern the admissibility of judicial records.

Despite this important distinction, the state asserts that Harwell supports the proposition that statutes and a regulation enacted to protect migrants can also amend the rules of evidence. Neither Harwell nor any other known authority suggests that a statute not concerned with either authentication or business records can be a basis for excluding otherwise admissible evidence. Certainly record keeping statutes and regulations go to weight and might provide useful cross-examination, provided they were in effect at the time the records were made.

And therein lies another problem for the state's new-found argument against admissibility. The state cites a 1987 Florida statute, and a 1983 federal statute and regulation, both of which went into effect after Trevino made the January, 1983 records that the defendant wanted to use to prove his

innocence.[5] The state's "inherently unreliable" contention does not need further attention.

2. The misspelling of the defendant's name did not make the business-employment records irrelevant

The indictment specified, and the trial judge along with the prosecutor and lead detective acknowledged, that the defendant used the names "Henry Garcia," "David Garcia," and "Enrique Juarez." (R.1, 275-5, 278-82, 289, 1474, 1894). Accordingly, the defendant subpoenaed his employment records under all three names. (R.1524). Trevino had none under either Henry Garcia or David Garcia, and the records for Enrique Juarez were labeled with a misspelling--"Enrique Juares."[6]

The state notes that Ms. Perez and others knew the defendant as Henry Garcia, and that, perhaps, the defendant used a fourth name for his employment with Trevino. (State's brief, at 41). The state then argues that without other evidence, such as "a pay stub in the defendant's possession," the misspelling means that the business-employment records are not the defendant's. (State's brief, at 41). The point of all

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[5] The federal statute and regulation became effective on April 14, 1983. See Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, § 524, and 48 Fed. Reg. 15805 (1983).

[6] The state admits in its brief that **"Juares"** is a misspelling of one of the defendant's last names. State's brief, pages 31, 35). There is no suggestion that "Juares" is a misspelling of a last name not used by the defendant.

this, according to the state, is that the records are irrelevant because they must belong to someone else. This contention is rejected by a fair factual analysis and by sound legal authority.

In his initial brief the defendant showed that because a) Ms. Perez testified she overheard the confession in January, 1983, while both she and the defendant were working in the fields for Trevino, b) Trevino kept payroll records, then c) if the defendant was the braggart, there would be payroll records showing that he worked with Ms. Perez after the crimes occurred. (Defendant's initial brief, pages 37-38). Significantly, there were records labeled for Ms. Perez (without a social security number or other identifying information) and although they were excluded by the trial court, the state does not now argue that they are not hers. The state reserves this argument for the defendant because one of Trevino's daughters misspelled a last name used by the defendant, and because the defendant *could* have been using a fourth last name for his work with Trevino.

First, it makes no difference that the label is misspelled. A spelling mistake by Trevino's daughter, where the evidence irrefutably demonstrates the predicate for business records, and where there was no motive for Trevino or his daughters to fabricate evidence to help the defendant at his murder trial, is simply a red herring. In fact, it is an appellate red herring because it was never mentioned below as a basis for excluding the business-employment records.

Second, the defendant is entitled to the perfectly reasonable inference that when a state's witness says he worked for a man named Trevino in January, 1983, his records are Trevino's January, 1983 business-employment records that are labelled with his name. This is especially true when there are no records under two other names also used by the defendant and there is no evidence that the defendant used a fourth name, either with Trevino or at any other time, on any other occasion, for any other reason. This inference is not rendered unreasonable by the defendant's failure to produce a pay stub more than five years latter.

Finally, case authority holds that a defendant who wishes to prove his whereabouts by business records is not required to do more than present the business records which bear his name. *Holley v. **State,*** 328 So.2d 224 (Fla. 2d DCA 1976), discussed in the defendant's initial brief at pages 39-40, addressed this problem. In Holley, it was held that to establish an alibi an accused may introduce motel guest records which show his name even though the desk clerk does not **testify.**[7]

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[7] The state attempts to distinguish Holley by asserting it stands only for the proposition that photocopies of business records may be admitted. This is not a fair reading of the case.

Admissibility of copies are the subject of rules and authorities quite distinct from business records. While it was mentioned in Holley that the originals had been destroyed, the opinion makes clear that the Uniform Business Records As Evidence Act (former codified law) was the issue at hand. 328 **So.2d,** at 225. The court declared that **"the** argument that [the record custodian] was not the desk clerk is beside the **point."**

(continued..)

The defendant's position is considerably stronger than Holley's. The testimony of Ms. Perez forecloses the possibility that the defendant scoured the files of crew leaders around the country to see if a worker with one of his three names had records which would help him establish an alibi. These were the records of Trevino for January, 1983--the exact and only records which would corroborate, or totally discredit, Ms. Perez' identification that the defendant was the Trevino worker who made the bragging confession a couple of days after the crimes were committed.

Clearly the business-employment records were relevant. Like its inherently unreliable contention, the state' position is really a dispute as to the weight of the evidence, a dispute which the jury should have been allowed to resolve.

3. There is a very reasonable theory of innocence established by the excluded business-employment records

For this argument the state cites ***Blanco*** V. ***State,*** 452 So.2d 520,523 (Fla.), ***cert. denied,*** 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed 2d 953 (1984). In ***Blanco,*** an accused murderer wanted to show eyewitness mis-identification by proving that there had been nearby robberies. With this established the accused hoped the jury would suspect that the robbers were

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[7](...continued)
Id. Holley is a business records case which is authority for finding a business record relevant where it reflects an accused's name. The jury then determines the weight to which the record is entitled.

guilty but that he was not. This Court held that the robbery evidence was properly excluded because there was no reasonable theory that would exculpate the accused.

Any comparison of this case with *Blanco* is frivolous. The excluded records show that the defendant did not work with Ms. Perez after the murders and that, therefore, he could not have been the migrant she overheard making the bragging confession. This was the pivotal evidence in the state's case. Without it there could have been no conviction. The state's claim that *Blanco* applies must be rejected out of hand.

II

DUE PROCESS OF LAW WAS DENIED WHERE THE ENTIRE BURDEN OF PROOF WAS LAID UPON THE DEFENDANT AND REQUIRED HIM **TO** PROVE THE TRUTH OF AN ALIBI, WHICH HE DID NOT **RAISE,** IN **ORDER** TO BE FOUND **NOT** GUILTY.

All arguments advanced by the state are rebutted in defendant's initial brief.

III

DUE PROCESS WAS DENIED WHERE IN A CASE WITH VERY **LITTLE** EVIDENCE AND THE DEFENDANT DID NOT TESTIFY THE PROSECUTOR DELIBERATELY INFLAMED THE JURY'S PASSION OVER A REVOLTING CRIME BY APPEALING TO EMOTION, ATTACKING THE DEFENDANT AS A LIAR, CHALLENGING THE DEFENSE TO PROVE INNOCENCE, CREATING ILL WILL AGAINST DEFENSE COUNSEL, **AND** BY "TESTIFYING" AGAINST THE DEFENDANT IN CLOSING ARGUMENT.

Very little need be said to rebut the state's argument. The state maintains that, with the exception of one admitted but slight instance of misconduct, the prosecutor's comments have been taken out of context. The prosecutor's comments are quoted

accurately and are presented in the context the defendant believes the jury understood them to mean.

The state forgives the admitted misconduct, "testimony" by the prosecutor, as "inadverten[ce]." (State's brief, at 63). It is, however, no coincidence that the prosecutor was inadvertent about the most significant issue in the case--exclusion of the business-employment records. Her "testimony" that the police had looked for them and that they did not exist was reprehensible, and, in light of the absence of evidence, fundamental error requiring a new trial.

IV

THE COURT ERRED IN CONSIDERING *AN* INFLAMMATORY VICTIM IMPACT STATEMENT FOUND IN THE PRESENTENCE INVESTIGATION REPORT WHEN IT SENTENCED THE DEFENDANT TO DEATH.

All arguments advanced by the state are rebutted in defendant's initial brief.

CERTIFICATE OF SERVICE

I DO CERTIFY that copy of hereof has been furnished to: Ivy Ginsberg, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite 921N, Miami, Florida 33128, by U.S. Mail/~~hand~~ delivery this ____ day of February, 1990.

Respectfully submitted,

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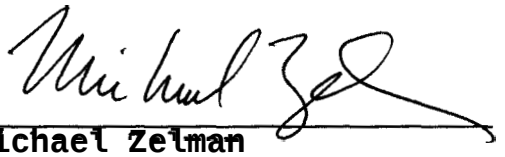
By: 
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