IN THE SUPREME COURT OF FLORIDA

CASE NO. 93, 491

DAVID GOODWIN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Petitioner, DAVID GOODWIN, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol “T.” designates the transcript of the trial court proceedings. The symbol “A.” designates the Appendix, which contains a copy of the Fourth District’s opinion in this case.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts, but makes the following clarifications and additions:

1. In opening statement, defense counsel told the jury, "You have an officer who, apparently, working in undercover capacity, is looking for people to sell him drugs." (T. 85). He urged, "this is a case of mistaken identity" (T. 88).

2. Without objection, Deputy Taranu testified, "I was working as an undercover drug buyer trying to make contact with the drug dealers." (T. 92).

3. Deputy Gandarilla, in explaining his "detail" on the date in question, stated that "basically what happens is, we have one of our guys or another fellow officer . . ." (T. 115).

4. Defense counsel began closing argument with, "Deputy Taranu was driving a police car working undercover trying to make contact with people so that he could buy cocaine." (T. 151).

5. In its opinion, the Fourth District stated, "our review of the record convinces us that this single comment was not 'unduly prejudicial'" (A. 1). Noting the officer's identification of Petitioner and corroborating evidence, the unchallenged similar evidence, and the fact that Petitioner did not raise any defense other than misidentification, the court concluded, "This is not a constitutional error to which State v. DiGuilio, 491 So. 2d 1129

(Fla. 1986), is required to be applied." (A. 1). It determined that Petitioner had failed to demonstrate prejudicial error (A. 1).

QUESTION PRESENTED

IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN DIGUILIO V. STATE, 491 SO. 2D 1129 (FLA 1986)?

SUMMARY ARGUMENT

POINT I

The trial court properly denied Petitioner's motion for mistrial with regard to Deputy Gandarilla's testimony. The testimony was background information that did not unduly prejudice Petitioner.

POINT II

Section 924.051(7), Florida Statutes, is constitutional and was properly applied to the instant case. States are free to make harmless error rules with regard to violations of state rules and laws. The Florida Legislature had the authority to enact the instant statute. Section 924.051(7) does not unreasonably interfere with this Court's rule making power.

By way of section 924.051(1)(a), the legislature defined what a challenging party's burden is under section 924.051(&). The definition coincides with the standards articulated under the federal harmless error statute and by this Court.

The instant case does not involve a constitutional error. Rather, it involves a violation amenable to resolution by reference to the Florida Rules of Evidence. Hence, the Fourth District properly utilized the prejudice standard under the harmless error statute instead of the harmless error rule used in cases of federal constitutional error.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR MISTRIAL WITH REGARD TO DEPUTY GANDARILLA'S TESTIMONY.

A motion for mistrial is addressed to the sound discretion of the trial court. Buenoano v. State, 527 So. 2d 194, 198 (Fla. 1988); Salvatore v. State, 366 So. 2d 745, 750 (Fla. 1979). The power to declare a mistrial and discharge the jury should be exercised with great caution and should only be done in cases of absolute necessity. Salvatore, 366 So. 2d at 750. A mistrial is a device used to halt the proceedings when an error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile. Johnsen v. State, 332 So. 2d 69, 71-72 (Fla. 1976). A mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial. Duest v. State, 462 So. 2d 446, 448 (Fla. 1985). A mistrial would not have been appropriate in this case.

The mere identification of a neighborhood where a defendant's arrest occurred as a high crime area is not reversible error per se. Gillion v. State, 573 So. 2d 810, 811 (Fla. 1991); Watson v. State, 672 So. 2d 71, 72 (Fla. 4th DCA 1996); Jefferson v. State, 560 So. 2d 1374 (Fla. 5th DCA 1990). In fact, such an identification may be relevant context testimony where, as here, it

explains why a particular area was chosen for a police operation. See Gillion, 573 So. 2d at 811. In Jefferson, the witness' testimony describing his job as an informant and indicating that he went to areas where drug activity was taking place did not present reversible error because it merely explained why the witness was at the particular location. 560 So. 2d at 1374. In Watson, the court held that the officer's testimony that he was involved in a "buy-bust" operation in which undercover officers would make purchases of narcotics in a narcotics area was not unduly prejudicial since it was just background information that did not impugn the area's reputation. 672 So. 2d at 72.

The State points out that Deputy Gandarilla did not directly testify that on the date in question Deputy Taranu was cruising an area known for street level drug sales. Rather, he premised his testimony about his job description with, "basically what happens is, we have one of our guys or another fellow officer . . ." (T. 115)(emphasis supplied). Any implication that the sale occurred in a drug commerce area did not warrant a mistrial. See Brown v. State, 570 So. 2d 427, 428 (Fla. 3d DCA 1990)(mistrial properly denied where prosecutor implied that transaction occurred in drug area).

The testimony could not have contributed to the verdict. See Gillion, 573 So. 2d at 812 (jurors would have to apply common sense that many innocent people use streets); Jefferson, 560 So. 2d at

1374 (even in high crime areas, the majority of people may well be law-abiding citizens). First, Deputy Taranu positively identified Petitioner as the person with whom he conducted the drug transaction. Moreover, Petitioner was stopped, within five minutes and near the area of the transaction, because he met the seller's description. Deputy Gandarilla testified that he saw Petitioner throw currency into the burning trash bin (T. 119).

Second, essentially the same type of testimony was admitted without objection prior to Deputy Gandarilla's testimony. See Pierre v. State, 597 So. 2d 853, 855 (Fla. 3d DCA 1992)(admission of the same or similar testimony rendered the complained of testimony harmless). Deputy Taranu testified, "I was working as an undercover drug buyer trying to make contact with the drug dealers." (T. 92). And, in statements to the jury, defense counsel stated "You have an officer who, apparently, working in undercover capacity, is looking for people to sell him drugs." (T. 85) and "Deputy Taranu was driving a police car working undercover trying to make contact with people so that he could buy cocaine." (T. 151). See generally Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983)(defendant may not complain on appeal about a matter which he invited).

Third, a curative instruction is likely to dissipate any prejudicial effect of an objectionable comment. Buenoano, 527 So. 2d at 198; Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982).

Here, any possible prejudice was remedied in light of the trial court's curative instruction to the jury to disregard the deputy's comments (T. 116). See Robinson v. State, 561 So. 2d 1264, 1264 (Fla. 3d DCA 1990)(remarks about high crime area did not require reversal where curative instruction given).

Fourth, defense counsel told the jury that this case was one of "mistaken identity" (T. 88). In Gillion v. State, 573 So. 2d 719, 720 (Fla. 4th DCA 1989), approved, 573 So. 2d 810 (Fla. 1991), the Fourth District stated that it did not feel that mere identification of a neighborhood as a high crime area should constitute reversible error, especially where the defendant is claiming mistaken identity.

Finally, the challenged testimony in this case constituted but a single incident, and not repeated testimony, and was not referred to in closing. See Davis v. State, 562 So. 2d 443, 444 (Fla. 2d DCA 1990)(isolated comment that neighborhood was a "drug supermarket" was not harmful). See also Gillion, 573 So. 2d at 812 (testimony about area not focus of trial).

POINT II

SECTION 924.051(7), FLORIDA STATUTES, IS CONSTITUTIONAL AND WAS PROPERLY APPLIED TO THE INSTANT CASE.

Section 924.051(7), Florida Statutes (Supp. 1996), provides that the party challenging a judgment or order of a trial court has the burden of demonstrating that prejudicial error occurred. Respondent submits that the burden placed on a challenging party under section 924.051(7) is constitutional and is consistent with the parameters set by the United States Supreme Court.

In Chapman v. California, 386 U.S. 18, 21 (1967), the court stated that application of a state harmless error rule is a state question where it involves errors of state procedure or state law, and not infractions of federally guaranteed rights. In Connecticut v. Johnson, 460 U.S. 73, 81 n. 9 (1983), the court recognized that state courts are free to interpret their own laws to permit fewer applications of the harmless error rule than does the federal constitution. In fact, in his dissent in Johnson, Justice Powell noted that the Connecticut harmless error statute actually requires the party claiming error to show that it was "materially injurious," with regard to alleged errors of state law. 460 U.S. at 91.

Clearly, then, the Florida Legislature had the authority to enact a statute that shifted the burden to the party challenging a judgment with regard to alleged errors pertaining to state rules

and laws. The court in Chapman recognized that state and federal harmless error rules serve the useful purpose of blocking setting aside convictions because of errors that have little likelihood of having changed the result of trial. 386 U.S. at 22. Indeed, earlier in Kotteakos v. United States, 328 U.S. 750, 760 (1946), the court had indicated that the federal harmless error statute only pertained to technical errors, and not errors of such a character that their natural effect is to prejudice a defendant's substantial rights.

Petitioner asserts that section 924.051(7) violates the separation of powers because it interferes with this Court's rule-making authority (Petitioner's Brief p. 14-15). This Court in State v. DiGuilio, 491 So. 2d 1129, 1134 (Fla. 1986), though, stated, "The authority of the legislature to enact harmless error statutes is unquestioned." And, in Kalway v. Singletary, 708 So. 2d 267, 269 (Fla. 1998), this Court noted that it had "deferred" to the legislature in limited matters relating to appeal. Indeed, in Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996) this Court specifically stated that the legislature may "place reasonable conditions upon it [an appeal] so long as they do not thwart the litigants' legitimate appellate rights."

Section 924.051(7), rather than interfere with any appellate rights, actually reaffirms the presumption of correctness of a

judgment or order on appeal. See Hitchcock v. State, 413 So. 2d 741, 745 (Fla. 1982); Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975). Moreover, regardless of the burden, the reviewing court must still evaluate the impact of any error to determine if the verdict was affected. See Heuss v. State, 687 So. 2d 823, 824 (Fla. 1996). Any doubt in the validity of section 924.051(7), then, should be resolved in favor of its constitutionality. See Leapai v. Milton, 595 So. 2d 12, 14 (Fla. 1992).

Petitioner complains that the burden under section 924.051(7) is vague (Petitioner's Brief p. 15). However, section 924.051(1)(a) defines "prejudicial error" as error that harmfully affected the judgment or sentence. This Court has described the standard of reversible error as error that "injuriously affected the substantial rights of the appellant." See Small v. State, 630 So. 2d 1087, 1089 (Fla. 1994). In United States v. Olano, 507 U.S. 725, 734 (1993), the court defined affecting "substantial rights" to mean showing that the error was prejudicial.

The court in Kotteakos explained that the burden under the federal harmless error statute on the party seeking a new trial was to show that technical errors of which the party complains affected substantial rights. 328 U.S. at 760. Respondent contends that under section 924.051(7), a defendant is similarly required to make a showing that either a technical error substantially affected the verdict or that the error is one that has the natural effect of

prejudicing a defendant's rights. See Kotteakos, 328 U.S. at 760.

The State maintains that the Fourth District properly found that Petitioner did not establish prejudicial error, since it determined that a constitutional error had not occurred. In Brecht v. Abrahamson, 507 U.S. 619, 631-632 (1993), the court said that the Kotteakos standard, "had substantial and injurious efect or influence in determining the jury's verdict," is grounded in the federal harmless error statute, 28 U.S.C. section 1111, which is only applied to claims of nonconstitutional error. It said that Chapman's harnmless beyond-a-reasonable-doubt standard is applied to claims of constitutional error. 507 U.S. at 630.

The court in United States v. Lane, 474 U.S. 438, 449 (1986) applied the less stringent Kotteakos harmless error standard to a case of misjoinder. It explained that the joinder standards under the federal criminal rules were not themselves of constitutional magnitude. 474 U.S. at 446, 449. Hence, it held that misjoinder affects substantial rights only if it results in actual prejudice. Id. at 449.

Later, in Dowling v. United States, 493 U.S. 342, 346-347 (1990), the court agreed with the circuit court's determination that a less stringent standard than the harmless error rule articulated in Chapman applied because the error was merely evidentiary and not constitutional in nature. 493 U.S. at 346, 354. The trial court in Dowling admitted testimony over the defendant's

claim that it was barred by collateral estoppel. The Supreme Court reasoned that because the evidence was only barred by the common-law doctrine of collateral estoppel, the Government was not "constitutionally" barred from using the contested testimony. 493 U.S. at 350.

The court recognized that the testimony had the potential to prejudice the jury. However, it stated that the question was whether the evidence was so extremely unfair that its admission violated "fundamental conceptions of justice." Id. at 352. It suggested that if it did not, then the testimony could be dealt with through nonconstitutional sources like the rules of evidence. It explained, "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly." Id.

In this case, like in Dowling, the alleged violation was evidentiary in nature. Because the alleged error did not amount to a denial of due process in light of the circumstances of this case, it was unnecessary for the Fourth District to apply the harmless error rule articulated in DiGuilio, which was based on the Chapman rule with regard to federal constitutional error.

Thus, the Fourth District properly applied section 924.051(7). The alleged error was resolvable by way of the Florida Rules of Evidence, specifically section 90.403, Florida Statutes.

Petitioner simply did not show that any probative value of the evidence was substantially outweighed by any prejudicial effect so to have harmfully affected the verdict.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, the decision of the District Court of Appeal should be AFFIRMED and the certified question answered in the AFFIRMATIVE, at least with regard to violations of state rules and laws as opposed to federal constitutional rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to, TATJANA OSTAPOFF, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on December 21, 1999.

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Counsel for Respondent