IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-805

FRANCISCO RODRIGUEZ
Appellant

-vs.-

STATE OF FLORIDA
Appellee

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

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STATEMENT OF THE CASE AND FACTS

Appellant Francisco Rodriguez was charged with burglary of an occupied building with an aggravated assault inside. (R. 15). On appeal from a jury trial on this charge, the sole issue raised was that the erroneous admission of hearsay statements made by Francisco's friend Coral Negron as to Francisco's intent and purpose required a new trial. The Third District Court of Appeal declined to reach the merits of this issue on the ground that any error was, at best, harmless. *Rodriguez v. State*, 215 So. 3d 194 (Fla. 3d DCA 2017). The Third District specifically relied on the standard found in section 59.041, Florida Statutes, which states that no judgment shall be reversed on the ground of improper admission of evidence unless the error resulted in a miscarriage of justice.

The following evidence was presented at trial: The State alleged that Francisco Rodriguez went to the apartment of Manny Londono and George Henriquez to avenge a wrong committed against his friend, Coral Negron. (T. 306). Coral lived next door to Manny and George. (T. 305). She was six months pregnant at the time and was having problems with her neighbors. (T. 511). The day before the incident, she had argued with Manny because his music was too loud. (T. 511). According to Manny, Coral told him, "I'm going to send somebody to come fuck you up." (T. 513).

The next day, Coral fought with one of the men—they each testified it was the other—because she believed Manny had cut off her electricity. (T. 333; 515). The third alleged victim, George's friend Yeovanny Tavarez, is an electrician. (T. 405). Coral called the police to investigate; the police came and spoke with the parties, but left without inspecting the fuse boxes. (T. 516; 677). Yeovanny testified that after the police left, he heard Coral tell Manny, "I'm going to get somebody to put a cap in [your] ass." (T. 814). Manny did not testify about this statement, but claimed that he later saw Coral stand in front of his open apartment door talking to someone on the phone. (T. 516). Manny said he heard Coral tell the caller his apartment number and then, "You better come over here right now." (T. 516). Yeovanny claimed that Coral peered into the apartment and said, "Yes, they are here now." (T. 818). No one heard her tell the caller her alleged former threat, i.e. "to come put a cap in their ass." Phone records show that Coral called Francisco thirty minutes prior to the incident. (T. 16).

Coral did not testify at trial. (T. 31). The defense moved pretrial to exclude her hearsay statements. (T. 31). The State argued they met the hearsay exception for a "then existing state of mind to…prove or explain acts of subsequent conduct of the declarant." (T. 32). The defense argued that the statements did not meet the exception because they were not introduced to prove *Coral's* intent to hurt her neighbors, but rather for the inference that *Francisco* acted consistently with her

wishes. (T. 36-37). The trial court denied the defense's motion and allowed the statements to be introduced through Manny and Yeovanny. (T. 37).

The trial of this case amounted to a credibility contest between three defense witnesses—the Appellant, Jose Gonzalez, and Richard Capaletti—and the three alleged victims. Francisco and Jose testified that Francisco went to Manny and George's apartment, with no weapon, to speak to them about leaving Coral alone. (T. 973, 992, 1054). Francisco testified that he never attacked them, but rather that the men attacked and beat him. (T. 1003, 1008). Richard also testified that Francisco did not have a firearm when he knocked on their door. (T. 810). The alleged victims in turn testified that Francisco brought a gun and pointed it at them at the outset. (T. 345, 821). It was undisputed that Francisco was severely beaten by the state witnesses and hospitalized as a result. (T. 533, 1021).

According to state witnesses George, Yeovanny, and Manny, before the incident with Francisco, they were hanging out inside their apartment, drinking and smoking marijuana. (T. 519). They heard a "forceful knock" on the door. (T. 340, 517). Manny testified that he went to the door to see who it was; Yeovanny testified that no one went to the door. (T. 520; 820). Both men claimed Francisco said he was there to rent an apartment. (T. 520; 819). When they did not open the door, he banged harder; Manny claimed he saw a firearm in Francisco's hand. (T. 521; 820). When Manny announced the gun, George dialed 911 on his phone.

(T. 820). Before he spoke to the 911 dispatcher, however, the men claimed Francisco kicked down the door and ran in. (T. 345). George's phone dropped to the ground and recorded parts of the ensuing scuffle; the open call was admitted into evidence. (T. 366).

The men claimed that Francisco ran up to George and Yeovanny. (T. 523). George testified that Francisco pointed the gun at both of them, but Yeovanny testified that Francisco held the gun directly to his temple. (T. 345, 821). According to Yeovanny, Francisco maintained constant eye contact with him while holding the gun to his head, not even breaking his stare when he pushed George against the wall. (T. 822). When Francisco finally broke eye contact, Yeovanny grabbed for the gun. (T. 823). Francisco and Yeovanny struggled for control of the gun while George put Francisco in a chokehold. (T. 348, 825). During this struggle, the firearm went off, sending a bullet through the window. (T. 350, 826). A few moments later, Francisco went limp from the chokehold. (T. 829). According to Yeovanny and George, Yeovanny grabbed the gun directly from Francisco's hand. (T. 350, 525). Manny, however, testified that he came out of the bathroom and kicked the gun away from Francisco towards George, who picked it up. (T. 525, 830).

Francisco was on the floor, surrounded by three men, with a gun pointed at him. (T. 830). George pushed Francisco out and told him to leave, so Francisco ran

away. (T. 350, 526, 528). Manny followed Francisco down the stairs and admitted to punching him "in the back of the head with all I had." (T. 528). Francisco stumbled on the steps but kept running so Manny "jumped on the steps and kicked him in his back," causing him to fall down the stairs; he somehow managed to get up and keep running. (T. 529). George and Manny chased after him and one of them—they each pointed the finger at the other—pushed him to the ground in front of the apartment building. (T. 355, 532). As he lay on the ground, Manny kicked him repeatedly in his face and head. (T. 533). Francisco was beaten so badly that he had a seizure and was hospitalized for four days. (T. 1021). Manny was not charged with any crime. (T. 22).

Francisco and defense witness Jose Gonzalez both testified to a very different version of the events. Francisco explained that he was hanging out with Jose that evening prior to basketball practice, which he has coached for nineteen years. (T. 990). He got a call from Coral, but testified that she simply asked him to come over "to talk to her neighbor" because the men were still being loud even after the police came. (T. 988, 1054). His friend Jose testified that Francisco did not appear mad or upset after this phone call, just urgent. (T. 977). Jose drove him over to Coral's apartment; he went in briefly to speak with her, came back out to tell Jose to leave, and then went back in to speak with her neighbors. (T. 993).

Francisco testified that he never brought a gun to the apartment. (T. 992). Jose similarly testified that he never saw Francisco with a gun that day. (T. 973).

Francisco went to Manny's apartment and knocked on the door. (T. 997). Manny came to the window and asked who he was, to which he replied, "I'm here about Coral, your neighbor." (T. 997). Manny responded, "That fucking bitch called the cops on me?" (T. 997). Francisco admitted that he became upset with the language Manny used to describe a pregnant woman, so he started cursing back at him. (T. 998). He told Manny that Coral "was pregnant and he was creeping her out and he needed to leave her alone." (T. 998).

After a couple of minutes, Francisco realized he was not getting through to Manny so he "tried a different approach." (T. 1000). He could smell marijuana coming through the door—in fact, George was growing a marijuana plant in the apartment—so he told Manny that Coral was going to call the police on them. (T. 1000). It was then that Manny threatened Coral: he made a cut throat gesture across his neck and said "she's going to get fucked up if she calls the cops" and "that fucking bitch is going to be dead." (T. 1001-02). The two men continued screaming at each other and banging on their respective sides of the door. (T. 1003). Francisco testified that as he banged on the door, he could feel that it was "a little loose" and had some "give and bounce" to it. (T. 1002). Francisco admitted to kicking the bottom of the door with his foot while he yelled, but denied

kicking the door down to enter the apartment. (T. 1005). He did not know what caused the door to open, but as he turned away, "it swung open [and] I saw a piece of the door frame fall." (T. 1003). Manny said to him, "What's your fucking problem?" and pulled him inside the apartment. (T. 1003).

Francisco testified that after he was pulled into the apartment, Manny and George started hitting him all over his body with their fists. (T. 1008). He kept his head down, trying to protect himself. (T. 1008). When he looked up, he saw Yeovanny pull a gun from his waistband and put it to his head. (T. 1009). Francisco feared for his life, so he grabbed Yeovanny's wrist and struggled with him. (T. 1016). As he struggled with Yeovanny, George tackled him. (T. 1017). This force caused Yeovanny's hand to be yanked, which made the gun go off. (T. 1018). George told him to leave, so he did. (T. 1019). On cross-examination, the State played a call Francisco made from jail to his mother after his arrest. (T. 1089). On the call, Francisco asked his mom to speak to the men about dropping the charges. (T. 1047). Nowhere on the call did Francisco admit his guilt to the charged crime or conduct. (T. 1091).

The defense also called Richard Cappelletti, who lived in the apartment building. (T. 790). The State had previously introduced the 911 call Richard made after hearing the gunshot. (T. 482). On the call, Richard told the dispatcher that he saw a black man kick down the men's door and then he saw a flash and heard a

shot. (T. 809). However, at trial, Richard testified that he only saw Francisco kick the bottom of the door and explained that the "door jamb was bad from the old tenant." (T. 796). Significantly, he also testified that he never saw Francisco with a gun while he was banging on the door. (T. 810).

In closing argument, the State relied on Coral's call to Francisco to prove that he went to the apartment with the intent to commit an assault inside: "This is the evidence that we have of the Defendant's intent to an assault inside apartment 14. First, we have the call from Coral Negron asking him to come over and bust a cap." (T. 1152). In response to the defense's objection to "facts not in evidence," the trial court instructed the jury to rely on its recollection. (T. 1152). The State later repeated this argument: "First, the phone call…She called the Defendant [and] asked him to come over and bust a cap." (T. 1154).

The jury found Francisco guilty of burglary with simple assault, with the specific findings that he did not possess, carry, or discharge a firearm in the course of the burglary. (R. 258). He was also acquitted of the battery against George. (R. 258). On appeal, the district court affirmed the conviction, holding that "Any error by the trial court in admitting the hearsay statements at issue was, at best, harmless." *Rodriguez v. State*, 215 So. 3d 194 (Fla. 3d DCA 2017). The district court relied on the harm standard of Florida Statute 59.041, "No judgment shall be set aside or reversed…on the ground of…the improper admission or rejection of

evidence…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."). *Id.*

SUMMARY OF THE ARGUMENT

In *State v. Lee*, this Court rejected the district court's use of the "miscarriage of justice" test of Florida Statute 59.041, and reaffirmed—again—the authority of the *DiGuilio* harmless error analysis. The Third District Court of Appeal's reliance on the "miscarriage of justice" standard in the present case is in direct violation of *Lee* and the entire *DiGuilio* line of cases.

Applying the correct *DiGuilio* test, the State cannot prove that its erroneous admission and reliance upon hearsay statements concerning Mr. Rodriguez's intent did not contribute to his conviction for burglary with assault. This case was a credibility contest between three defense witnesses and the three alleged victims, who admitted to beating and kicking Mr. Rodriguez to the point of hospitalization. Mr. Rodriguez and his two witnesses testified that he did not bring a gun to the men's apartment; Rodriguez further testified that he was the victim, rather than the perpetrator, of the attack. The three alleged victims, on the other hand, offered inconsistent accounts that contradicted each other on important facts such as who Rodriguez allegedly pointed the gun at, and who took the gun away from him. The harm of the hearsay statements was compounded by the State's repeated reliance upon them in its closing argument. Under these circumstances, the State cannot prove the error of admitting the hearsay statements was harmless. The Court must reverse the district court's decision and remand with directions to order a new trial.

ARGUMENT

THE DISTRICT COURT'S USE OF THE "MISCARRIAGE OF JUSTICE" TEST FOR HARM IS CONTRARY TO THIS COURT'S DECISIONS. UNDER THE CORRECT *DIGUILIO* STANDARD, THE DISTRICT COURT'S ERROR IN ADMITTING HEARSAY STATEMENTS REGARDING MR. RODRIGUEZ'S INTENT WAS NOT HARMLESS.

The district court affirmed Mr. Rodriguez's conviction, holding:

> Any error by the trial court in admitting the hearsay statements at issue was, at best, harmless. *See* § 59.041, Fla. Stat. (2015) ("No judgment shall be set aside or reversed…on the ground of…the improper admission or rejection of evidence…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.").

Rodriguez v. State, 215 So. 3d 194 (Fla. 3d DCA 2017). This Court has already rejected this very same "miscarriage of justice" standard.

In *State v. Lee*, 531 So. 2d 133 (Fla. 1988), this Court addressed the following certified question:

> Does the erroneous admission of evidence of collateral crimes require reversal of appellant's conviction where the error has not resulted in a miscarriage of justice but the State has failed to demonstrate beyond a reasonable doubt that there is no reasonable possibility that the error affected the jury verdict?

Id. at 134. The Court answered in the affirmative, rejecting the miscarriage of justice standard found in section 59.041, and reaffirming *State v. DiGuilio,* 491 So. 2d 1129, 1135 (Fla. 1986), as the correct analysis for harmless error. *Lee*, 531 So.

2d at 136. Under *DiGuilio*, the appellee must establish beyond a reasonable doubt that the error at issue did not contribute to the verdict. *Id.*

This Court has recognized that while the legislature has the power to enact harmless error statutes, "the inherent authority to determine when an error is harmless and the analysis to be used in making the determination" lies solely with the Supreme Court. *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999) (citing *Lee*, 531 So. 2d at 136 n.1). *DiGuilio* was decided in 1986, and case law is replete with admonishments from this Court over the years that it should not be substituted with any other harm analysis. *See Goodwin*, 751 So. 2d at 546 ("The *DiGuilio* standard of harmless error remains the applicable analysis to be employed in determining whether the error requires a reversal on direct appeal."); *Ventura v. State*, 29 So. 3d 1086, (Fla. 2010) (holding that Third District "improperly utilized an 'overwhelming evidence' test" when considering harmless error); *Williams v. State*, 863 So. 2d 1189, 1190 (Fla. 2003) (quashing Third District's "did not deprive defendant of a fair trial" harm analysis"); and *Knowles v. State*, 848 So. 2d 1055, 1058-59 (Fla. 2003) ("The *DiGuilio* standard remains the benchmark of harmless error analysis.").

The district court here did not analyze whether the erroneously admitted hearsay statements "contributed to the conviction." *DiGuilio*, 491 So. 2d at 1135. Instead, it employed the test expressly rejected by this Court in *Lee*, 531 So. 2d at

136, concluding that the error was harmless because it did not "result[] in a miscarriage of justice." *Rodriguez,* 215 So. 3d at 194. Under the proper *DiGuilio* harm standard, the State cannot now prove beyond a reasonable doubt that there is no reasonable possibility that the error of admitting and relying upon numerous hearsay statements to prove Mr. Rodriguez's criminal intent did not affect the verdict. *See DiGuilio,* 491 So.2d at 1135.

The trial was a credibility contest between the three defense witnesses, including Mr. Rodriguez, and the three alleged victims. It is undisputed that those men beat Rodriguez so severely that he had a seizure, was evacuated from the scene in an ambulance, and was hospitalized for four days. The men offered conflicting accounts that accused Rodriguez of entering the apartment and threatening them with a gun. Rodriguez testified that the men who beat him were the aggressors. No physical evidence tied Rodriguez to the gun, and both Jose and Richard testified that Rodriguez did not have a gun. The question for the jury was whether Rodriguez's testimony raised a reasonable doubt.

This is the context in which the prosecutor repeatedly relied on Coral's hearsay threats in closing argument as its primary proof that Rodriguez intended to burglarize and assault the men: "This is the evidence that we have of the Defendant's intent to an assault inside apartment 14. First, we have the call from Coral Negron asking him to come over and bust a cap." and "First, the phone

call…She called the Defendant [and] asked him to come over and bust a cap." (T. 1152, 1154). These arguments contradicted Rodriguez's testimony, corroborated by other witnesses, that he was not angry when he went over to the apartment, and was not carrying a firearm. The State used the hearsay statements to bolster the credibility of its witnesses—witnesses who admitted to severely beating Rodriguez, and yet were not charged with any crime, and whose testimonies contained numerous important contradictions between the three stories.

Contrary to their story of burglary and assault, the evidence suggested that the men fabricated the story to divert attention away from their own criminal conduct in chasing Rodriguez, pushing him down the stairs, and then kicking him in the head until he had a seizure and was hospitalized. The jury's verdict acquitting Rodriguez of the firearm and battery charges demonstrates its disbelief of the men's stories and the credit it gave to Rodriguez's testimony. Under these circumstances, the State cannot prove that the State's improper introduction and reliance on Coral's hearsay statements did not contribute to the jury's verdict. *See DiGuilio,* 491 So.2d at 1135. The Court must reverse the district court's decision and remand with directions to order a new trial.

CONCLUSION

For the foregoing reasons, the Court must quash the district court's opinion and remand with instructions to order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Natasha Baker-Bradley, counsel for the Appellant, HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by email to counsel for the Appellee, Nikole Hiciano, Assistant Attorney General, Office of the Attorney General, Criminal Division, One SE Third Avenue, Suite 900, Miami Florida 33131 at CrimAppMIA@myfloridalegal.com this 13th day of November, 2017.

Pursuant to Rule 2.516, undersigned counsel hereby designates the following email address for the purpose of service of all documents in this proceeding: appellatedefender@pdmiami.com (primary); NZB@pdmiami.com (secondary).

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14-point proportionately-spaced Times New Roman.

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