

IN THE SUPREME COURT OF FLORIDA

---

CASE NO. SC20-506  
Lower Tribunal Nos. 3D18-165;  
132014CF0129410001XX

---

ROBERT VELAZCO,

Petitioner,

STATE OF FLORIDA,

Respondent,

ON REVIEW FROM THE DISTRICT COURT OF APPEAL  
THIRD DISTRICT, STATE OF FLORIDA

---

**PETITIONER'S INITIAL BRIEF**

---

**MICHAEL MIRER, ESQ.**

100 N. Biscayne Blvd.

Suite 1300

Miami, Florida 33132

Telephone: (305) 536-6177

Facsimile: (305) 536-6179

E-mail: michael@mirerlaw.com

Florida Bar No. 119490

RECEIVED, 07/26/2021 12:55:27 PM, Clerk, Supreme Court

**TABLE OF CONTENTS**

**PAGE NO.**

TABLE OF CONTENTS..... ii

TABLE OF CITATIONS..... iii

STATEMENT OF THE CASE AND FACTS..... 1

SUMMARY OF THE ARGUMENT..... 9

ARGUMENT..... 10

ISSUE I

THIS COURT SHOULD QUASH THE THIRD DISTRICT COURT’S DECISION IN THIS CASE AND APPROVE FOURTH DISTRICT COURT’S DECISION IN *ANGUILLE V. STATE*, 243 SO. 3D 410 (FLA. 4<sup>TH</sup> DCA 2018) BECAUSE PETITIONER’S CONVICTIONS AND SENTENCES FOR BOTH DUI CAUSING SERIOUS BODILY INJURY AND DUI CAUSING PROPERTY DAMAGE VIOLATED DOUBLE JEOPARDY..... 10

ISSUE II

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DETERMINED A STATE’S WITNESS WAS UNAVAILABLE AND PERMITTED THE STATE TO PLAY HER VIDEOTAPED DEPOSITION TESTIMONY OVER VELAZCO’S OBJECTION AND THE THIRD DCA SHOULD HAVE REVERSED AND REMANDED THE CASE FOR A NEW TRIAL ON THIS BASIS. . . 16

CONCLUSION..... 19

CERTIFICATE OF SERVICE..... 19

CERTIFICATE OF COMPLIANCE WITH FONT AND WORD COUNT REQUIREMENT..... 20

**TABLE OF CITATIONS**

<b>CASES</b>	<b>PAGE NO.</b>
<i>Anguille v. State</i> , 243 So. 3d 410 (Fla. 4 <sup>th</sup> DCA 2018).....	8-9, 10, 11-13, 15-16
<i>Arnold v. Arnold</i> , 889 So. 2d 215, 216 (Fla. 2d DCA 2004).....	18
<i>Blockburger v. U.S.</i> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).....	10
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	16-17
<i>Green v. Cottrell</i> , 204 So. 3d 22, 29 (Fla. 2016).....	16
<i>Houser v. State</i> , 474 So.2d 1193 (Fla.1985).....	10
<i>Lukas v. State</i> , 627 So. 2d 123 (Fla. 5 <sup>th</sup> DCA 1993).....	19
<i>Partin v. State</i> , 82 So. 3d 31 (Fla. 2011).....	17
<i>State v. DiGuilio</i> , 491 So.2d 1129 (Fla.1986).....	19
<i>State v. Marsh</i> , 308 So. 3d 59 (Fla. 2020).....	12
<i>State v. Paul</i> , 934 So.2d 1167 (Fla.2006).....	14, 15

*Valdes v. State*,  
3 So. 3d 1067 (Fla. 2009)..... 14, 15

*Velazco v. State*,  
305 So. 3d 72 (Fla. 3d DCA 2020)..... 8-9, 13-16, 17

**FLORIDA STATUTES**

§ 90.804..... 17  
§ 316.193..... 15  
§ 775.021.. ..... 10-11, 13

**RULES**

Florida Criminal Procedure Rule 3.190. .... 17

## **STATEMENT OF THE CASE AND FACTS**

In this appeal Petitioner, Robert Velazco, will be referred to as “Velazco” and Respondent will be referred to as “the State.” References to this Court’s Record will be made using the letter R followed by the page number (e.g. R-1). References to the District Court’s Record will be made using the letters “DCR” followed by the page number. References to the trial transcript will be made using the letter “T” followed by the page number.

On September 5, 2017, Velazco was charged by Amended Information with leaving the scene of an accident involving serious bodily injury in violation of Florida Statute § 316.027(2)(b) (Count 1); driving under the influence causing serious bodily injury in violation of Florida Statute § 316.193(3)(c)(2) (Count 2); driving under the influence with damage to property or person in violation of Florida Statute § 316.193(3)(a)(b)(c)(1) (Count 3); and failure to obey a traffic control device (Count 4). DCR-85. The alleged victim charged in Count 2 - DUI causing serious bodily injury - was Alexander Rodas. DCR-87. Count 3 charged Velazco with DUI causing damage to Rodas’ scooter. DCR-88.

These charges stem from an accident that occurred on June 4, 2014. At 12:13 a.m. on that date, traffic cameras captured video of an accident at

southwest 57<sup>th</sup> Avenue and southwest 8<sup>th</sup> Street in Miami-Dade County, Florida. T-109. The video showed a white pick-up truck ran the red light. T-110. However, the driver of the white pick-up truck was not visible. T-111.

Trial began on October 31, 2017. The State's first witness, West Miami Police Department Officer Diaz, testified that a short time before the accident, he pulled over a man on a scooter at the same intersection. T-113. He ticketed the man for not having a headlight and driving without a valid license. T-113. Instead of towing the scooter, he permitted the scooter driver to contact his uncle to pick it up. T-113-114. Officer Diaz instructed the scooter driver to move to a more well-lit corner of the intersection to wait. T-114. Then Officer Diaz left the intersection, heading westbound toward West Miami. T-115. When he was approximately a block away he heard a loud bang, T-115, and noticed dense fog and people heading toward the intersection at 57<sup>th</sup> Avenue and 8<sup>th</sup> Street. T-115.

Officer Diaz returned to the intersection to see that the scooter was on the ground. T-116. Officer Diaz also saw the victim laying on the ground with injuries Officer Diaz characterized as traumatic. T-116; 117. (Fire Rescue personnel later described the injuries as "very bad facial trauma" and severe "deformity" to the leg. T-215). Officer Diaz contacted fire rescue and issued

a BOLO based on witnesses' descriptions of the vehicle involved. T-118. Officer Diaz did not see the driver of that vehicle or otherwise connect Velazco to the accident. T-124.

Patricia Hernandez testified that she, her husband Alexander Rodas, and family members drove in one car to the intersection of 57<sup>th</sup> Avenue and southwest 8<sup>th</sup> Street to pick up Rodas' nephew and his scooter. T-129. The nephew got in the car with Hernandez and the others while Rodas got on the scooter. T-129. Rodas was driving the scooter in front of the car Hernandez was driving. T-130. Just as they began to drive away, Hernandez saw a car strike the scooter. T-130. Hernandez ran from her car to where Rodas was positioned. T-131. She observed a lot of blood and a broken twisted leg. T-131. She did not see the driver of the truck nor could she give the police a description of the vehicle or a tag number. T-134-135.

Rodas remembered driving the scooter into the intersection on a green light but nothing else except waking up in the hospital. T-140-141; 146. He could not describe the vehicle that hit him as his injuries were severe. T-146. Rodas' nephew saw his uncle begin to enter the intersection on a green light when he was struck by a vehicle. T-150. However, he did not see the type of vehicle or its driver. T-150; 152.

Prior to the accident, Alexandra Arroyo saw the white pick-up truck at the intersection of northwest 7<sup>th</sup> Street and 57<sup>th</sup> Avenue. T-194-195. She noticed the truck come up behind her, switch to the right lane, and go through the red light. T-195. Arroyo decided to call 911. T-196. She proceeded through the intersection and southbound on 57<sup>th</sup> Avenue. T-196. When she arrived at 57<sup>th</sup> Avenue and 8<sup>th</sup> Street she saw that the scooter was on the ground in pieces and a person was lying near it. T-196-197. Arroyo did not see the impact. T-196; 197. While she believed the pick-up truck driver was a male, she was not 100% certain and did not know how many people were in the truck. T-200.

Heather Maroney did see the truck hit the scooter. T-206. She was stopped at the intersection facing northbound when she saw the truck coming toward the intersection at a high rate of speed. T-206. She observed the truck go through the red light, hit the scooter, and continue on its way. T-207. Maroney never saw the driver of the truck. T-210. References she made to the driver as "he" were just a guess. T-210.

More than a year prior to trial the State sought to perpetuate the testimony of Leticia Suri. DCR-70. According to the State, Suri was an essential witness who may become unavailable because she undergoes

dialysis three times a week and was hospitalized. DCR-70. Thus, a videotaped deposition was taken. Defense counsel was present.

On the morning of trial the State moved *in limine* to introduce the video arguing Suri was unavailable. T-8. The State alleged Suri had surgery approximately 3 weeks earlier and she had “some complications.” T-8. Suri was apparently hospitalized to receive additional “treatment.” T-8. She was released from the hospital seven days prior and apparently told the State the morning of trial that she was “sick.” T-8. The State told the trial court it could not get more information from Suri because she was on medication and steroids because of swelling in her arm. T-9. Velazco’s counsel objected, arguing she was available on that date and her testimony would take one hour maximum. T-12. The trial court granted the State’s motion finding Suri was unavailable. T-12. Counsel objected again when the parties were going through exhibits, T-93-94, and renewed his objection prior to the video being played for the jury. T-220.

Suri, a prostitute, testified during the deposition that Velazco picked her up on a “date” on the night of June 3, 2014. She alleged it was Velazco driving the pick-up truck at the time of the accident. T-340. She also claimed Velazco was drinking in the car while driving and she told him to stop the car

after the accident but he did not. T-340.

Officer Dodie testified that Suri flagged him down at 40<sup>th</sup> Street and 62<sup>nd</sup> Avenue. At that point, Suri told Officer Dodie that “he” hit somebody and she told him to stop. T-223. Suri then directed Officer Dodie to a home located at 6278 SW 39<sup>th</sup> Street. T-224. It was Velazco’s home. T-225. Officer Dodie observed a white pick-up truck in the driveway with damage to the right front corner. T-227. When Velazco was removed from the home in handcuffs, Suri, who had been in the back of Officer Dodie’s police car, told the officer that he was the person driving the pick-up at the time of the accident. T-226. Officer Dodie had no other information to corroborate Suri’s claim. T-229.

Officer Closius arrived at 62<sup>nd</sup> Avenue and 39<sup>th</sup> Street at about 1:04 a.m. on June 4, 2014. According to Officer Closius, when he encountered Velazco in the back of a police car he observed the odor of alcohol, wet and watery eyes and Velazco’s look of nervousness. T-251. Also according to Officer Closius, when he told Velazco that he was conducting a criminal investigation while others were investigating a crash, Velazco yelled “what f-ing crash” and said he was hit. T-252. After conducting field sobriety tests, Officer Closius determined that he needed to continue at the station. T-261. While there, Velazco submitted to a breath and urine test. T-261-262. Based on the

results, Officer Closius concluded Velazco was impaired. T-264. (The breath test results were .143 and .134. T-295; The urine later returned positive for cocaine with no indication of when the drug was consumed, T-302; 306 and coca ethylene. T-321). Officer Closius acknowledged that Velazco never said he that he was driving the truck. T-267; 269.

The jury was instructed that the victim in Count 2 was Rodas, DCR-220, and that the property damaged in Count 3 belonged to Rodas. DCR-223. Velazco was convicted of leaving the scene of an accident with serious bodily injury, DUI causing serious bodily injury *to Rodas*, and DUI causing damage to *Rodas'* property. DCR-243. Velazco was remanded into custody. DCR-277. Velazco was sentenced to 15 years on Count 1 and 5 years on Count 2 followed by a term of probation (first minimum mandatories as to Count 3). DCR-306-307. Each count was ordered to run consecutive for a total of 20 years state prison followed by a term of probation with conditions including license revocation. DCR-307.

Velazco appealed to the Third District Court of Appeal. He raised two issues. R-4. Velazco argued the trial court abused its discretion when it determined Suri was unavailable. R-15-17. Velazco argued that while Suri had ongoing health issues, the State *proffered* only that Suri was “sick” on the

day of the trial. R-15-17. Suri was the only person who testified Velazco was driving (and she was in the passenger seat) of the vehicle that struck the victim. R-15-17. Velazco argued any error in permitting the State to play the video of her deposition instead of requiring live testimony was not harmless and required a new trial. R-17-18. The Third DCA's analysis of this issue is one sentence: "Finally, as Suri was subject to cross-examination and the State sufficiently demonstrated her unavailability at the time of trial, we find no abuse of discretion in the admission of the perpetuated testimony." *Velazco v. State*, 305 So. 3d 72, 81 (Fla. 3d DCA 2020).

Relying on *Anguille v. State*, 243 So. 3d 410 (Fla. 4<sup>th</sup> DCA 2018), Velazco also argued that his convictions for both DUI causing serious bodily injury to victim Rodas in violation of § 316.193(3)(c)(2) and DUI causing damage to Rodas' property in violation of § 316.193(3)(c)(1) could not stand. R-18-22. In that case the Fourth DCA reviewed the propriety of convictions for "both DUI and reckless driving with serious bodily injury, DUI and reckless driving with property damage, DUI with serious bodily injury and property damage as to the same victim, and reckless driving with serious bodily injury and property damage to the same victim." *Id.* at 412. The *Anguille* Court determined that because convictions for DUI with serious bodily injury and

DUI with property damage to the same victim are degrees of the same offense, convictions for both violate double jeopardy. Although Velazco's facts are identical to those in *Anguille* on this issue, the Third DCA determined that DUI with serious bodily injury and DUI with damage to the same victim's property are not degrees of the same offense and therefore Velazco's convictions for both does not violate double jeopardy. *Velazco*, 305 So. 3d at 80. It certified conflict with *Anguille*. *Id.* Velazco's motion for rehearing was denied. R-94. This Court accepted jurisdiction.

### **SUMMARY OF THE ARGUMENT**

Velazco's convictions and sentences for both DUI causing serious bodily injury and DUI causing property damage cannot stand. While multiple convictions for DUI can arise out of the same transaction, those convictions only endure in cases where there are multiple victims. When there is one victim whose body and/or property is injured, convictions for two offenses violates principles of double jeopardy because the offenses are degree-variants of the same offense. Thus this Court should quash the Third DCA's opinion and approve the Fourth DCA's decision in *Anguille*.

This Court should also reverse the Third DCA's determination that the trial court did not abuse its discretion in finding Suri was unavailable.

Although Suri had ongoing health issues, the State proffered only that Suri was “sick” on the day of the trial. A prior opportunity to cross-examine the witness is only one part of the determination. The State was also required to demonstrate Suri was unavailable on that date and its mere assertion that she was is insufficient. Thus, the erroneous admission of this evidence requires a new trial.

## ARGUMENT

### ISSUE I

THIS COURT SHOULD QUASH THE THIRD DISTRICT COURT’S DECISION IN THIS CASE AND APPROVE FOURTH DISTRICT COURT’S DECISION IN *ANGUILLE V. STATE*, 243 SO. 3D 410 (FLA. 4<sup>TH</sup> DCA 2018) BECAUSE PETITIONER’S CONVICTIONS AND SENTENCES FOR BOTH DUI CAUSING SERIOUS BODILY INJURY AND DUI CAUSING PROPERTY DAMAGE VIOLATED DOUBLE JEOPARDY

Florida courts use the *Blockburger* test, codified in Florida Statute § 775.021(4), to determine when multiple convictions for the same offense are prohibited. *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Houser v. State*, 474 So.2d 1193, 1196 (Fla.1985). Section 775.021(4), provides in relevant part:

(b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.

Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

It is the second exception - - whether DUI causing serious bodily injury and DUI causing property damage are degrees of the same offense as provided by statute - - that is at issue in this case.

In *Anguille v. State*, 243 So. 3d 410 (Fla. 4<sup>th</sup> DCA 2018), the Fourth District Court of Appeals reviewed the propriety of convictions for both DUI causing serious bodily injury and DUI causing property damage to a single victim (as well as reckless driving offenses stemming from the same incident). In that case, the defendant was involved in a “horrific” crash that caused serious injury to one victim. The State charged the defendant with DUI causing serious bodily injury; reckless driving with serious bodily injury; DUI causing property damage; reckless driving with property damage; and refusal to submit. *Id.* at 411. The defendant ultimately entered an open plea to all counts. On appeal the defendant argued he could not be convicted of “both DUI and reckless driving with serious bodily injury, DUI and reckless driving with property damage, DUI with serious bodily injury and property damage as

to the same victim, and reckless driving with serious bodily injury and property damage to the same victim.” *Id.* at 412<sup>1</sup>. Relevant to this case is the Fourth DCA’s analysis of the “relationship” between DUI causing serious bodily injury and DUI causing property damage to the same victim.

The Court noted that multiple DUI convictions from a single transaction involving injury or damage to multiple victims does not violate double jeopardy. However, the Court held that this principle does not apply when the charges involve a single victim.

The second issue brought to this Court is the relationship between degrees of the same offense under the same statute and how those enhancements, that is, degrees of the same offense, are applied when there is but one victim. It is well established that multiple convictions for DUI can arise out of the same transaction or occurrence if there are injuries or damages to multiple persons. *Melbourne v. State*, 679 So.2d 759, 765 (Fla. 1996). In reading *Melbourne* in conjunction with *Valdes*, we hold that there can be but one conviction for each victim, regardless of whether that victim sustains property damage, serious bodily injury, or both. The *Valdes* case provides the framework for the analysis. As discussed above, the addition of the enhancement of “serious bodily injury” does not change the elements of the underlying offense. The charge itself puts the defendant on notice of the crime charged. The enhancement gives definition to the degree of the offense the defendant is facing for the charge. While *Valdes* allows for prosecution for separate offenses that involve the same victim, it also prohibits separate offenses for varying degrees of

---

<sup>1</sup>This Court approved *Anguille* to the extent it held that convictions for DUI with serious bodily injury and reckless driving with serious bodily injury do not violate double jeopardy. *State v. Marsh*, 308 So. 3d 59 (Fla. 2020)

the same charge.

*Id.* at 414. After outlining that DUI causing serious bodily injury and DUI causing property damage are both prescribed by § 316.193(3)( c), the Court said the following:

In looking at the statutory construction [of § 316.193(3)( c)] in line with section 775.021(4), to allow convictions for both the serious bodily injury and the property damage of the victim would run afoul of double jeopardy principles. The victim is the “another” for the purposes of statutory construction. She is the entity so damaged or injured, either to her person or to her property. The separation of the enhancements for serious bodily injury from personal injury or property damage delineates the degree of the offense for which the defendant can be convicted, for the causal damage inflicted upon one victim for the offense of DUI. Thus, *since the offenses of DUI with serious bodily injury and DUI with property damage as they relate to one victim are degrees of the same offense as provided by statute, the convictions for both cannot stand.*

*Id.* at 415. Velazco’s case is indistinguishable.

Nevertheless, the Third DCA determined that Petitioner’s convictions for DUI serious bodily injury and DUI property damage, arising out of the same criminal incident and to the same victim, do not violate double jeopardy. Although the Third DCA noted that § 775.021(4)(b) sets forth exceptions to “the intent to ‘convict and sentence [separately] for each criminal offense committed in the course of one criminal episode or transaction,’ ” it nonetheless found that DUI with serious bodily injury and DUI with property

damage are not degree variants of the same offense. *Id.* at 10-15. In doing so, the Third District Court applied this Court's analysis in *Valdes v. State*, 3 So. 3d 1067 (Fla. 2009) (adopting Justice Cantero's opinion in *State v. Paul*, 934 So.2d 1167 (Fla.2006) which set forth examples of degree-variants) to conclude that "the only offenses that fall under subsection (4)(b)(2), are those that constitute different degrees of the same offense, as *explicitly* set forth in the relevant statutory sections." *Id.* at 79. (Emphasis in original). Although the Third DCA recognized that a statute does not have to use the term "degree" it still determined "the DUI statute omits any reference to 'degree,' and delineates varying penalties for separate, distinct, non-overlapping harms." *Id.* at 80. And, after citing a string of cases holding multiple DUI convictions for harm to multiple victims in a single episode do not violate double jeopardy principles, the Third DCA concluded...

The sole factor differentiating the instant case from the aforesaid body of established jurisprudence is that, here, in addition to suffering personal injuries, the victim owned the damaged scooter. The mere happenstance that property ownership was vested in the same critically wounded individual cannot be logically construed to insulate the accused from the prosecution of a separate, legislatively-proscribed crime. Accordingly, we conclude that, as the resultant injuries are entirely distinguishable and do not overlap, "neither offense is an aggravated form of the other," and the crimes do not constitute degree-variants. *Valdes*, 3 So. 3d at 1077; see also *Melbourne*, 679 So. 2d at 765 ("In the case of DUI, ... the driver's intoxication results in his or her

inability to drive safely. The DUI driver may sustain multiple convictions because the violation causes injury to each victim.”).

*Id.* at 80–81. However, it is the fact there was only one victim that distinguishes this case from those cited.

Notably Chief Judge Emas, also relying on *Valdes* and *Paul* came to the exact opposite conclusion in his dissent. *Id.* at 83-87. After discussing the majority’s concern about the omission of the word “degree” from the statute, Judge Emas concluded that DUI with serious bodily injury and DUI with property damage are aggravated forms of the basic DUI offense. *Id.* And, a review of the statutory framework supports that conclusion.

Section 316.193 is a “comprehensive DUI statute.” *Id.* at 87. The first part defines the elements of the DUI offense. Subsections (2) and (3) describe “at least nine separate provisions in which certain additional/aggravating conduct subjects the offender to correspondingly increased punishment.” *Id.* at 87. Under subsection 3( c)(1) when the basic DUI offense causes bodily injury or property damage to another it is classified as a first degree misdemeanor. When that same basic DUI offense causes serious bodily injury to another it is classified as a third degree felony under subsection 3( c)(2). Indeed, “[t]he separation of the enhancements for serious bodily injury from personal injury or property damage delineates the degree

of the offense for which the defendant can be convicted, for the causal damage inflicted upon one victim for the offense of DUI.” *Anguille* at 415. Thus, the Fourth DCA (and Judge Emas) properly applied this Court’s decision in *Valdes* when it analyzed whether the two are degrees of the same offense and thus fall under the § 775.021(4)(b)(2) exception. Accordingly, Petitioner asks this Court to quash the Third DCA’s decision and approve *Anguille*.

## ISSUE II<sup>2</sup>

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DETERMINED A STATE’S WITNESS WAS UNAVAILABLE AND PERMITTED THE STATE TO PLAY HER VIDEOTAPED DEPOSITION TESTIMONY OVER VELAZCO’S OBJECTION AND THE THIRD DCA SHOULD HAVE REVERSED AND REMANDED THE CASE FOR A NEW TRIAL ON THIS BASIS

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits the introduction of testimonial statements by witnesses not called to testify at trial except under a firmly rooted hearsay exception. To insure a defendant’s Sixth Amendment right to confront witnesses remains intact, *Crawford* requires a prior opportunity to cross-examine **and** showing of unavailability of the witness

---

<sup>2</sup> “[O]nce this Court accepts jurisdiction over a case to resolve a legal issue in conflict, it may consider any other issue that is properly raised and argued.” *Green v. Cottrell*, 204 So. 3d 22, 29 (Fla. 2016)

before such statements may be admitted. The Third DCA's chosen parentheticals for this proposition demonstrate an emphasis on the former but not the latter. *Velazco*, 305 So. 3d at 81.

While the introduction of a deposition taken to perpetuate testimony pursuant to Florida Criminal Procedure Rule 3.190(j) may satisfy the right of confrontation, Rule 3.190(6) prohibits the use or reading into of evidence of a deposition "when the attendance of the witness can be procured." Thus, before a videotaped deposition may be admitted (even if the defendant had a prior opportunity to cross-examine the witness) the State must show that the witness is unavailable. Florida Statute § 90.804 defines "unavailability as a witness," in relevant part, as a declarant who:

[i]s unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity.

§ 90.804(d). Unavailability under this subsection is "a question of preliminary fact for the trial court" which the State must prove by a *preponderance of the evidence*. *Partin v. State*, 82 So. 3d 31, 43 (Fla. 2011). A trial court's decision on this issue is reviewed for abuse of discretion. *Id.*

Here, the trial court abused its discretion when it determined Suri was unavailable to testify. On the morning of trial the State explained that Suri had

surgery weeks earlier and she had swelling in her arm. Although she had been treated for complications from her surgery, she was not currently in the hospital and was not scheduled to undergo further treatment for several more weeks. In fact, the only description given as to why she could not appear on *that* date was she was “sick.” And, that description was not competent evidence as it came only from the State’s proffer. *Arnold v. Arnold*, 889 So. 2d 215, 216 (Fla. 2d DCA 2004)(“Unsworn statements cannot serve as the basis for a trial court's factual determinations”). Likewise, this assertion failed to explain why her attendance (for the short time she would have appeared) could not be procured. Thus, the trial court erred in admitting the video of Suri’s deposition over Velazco’s objection and the Third DCA should have come to this same conclusion.

Moreover, this error was not harmless. Suri was a prostitute allegedly picked up by Velazco on the night of the accident. She is the only person that pointed to Velazco as the driver of the white pick-up truck involved in the accident. No other witness saw the person who was driving the truck. No one provided a description of the driver. Nor did the video of the accident show the driver. Thus, without Suri’s testimony, the State lacked direct evidence that Velazco was either driving or in actual physical control of the truck.

Without such proof, Velazco could not be convicted of the crimes charged. See, e.g., *Lukas v. State*, 627 So. 2d 123 (Fla. 5<sup>th</sup> DCA 1993). As such, the admission of Suri's deposition testimony was not harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986) (Holding that "[t]he question [for harmless error analysis] is whether there is a reasonable possibility that the error affected the verdict"). Therefore, Velazco's convictions must be reversed and this case must be remanded for a new trial.

### **CONCLUSION**

Based on the foregoing facts and arguments, Velazco respectfully requests that this Court quash the Third District's decision, approve *Anguille*, and/or vacate Velazco's convictions and remand for a new trial for the erroneous admission of Suri's videotaped deposition.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and provided via the ePortal to Assistant Attorney General Rachel Kamoutsas, PL-01, The Capitol, Tallahassee, Florida 32399, at [crimappmia@myfloridalegal.com](mailto:crimappmia@myfloridalegal.com), this 26<sup>th</sup> day of July, 2021.

*/s/ Michael Mirer*

\_\_\_\_\_  
**MICHAEL MIRER, ESQ.**

**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT**

I HEREBY CERTIFY that the foregoing computer-generated brief is in  
Arial 14-point font in compliance and contains 4556 words.

*/s/ Michael Mirer*  
**MICHAEL MIRER, ESQ.**