

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 REPLY BRIEF

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS..... ii

TABLE OF CITATIONS..... iii

REPLY ARGUMENT..... 1

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. . . . 1

CONCLUSION..... 3

CERTIFICATE OF SERVICE..... 4

CERTIFICATE OF COMPLIANCE WITH FONT AND WORD COUNT REQUIREMENT..... 4

TABLE OF CITATIONS

CASES	PAGE NO.
<i>Green v. Cottrell</i> , 204 So. 3d 22, 29 (Fla. 2016).....	1
<i>Lukas v. State</i> , 627 So. 2d 123 (Fla. 5 th DCA 1993).....	3
<i>Partin v. State</i> , 82 So. 3d 31 (Fla. 2011).....	2
<i>State v. DiGuilio</i> , 491 So.2d 1129 (Fla.1986).....	3

REPLY TO STATE'S ARGUMENT¹

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

The State first contends this Court should decline to exercise its jurisdiction to consider this issue. To this end, the State asserts that this issue is not subject to conflict jurisdiction or a question of great legal import. However, this is not required. Rather, "once 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)(emphasis added). This issue was properly raised and argued before the Third District which decided the issue on the merits.

With regard to the State's claim that it provided a detailed explanation of the witness' condition, this is just not accurate. The evidence presented *on the morning* of trial was vague. Suri had surgery approximately 3 weeks earlier and she had "some complications." T-8. She apparently told the State

¹Velazco rests on his Initial Brief as to any of the State's arguments not addressed in this Reply.

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. And, while the State now suggests that Velazco should have come forward with evidence to contradict the State, it was not his burden. *Partin v. State*, 82 So. 3d 31, 43 (Fla. 2011) (Noting that 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*). Velazco’s counsel objected, arguing she was available on that date and her testimony would take one hour maximum. T-12. He 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. As such, (and under the State’s reasoning) the trial court should not have relied on the State’s bare assertions.

Moreover, the State’s claim that this evidence is cumulative and, therefore, harmless is belied by the trial testimony. Not a single witness identified Velazco as the driver. No one could provide a description of the driver. Nor did the video of the accident show the driver. While Velazco made statements corroborating *an accident*, he never admitted he was driving when the accident happened. Even Officer Closius acknowledged that

Velazco *never* said that he was driving the truck. T-267; 269. Thus, Suri, who had every reason to tell the police that she was not driving the truck, is the *only* witness that testified Velazco was. Without Suri's testimony, the State lacked direct evidence that Velazco was either driving or in actual physical control of the truck, proof required to convict him. See, e.g., *Lukas v. State*, 627 So. 2d 123 (Fla. 5th 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").

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 Asad Ali, One Southeast Third Avenue, Suite 900, Miami, Florida 33131, at crimappmia@myfloridalegal.com, this 1st day of February, 2022.

/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 and contains 610 words.

/s/ Michael Mirer _____

MICHAEL MIRER, ESQ.