IN THE SUPREME COURT OF FLORIDA

NATHANIEL WILLIAMS,

Petitioner

v.

STATE OF FLORIDA,

Respondent.

CASE NO.: SC03-139

L.T. CASE NO.: 3D02-11

****

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

****

RESPONDENT'S AMENDED ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Nathaniel Williams, was the defendant in the trial court and was the appellant in the Third District Court of Appeal. Petitioner will be referred to herein as "Defendant." Respondent, the State of Florida, was the prosecution in the trial court and was the appellee in the Third District Court of Appeal. Respondent will be referred to herein as "respondent" or "the State."

The following symbols will be used throughout this Brief:

IB = Appellant's Initial Brief

JB = Appellant's Brief on Jurisdiction

R = Record on Appeal

SR = Supplemental Record

T = Trial Transcripts

STATEMENT OF THE CASE AND FACTS

Defendant was indicted in January 1988 on one count of First Degree Murder and one count of Possession of a Firearm in the Commission of a Criminal Offense in connection with the November 1987 shooting of Daniel Rhodes. (R. 1,3). Twelve years later, in 2000, Defendant was arrested in the State of Georgia. (T. 277-278). In October 2001, the State charged Defendant in a superseding information with one count of Second Degree Murder with a Deadly Weapon. (R. 4-6). Defendant was convicted after a jury trial and sentenced to a term of imprisonment for seventeen years. (R. 11, 17, 20). The jury deliberated for one hour and thirty minutes. (T. 424-426). Defendant filed a timely notice of appeal, and the Third District Court of Appeal affirmed Defendant's conviction and sentence. Williams v. State, 834 So. 2d 923 (Fla. 3d DCA 2003); (R. 25). This Court granted discretionary review.

The State brought a motion *in limine* to preclude defense counsel from cross-examining State witness Roger Hunt about an arrest for aggravated assault. (T. 7-8). Hunt had received a withhold of adjudication on that charge, for which he had been arrested some time after the 1987 shooting. The State argued that defense counsel should be precluded from asking Hunt whether he had ever been convicted of a felony. (T. 8). The

State's motion *in limine* did not involve Hunt's participation in the police explorers in any manner. Id. Defense counsel responded that the arrest issue may become relevant at trial to explain why Hunt stopped being a police explorer, which he had been in 1987, and why he could not be a police officer. Id. The trial court granted the State's motion but ruled the defense could reargue the issue if it became relevant. Id.

At trial, defense counsel sought to cross-examine Hunt about the reason why he stopped being a police explorer, arguing that the jury would not have a complete picture of Hunt without knowing that he had wanted to be a police officer but could not because he had "got into problems on his own." (T. 219-220). Citing the points raised in the motion *in limine*, the State argued that this question was improper impeachment as it went to Hunt's aggravated assault arrest, which resulted in a withhold of adjudication. (T. 218-219). Defense counsel stated that he would not ask Hunt about the arrest, although counsel did not explain his proposed questions. (T. 220). The trial court ruled defense counsel could not ask Hunt why he stopped being a police explorer and that "[y]ou can ask him anything that concerns with police explorer but anything about his withhold of adjudication for a criminal offense will not be allowed at this moment." (T. 221).

Evidence Adduced at Trial

SERGEANT MIGUEL TABERNERO was a homicide detective in the Metro-Dade Police Department on November 27, 1987, when he was assigned to investigate the shooting death of Daniel Rhodes. (T. 162-164). Tabernero went to the Cutler Ridge fire house, located next to the police station, where he saw a red Firebird in the parking lot. (T.165-166). The car belonged to Derrick Pinto, who was seated inside a police car waiting to be interviewed. Daniel Rhodes was on the ground just outside the Firebird's passenger door. Rhodes was dead. He had been shot outside 22221 Southwest 116 Avenue and then driven to the fire house. (T. 165-169).

Tabernero received a photo of Defendant from his [Defendant's] mother and showed the picture to witness ROGER HUNT. (T. 172-173). Hunt was also presented with a high school yearbook which contained a photograph of Defendant and several other persons on the same page. (T. 173). Hunt recognized the shooter from the yearbook and signed and dated the picture. Id.

Tabernero also met with JOHN KENZIE three days after the shooting. (T. 174). Kenzie was presented with a photographic lineup, which included Defendant's picture. (T. 174-175). Kenzie picked out the shooter and signed the picture of him in front of Tabernero. (T. 175).

Tabernero assigned DETECTIVE LAWRENCE WILKOTZ to process the primary crime scene on 116 Avenue and the secondary scene in the parking lot. Tabernero assigned Detective King to canvass the area and interview witnesses. (T. 169-171, 188-189). Wilkotz found two spent .25 caliber shell casings and one .25 caliber live round at the scene of the shooting. (T. 191-194).

DEPUTY CHIEF MEDICAL EXAMINER DOCTOR EMMA LIU testified that Rhodes had one gunshot wound to the chest and one gunshot wound to the wrist. The wrist had entrance and exit wounds. The bullet to the chest had traveled through Rhodes body and was recovered during the autopsy. (T. 345-347, 349). CRIMINALIST REY ALTON FREEMAN testified that the recovered bullet was .25 caliber and was consistent with the shell casings found at the scene. Freeman further testified that the live round and the recovered bullet were consistent with having come from the same manufacturer. (T. 334).

Within days of the shooting, Tabernero interviewed witnesses ROGER HUNT and JOHN KENZIE. (T. 171, 173-6). Both witnesses identified Defendant as the man who shot Daniel Rhodes. (T. 171-175, 215-216, 256-257). Subsequently, Tabernero went to Defendant's house many times attempting to arrest him. Tabernero spoke with Defendant's family, including his brother Bernard. (T. 176). After weeks of searching, Tabernero obtained

an arrest warrant based upon the information provided by the witnesses and the medical evidence. (T. 177-180).

Twelve years after the shooting, in November 1999, cold case investigator DETECTIVE RAMISH NYBERG received information that Defendant was living in Atlanta, Georgia, under the name "Nicholas Smith." (T. 273-274). Nyberg obtained Defendant's Georgia address and verified that he was wanted for the 1987 murder of Daniel Rhodes. (T. 274- 275). Defendant was eventually arrested outside his house in an Atlanta suburb, and transported to Miami in May 2000. (T. 276-277). After the arrest, Nyberg interviewed MARTIN ANDERSON, a federal prisoner, to whom Defendant had confessed in 1987. (T. 280-281, 285).

At the time of his trial testimony, ROGER HUNT was thirty-one years old, married, and a pastor of his own congregation. Hunt was a security guard before he became a pastor. (T. 197-198). On cross-examination Hunt testified that he had been a pastor for at least four years, with a congregation between twenty-five and fifty. (T. 222-223). Hunt was not an ordained minister and he had not gone to school to become one. (T. 222). Before he became a pastor, Hunt worked as a security guard, a courier, and a chauffeur. (T. 223). He had also driven a bus in Georgia after finishing high school at age eighteen. (T. 223-234).

In November 1987, Hunt was a seventeen-year-old high school student. He was a member of the police explorers, a program designed to help keep children out of trouble. (T. 198-199, 217-218). On cross-examination Hunt testified that he had been a police explorer for one or two years at the time of the shooting and had stopped being a police explorer in 1992 or 1993. (T. 222). On the morning of the shooting Hunt attended a police explorer event at the Cutler Ridge Mall. (T. 201). Hunt left the mall to drive home when the event ended. He stopped behind a red Firebird on 116 Avenue, the street where he lived. (T. 201-204, 212, 224). Hunt saw two men standing by the Firebird's passenger door, close to the sidewalk. One of the men had a gun. (T. 204-205).

Through his open car windows, Hunt heard the man with the gun say,"fuck, nigger," and point the gun at the other man. (T. 205-206, 209-210). Hunt heard at least one gun shot, and pulled around the red Firebird. (T. 209-210, 227-231). The man who had been shot fell into the Firebird's passenger seat and the car left the scene. (T. 210-212). As Hunt pulled into his driveway a few houses away from the shooting, he heard people screaming, "the guy is shot." (T. 213). Hunt followed the car for about one-half mile, until he could not see it anymore. (T. 213).

Later that day Hunt went to the Cutler Ridge police station. He had a riding assignment that evening with the police explorers. He saw the red Firebird, with yellow tape around it, parked in the lot at the neighboring fire house. Hunt went into the police station and spoke with the desk sergeant. Hunt also gave a sworn statement to homicide detectives. (T. 213-215). Hunt testified that at the time of the shooting, he recognized the man with the gun. Hunt had seen the man around the neighborhood for two or three years, and they had gone to the same summer schools. (T. 205, 208, 211-212). Hunt knew the man's nickname and the location of his house. (T. 211, 228, 235). When Hunt spoke with detectives after the shooting, he made a confirmatory identification of Defendant as the man with the gun, and also identified Defendant from yearbook photographs. (T. 171-173, 184-186, 215-216). Hunt did not make an in-court identification.

Over defense objection, Hunt identified a photograph of the victim, in military uniform, as the man who had been unarmed at the time of the shooting. The photograph was brought to the State by the victim's family. (T. 207-208). Hunt testified that at the time of the shooting the victim's hair was braided or twisted and he did not wear a uniform. (T. 205-206, 208). While acknowledging the photograph's relevancy to

identification, defense counsel argued that the depiction of the victim in military uniform with an American flag was too prejudicial. (T. 206). The State responded that the purpose of the photograph was Hunt's identification of the victim as the unarmed man. (T. 207). Defense counsel suggested the State show the autopsy photos for identification purposes, but the State asserted Hunt would be unable to identify the victim from autopsy photos because "[h]e's dead. His eyes swelled up and in his head." Id. Defense counsel never challenged, contested, or disputed whether Hunt would be unable to identify the victim from the autopsy photos. Id.

JOHN KENZIE, a retired construction worker, testified that at about 2:00 p.m. on November 27, 1987, he was home at 22211 Southwest 116 Avenue, an apartment building which he owned. (T. 250-251, 259). Two men ran past Kenzie's front door and stopped on the sidewalk, about fifteen feet away. A red car was parked next to the men. They were arguing about money. (T. 264).

As Kenzie watched from his front porch, he could see both men clearly. One of the men pulled out a small gun that appeared to be a .25 caliber. The other man was unarmed. (T. 251-254, 256, 261-262, 266, 271). The man with the gun shot the other man in the chest once, and then walked across the street still holding the gun. (T. 255). The man who had been shot got

into the passenger seat of the red car, and told the driver, “take me somewhere, I’ve been shot.” (T. 255-256). The car left the scene. (T. 256). Kenzie testified that he did not recall seeing a car stopped behind the red car, or seeing a car pull around the red car. (T. 269-270).

Although Kenzie did not identify Defendant at trial, Kenzie did make a photographic identification of Defendant as the shooter to homicide detectives in November 1987. (T. 256-257, 173-175). Kenzie testified that at the time of the shooting, he recognized the man with the gun as someone Kenzie had seen around the neighborhood for a long time. (T. 254). At the time, Kenzie also knew the shooter’s name and family. (T. 254-255). Kenzie selected the shooter from a photographic lineup and signed the picture. (T. 257).

MARTIN ANDERSON testified that some time after the shooting, in 1987, he spoke with Defendant at Anderson’s brother’s house in Liberty City. Anderson, who was seventeen at the time, was close friends with Defendant’s brother Bernard. (T. 303-4). Anderson had seen Defendant, who was friends with Anderson’s brother, at least two other times and knew his nickname. (T. 303, 317-318). Defendant told Anderson that he, Defendant, had shot someone at close range seven times and that the Miami police were looking for him. (T. 305-307). Anderson did not

tell the police about this conversation. (T. 307).

Anderson moved to Atlanta, Georgia, a year or two later. (T. 302). Defendant was also living in Atlanta, with someone Anderson knew. Anderson and Defendant became friendly and ultimately went into business together. (T. 307-309). In 1990 or 1991, Defendant assumed the identify of Nicholas Smith, who had worked for Anderson and Defendant. Defendant began using Smith's name and social security number when Smith died. (T. 309-310).

Anderson testified that he and Defendant had two additional conversations about the 1987 shooting. (T. 309-311, 315-316). Anderson testified that one Christmas, he was going to Miami to visit family. Defendant remarked that he wanted to see his own family but could not return to Miami because the police were still looking for him. Around 1996 or 1997, Defendant stated that he was thinking about returning to Miami to turn himself in to the police. Anderson offered to help by hiring lawyers. (T. 310-311).

At the time of his testimony, Anderson was serving a ten-year federal sentence for conspiracy to distribute narcotics. Anderson had already begun serving his sentence when he first spoke with Detective Nyberg in Atlanta. (T. 280-281, 285-286, 302, 311-312, 319). Anderson stated that in exchange for his

cooperation, State authorities told him he could possibly receive a recommendation to reduce his sentence. (T. 281, 286, 294-295, 319-321).

SUMMARY OF ARGUMENT

Point I. Since the trial court did not prohibit Defendant from eliciting the fact that Hunt had been expelled from the police explorers, the Third District's decision should be affirmed under the "tipsy coachman" doctrine. Defendant's argument in this case is based upon semantics, and the Third District utilized the proper test when it held that the trial court's alleged error was harmless. Finally, Defendant is not entitled to a new trial. If this Court holds that the Third District employed an improper harmless error analysis, this Court should quash the decision below and remand to the district court for reconsideration of whether the error is harmless in light of the proper standard.

Point II. This Court should decline to address the issue because it is outside the scope of the conflict issue. In any event, the trial court properly admitted a photograph of the victim into evidence because it was relevant to establish the victim's identity. Accordingly, Defendant's argument on this point should be rejected.

ARGUMENT

POINT I

THE THIRD DISTRICT COURT OF APPEAL'S DECISION REGARDING THE LIMITATION OF CROSS-EXAMINATION OF ROGER HUNT SHOULD BE AFFIRMED

Trial Court Did Not Preclude Defendant From Eliciting That Hunt Was Expelled From The Police Explorers

As a threshold matter, the State would point out that the trial court never actually prohibited Defendant from eliciting "the fact that Hunt had been expelled from the police explorers." Williams, 834 So. 2d at 925. The State's motion *in limine* sought to preclude Defendant from cross-examining Roger Hunt about an arrest for aggravated assault (which resulted in a withhold of adjudication). (T. 7-8). The State argued that Defendant should be precluded from asking Hunt whether he had ever been convicted of a felony, and nothing in the State's motion *in limine* involved Hunt's participation in the police explorers in any manner. (T. 8). The trial court granted the State's motion but ruled the defense could reargue the issue if it became relevant. Id.

At trial, the prosecutor objected to defense counsel's line of questioning because she had "a feeling that [defense counsel] is going towards that to ask about the aggravated assault." (T. 218-219). Defense counsel responded that he believed "the jury

has a right to hear **why** he stopped being a police explorer." (T. 219-220)(emphasis added). The trial court stated it would not permit defense counsel to ask why Hunt stopped being a police explorer. (T. 220). Defense counsel argued "[t]he reason he stopped being a police explorer is because he got into problems on his own and he wanted to be a police officer and he couldn't become a police officer and he became a pastor and that's where I'm going and I wouldn't have asked the question about his arrest. I think it's certainly something that [the] jury can hear and it's certainly something that is relevant in this case. I think I certainly can ask." Id. The trial court responded "you are still using a withhold [of adjudication] for impeachment purposes no matter how you slice it." (T. 221).

When argument on the matter concluded, the trial court ruled that defense counsel was "not allowed to ask **why** he stopped being a police explorer. **You can ask him anything that concerns the police explorer but anything about the withhold of adjudication for a criminal offense will not be allowed at this moment.**" Id. (emphasis added). Contrary to the Third District's opinion, nothing in the trial court's ruling prohibited defense counsel from eliciting "the fact that Hunt had been expelled from the police explorers." Williams, 834 So. 2d at 925. Instead, the trial court's ruling permitted defense

counsel to ask Hunt "anything that concerns the police explorer" except **why** he stopped being a police explorer (i.e., the withhold of adjudication for a criminal offense).

Defense counsel could have easily elicited the fact that Hunt was expelled from the police explorers by asking any number of permissible questions that did not involve the withhold of adjudication for aggravated assault. For example, defense counsel could have asked Hunt "**how** did your affiliation with the police explorers end?" or "when your affiliation with the police explorers ended, was it voluntarily (you quit) or involuntarily (you were expelled)?" These questions were permissible under the trial court's ruling and would have elicited the fact that Hunt was expelled from the explorers without touching upon the specific reason why (the withhold of adjudication for aggravated assault). Defense counsel, however, did not ask these questions because he wanted to introduce improper impeachment evidence about Hunt's withhold of adjudication for aggravated assault and did not care if the jury knew Hunt was expelled from the explorers.[1] Since the record in this case shows that the trial court did not preclude defense counsel from eliciting "the fact

[1] This Court has previously held that a witness may not be impeached by a withhold of adjudication. State v. McFadden, 772 So.2d 1209 (Fla. 2000).

that Hunt had been expelled from the police explorers," the trial court did not abuse its discretion below. Williams, 834 So. 2d at 925; Thornton v. State, 767 So. 2d 1286 (Fla. 5th DCA 2000)(defendant wanted to introduce evidence that the victim of robbery at a grocery store was fired by a subsequent employer for making unauthorized telephone calls to impeach the victim's veracity and support the theory of defense - robbery was an "inside job" in which the victim was a willing participant; trial court did not abuse its discretion by excluding information about the victim's subsequent firing); (T. 221). Accordingly, this Court should uphold the Third District's decision under the "tipsy coachman" doctrine. Combs v. State, 436 So. 2d 93, 96 (Fla. 1983)(district court of appeal erroneously held that it only had jurisdiction to review violations which effectively deny appellate review when it denied a petition for writ of certiorari from circuit court sitting in its appellate capacity; this Court approved decision of district court of appeal to deny petition for certiorari as "right for the wrong reasons").

Defendant's Argument

Contrary to Defendant's bald assertions, the State never attempted to "bolster Hunt's character and therefore credibility" by asking Hunt basic background questions regarding

his employment. (IB. 9). The State asked background questions regarding employment to every single witness in this case, not just Hunt.[2] (T. 162-163, 187, 197-199, 249, 272, 325, 337). The State never vouched for Hunt's credibility, nor did it contend that his testimony was especially trustworthy due to his employment. Furthermore, no objection was raised to the State's alleged attempt to "bolster Hunt's character and therefore credibility" by asking him basic background questions about his employment. (T. 197-199). Thus, Defendant cannot now be heard to complain about the matter. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)(appellate court will not consider an issue unless it was presented to the lower court).

Defendant also contends that the State "bolstered Hunt's character by establishing that he was a police explorer." (IB. 11). Since Defendant did not raise this "bolstering of character" issue before the trial court, he cannot raise it now. Steinhorst, 412 So. 2d at 338. In any event, the State never vouched for Hunt's credibility, nor did it contend that his testimony was especially trustworthy due to his affiliation with

[2] The State did not ask Martin Anderson about his employment because he was obviously unemployed due to his incarceration in a federal prison. (T. 302). The State did, however, did ask Anderson questions about his prison sentence. Id.

the explorers more than a decade earlier.[3] The record reveals that Hunt was driving home from an explorer event when he witnessed the shooting. (T. 201). The night of the shooting, Hunt had a ride-along assignment with the police (based upon his association with the explorers). (T. 213). When Hunt drove up to the police station, he observed the car he saw earlier during the shooting. (T. 214). Hunt then contacted someone at the desk regarding the matter and eventually gave a sworn statement to a detective. Id. Thus, the testimony concerning Hunt's affiliation with the explorers merely provided the context for his actions on the day of the crime and explained how he became a witness.

Defendant argues that the Third District ignored this Court's holdings in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), and Goodwin v. State, 751 So. 2d 537 (Fla. 1999), when it

[3] The prosecutor in this case conducted an extensive voir dire and repeatedly asked whether the potential jurors would afford greater credibility to police officers. (T. 25-26, 29, 40, 48, 52, 55, 74-75). At least two members who sat on the jury affirmatively stated they would not lend greater credibility to law enforcement officers. (T. 23-24, 111, 140). If the jurors in this case would not lend greater credibility to law enforcement officers, it is absurd to believe the jurors would afford greater credibility to a police explorer. Furthermore, it was defense counsel, not the prosecutor, who first commented on Hunt's affiliation with the explorers during closing arguments. (T. 374). Accordingly, Defendant's "bolstering of credibility" argument based upon Hunt's affiliation with the explorers is meritless.

conducted a harmless error analysis. (IB. 14-15). Contrary to Defendant's contentions, nothing in Williams "reveals that the Third District Court of Appeal never looked at the error in this case and how the error may have effected the jury verdict." (IB. 14-15). The Third District obviously looked at the alleged error in this case because it determined that the trial court abused its discretion in not permitting Defendant to elicit the fact that Hunt had been expelled from the explorers. Williams, 834 So. 2d at 925. Furthermore, the Williams opinion did not require "the defendant to establish that the error deprived him of a fair trial rather than requiring the state to prove beyond a reasonable doubt that the error did not contribute to the jury verdict . . ." (IB. 15). Instead, the Third District reviewed the evidence in the case and properly determined beyond a reasonable doubt that the alleged error did not affect the verdict. Williams, 834 So. 2d at 925 ("given all of the other evidence as to William's [sic] guilt, we cannot conclude that this error necessarily deprived Williams of a fair trial to warrant a reversal.").

Defendant's argument in this case is based upon semantics, i.e., he takes issue with the language the Third District utilized when it held that the trial court's alleged error was harmless. Defendant argues, in essence, that the Third

District's opinion in this case was erroneous because it did not contain a more prolonged harmless error analysis complete with chapter and verse citations. This argument must fail because this Court has previously used less verbiage in conducting a harmless error analysis. See Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991)("Notwithstanding, in view of all the evidence of Derrick's guilt, this was clearly harmless error."). This is not a case where a district court made an unwarranted departure from the DiGuilio standard. See Knowles v. State, 28 Fla. L. Weekly S450 (Fla. June 12, 2003)(Second District's harmless error analysis was erroneous because it held that "[a] review of the record has convinced this court that the error did not substantially influence the jury's verdict"). Accordingly, the Third District's opinion in Williams should be affirmed.

In DiGuilio, this Court stated:

> The harmless error test, as set forth in *Chapman* and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman*, 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

DiGuilio, 491 So. 2d at 1135. This Court also recognized that the harmless error rule is concerned with the due process right to a fair trial. Id. The Third District closely examined the permissible evidence on which the jury could have legitimately relied, as well as the testimony allegedly precluded by the trial court. Williams, 834 So. 2d at 925. The Third District also determined that he alleged error was harmless and did not deprive Defendant of a fair trial (which is what the harmless error rule is concerned with). Although the Third District's harmless error analysis in this case was brief, its lack of wordiness on the issue does not indicate that the analysis was improper or that it ran afoul of this Court's decisions in DiGuilio and Goodwin. See Derrick, 581 So. 2d at 36 ("Notwithstanding, in view of all the evidence of Derrick's guilt, this was clearly harmless error.").

Defendant suggests that "it will be impossible for the court to conclude beyond a reasonable doubt that the error did not contribute to the jury verdict." (IB. 15). However, there is no reasonable possibility that the trial court's alleged error in this case affected the verdict because two eyewitnesses who had recognized Defendant at the time of the shooting identified him immediately after the crime. In addition, Defendant confessed his guilt to another witness, whose credibility the

jury had the opportunity to evaluate. Furthermore, Defendant fled the State of Florida after the crime to escape arrest, living for more than a decade under an assumed identity. This Court has previously found harmless error where a trial court improperly limited cross-examination and/or prevented a defendant from impeaching a witness. Derrick, 581 So. 2d at 36; Livingston v. State, 565 So. 2d 1288, 1291 (Fla. 1990)("We agree with the appellant that the trial court's refusal to permit the cross-examination of Baker about his possible motive for testifying was error. However, in light of the evidence in this case we find it to be harmless error."). Accordingly, this Court should hold that the trial court's alleged error, if any, was harmless beyond a reasonable doubt.

Assuming, *arguendo*, the Third District utilized an incorrect harmless error analysis in this case, it is unclear whether the application of the DiGuilio test would have yielded a different result below. If this Court finds that the Third District utilized an incorrect harmless error analysis in this case, this Court should "quash the decision below and remand to the district court for reconsideration of whether the error is harmless in light of our reaffirmation of the DiGuilio standard." Knowles, 28 Fla. L. Weekly S450. Thus, contrary to Defendant's contention, a new trial is not warranted in this

case.

POINT II

THE THIRD DISTRICT COURT OF APPEAL PROPERLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING A PICTURE OF THE VICTIM INTO EVIDENCE DURING TRIAL

The only issue raised in Defendant's Brief on Jurisdiction is an alleged conflict between the Third District's opinion in this case and the harmless error analysis set forth in this Court's decisions in DiGuilio and Goodwin. (JB. 6-9). The issue raised in Point II of Defendant's Initial Brief was not raised in his Brief on Jurisdiction and is beyond the scope of the conflict issue. Therefore, this Court should decline to address the issue raised in Point II of Defendant's Initial Brief because it is outside the scope of the conflict issue. See Knowles v. State, 28 Fla. L. Weekly S450; Wood v. State, 750 So. 2d 592 (Fla. 1999); Asbell v. State, 715 So. 2d 258 (Fla. 1998).

In an abundance of caution, the State will address the merits of the issue raised in Point II of Defendant's Initial Brief. At trial, the State introduced a photograph of the victim into evidence during Hunt's testimony. (T. 206-209). Defendant argues that the trial court abused its discretion by "allowing the introduction of this photograph since the

photograph had no relevance to any issue at the trial and in the alternative, whatever minor relevance the photograph had was outweighed by the potential that the photograph may have inflamed the passion of the jury and therefore denied defendant a fair trial." (IB. 18). Defendant's argument is without merit.

Initially, the State would point out that defense counsel conceded the photograph's relevancy at trial. At sidebar, defense counsel acknowledged that the photograph would serve the purpose of allowing Hunt to identify the victim. (T. 206). Counsel objected and simply claimed that the State could find a less prejudicial photograph, one that did not "inflame the jury to show . . a soldier . . was killed." Counsel did not argue that the photograph was irrelevant because it did not depict the victim as he appeared at the time of the shooting. Thus, Defendant's present claim that the photograph was irrelevant to any issue at trial is not preserved for this Court's review. Steinhorst, 412 So.2d at 338.

Defendant contends, without providing any record citation or other form of proof, that the State "could have used another picture" to have Hunt establish the victim's identity as the person who did not have a gun. (IB. 19). The record reveals that the photograph of the victim was provided to the State by

his family, and nothing in the record suggests that the family had any other photographs of the victim. (T. 207) When defense counsel suggested that the autopsy photographs could be used to have Hunt identify the victim, the prosecutor stated "[h]e's [Hunt] not going to recognize him [the victim]. He's dead. His eyes swelled up and in his head." (T. 207). Defense counsel did not dispute the fact that Hunt would not be able to recognize the victim from the autopsy photos.[4] Id.

Appellate courts must view the evidence at trial in the light most favorable to the prevailing party. Vasquez v. State, 763 So. 2d 1161, 1164 n. 2 (Fla. 4th DCA 2000). The record in this case, viewed in a light most favorable to the State, demonstrates that (1) Hunt was unable to recognize the victim from the autopsy photos and (2) the State could not have used another photograph to establish the victim's identity as the person who did not have a gun. Defendant's argument to the contrary is based upon pure speculation, and the law is clear that "reversible error cannot be predicated upon mere conjecture." Phelps v. State, 353 So. 2d 1221, 1222 (Fla. 3d DCA 1978); Hutchins v. State, 334 So. 2d 112 (Fla. 3d DCA 1976);

[4] Contrary to Defendant's assertions at pages 19-20 of his Initial Brief, nothing in the record indicates that Hunt did not see the autopsy photos either (1) at trial, or (2) before trial.

Jacobs v. Wainwright, 450 So. 2d 200, 201 (Fla. 1984). Accordingly, appellant's argument on this point must fail.

Trial courts have broad discretion in deciding the admissibility of photographic evidence and appellate courts will not disturb such decisions absent a clear showing of abuse. Pope v. State, 679 So. 2d 710 (Fla. 1996); Pangburn v. State, 661 So. 2d 1182 (Fla. 1995); Vargas v. State, 751 So. 2d 665 (Fla. 3d DCA 2000). The test to determine a photograph's admissibility is relevance, not necessity. A photograph that is relevant to an issue at trial, either independently or to corroborate other evidence, is admissible unless the probative value is outweighed by undue prejudice. Allen v. State, 662 So. 2d 323 (Fla. 1995); Czubak v. State, 570 So. 2d 925 (Fla. 1990); Kirby v. State, 625 So. 2d 51 (Fla. 3d DCA 1993).

In this case, the victim's photograph was relevant for purposes of identification and clarification of Hunt's testimony. In testifying about the shooting and surrounding events, Hunt repeatedly distinguished between "the man with the gun" and "the man without the gun." Although Hunt recognized Defendant on the day of the murder and identified him through photographs, Hunt was unable to make an in-court identification of Defendant fourteen years later. Hunt had never seen the victim before the shooting, and did not know his name. Under

these circumstances, the photograph was relevant to establish the victim's identity as the man Hunt referred to as unarmed.

Furthermore, the victim's appearance in military uniform did not render the photograph irrelevant or unduly prejudicial. As Hunt had seen the victim only when he was alive, a photograph of the victim in life was essential for Hunt's identification. Hunt would have been unable to identify the autopsy photograph because the victim's face was distorted in death. (T. 207). The victim's apparent military service was inconsequential, as Hunt testified that at the time of the shooting the victim had long, twisted hair and did not wear a uniform. Thus the trial court did not err in admitting the photograph into evidence. Allen v. State, 662 So. 2d 323 (Fla. 1995)(No abuse of discretion to admit photograph of murder victim with grandchild to corroborate witness testimony); Palmer v. State, 451 So. 2d 500 (Fla. 5th DCA 1984)(No error in admitting photograph of murder victim and girlfriend to corroborate identity).

This issue was previously addressed in Commonwealth v. King, 595 N.E.2d 795 (Mass. App. Ct. 1992). In King, the trial court admitted a photograph of the victim in his military uniform (before the murder) into evidence. The defendant in King, like Defendant in this case, argued the trial court improperly admitted the photo into evidence. The appellate court held that

the photograph of the victim in his military uniform was relevant for the purpose of identification and to show how he appeared before he was murdered. Id. at 798. Similarly, the trial court in this case properly admitted the victim's photograph into evidence because it was relevant for identification purposes. Id.; State v. Bell, 450 S.E.2d 710 (N.C. 1994)(trial court properly admitted into evidence photograph of victim wearing his police uniform and standing in front of patrol car). Accordingly, Defendant's argument on this point is without merit.

The trial court admitted a photograph of the victim in military uniform because it was relevant to identify the victim in the context of the eyewitness testimony. Nothing in the record demonstrates that another picture of the victim, while alive, was available. Hunt testified that Defendant shot a man who was not armed, and Hunt identified the photograph of the victim as the unarmed man. Hunt further testified that the victim was not in uniform and had a different hairstyle when he was killed. Thus, the trial court did not abuse its discretion by admitting the photograph into evidence.[5]

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[5] Defendant argues that the State's reason for introducing the photograph "was illusory" and that "[t]his was not a self defense case. The only issue the jury had to resolve was whether defendant was the person who shot the victim." (IB. 19). Defendant's argument on this matter is belied by his

Defendant contends that the photograph was unduly prejudicial and that its sole purpose was to inflame the jury's passions and invoke sympathy for the victim. As discussed above, however, defense counsel conceded relevancy at trial and the record demonstrates that the photograph was relevant to issues of identification and clarification of testimony. The record also shows that the photograph did not unduly prejudice defendant by inflaming the post-September 11th jury and invoking sympathy for the victim. The victim's military service was never discussed at trial, and the evidence showed the victim did not die as a soldier. Even if the evidence supported Defendant's claim that the jury felt sympathy for the victim because he had worn a military uniform, which it did not, the trial court did not err in admitting the photograph because it was otherwise relevant to establish identity. Palmer v. State, 451 So. 2d 500 (Not reversible error to admit a photograph that might inflame a jury where the photograph has independent or corroborative relevance). Furthermore, as the Third District pointed out, Defendant's argument on this issue "rings hollow

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actions below, i.e., he requested jury instructions on justifiable homicide and excusable homicide. (T. 362). If "[t]he only issue the jury had to resolve was whether defendant was the person who shot the victim," Defendant would not have agreed to instructions on justifiable and excusable homicide. (IB. 19).

given the fact that the delay in this proceeding until September 2001 was largely attributable to his status as a fugitive for thirteen years. He is like the proverbial person who kills his parents and then complains about his orphan status." Williams, 834 So. 2d at 926 n.2.

Even if the trial court abused its discretion by admitting the victim's photograph, such error would be harmless. See Goodwin; DiGuilio. The State did not highlight the victim's military service, and the evidence of defendant's guilt was compelling. Two witnesses who had recognized defendant at the time of the shooting identified him immediately after the crime. Defendant confessed his guilt to another witness, whose credibility the jury had the opportunity to evaluate. Defendant also fled from Florida after the crime to escape arrest, living for more than a decade under an assumed identity. The strength of the State's case is evidenced by the fact that the jury's deliberations were short (approximately ninety minutes). (T. 424-426). There is no reasonable possibility that the introduction of the victim's photograph affected the jury's verdict. Hertz v. State, 803 So. 2d 629 (Fla. 2001); Almeida v. State, 748 So. 2d 922 (Fla. 1999); Duncan v. State, 619 So. 2d 279 (Fla. 1993).

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court to affirm the decision of the Third District Court of Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by U.S. mail to: Robert Kalter, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125 on July 8, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

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