IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-483
DCA CASE NO. 3D05-872

JAVIER D. VENTURA,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner was the defendant in the trial court. The parties will be referred to as they stood in the trial court. For purposes of this brief, the symbol "R." refers to the record on appeal, the symbol "T." refers to the trial transcripts, and the symbol "S.R." refers to the supplemental record on appeal.

STATEMENT OF THE FACTS AND THE CASE

Defendant was charged by amended information on February 12, 2003 with three counts of armed robbery with a deadly weapon. (R. 15-18). The alleged victims were: Vladimiro Rojas in count one, Dina Szejnblum in count two and Silvina Burstein in count three. (R. 15-18).

The following pertinent testimony was presented at Petitioner's trial:

Vladimiro Rojas testified as follows:

On October 31, 2002, at approximately 2:00 a.m., he, Silvina Burstein and a friend of Silvina, were at South Beach walking east on 8th Street. (T. 158-59). When they arrived at Collins Avenue and turned south on Collins, a brown Ford Grand Marquis or Crown Victoria pulled over; the car looked like a police car. (T. 159-60). Two men exited the vehicle demanding their belongings. (T. 160). One man was "skinny and the other was fat." (T. 161). The thin man's head was shaved and he had a "five o'clock shadow." (T. 161-62). The thin man was

wearing a shirt "like a tank that was white with black" and had dark colored big pants. (T. 162). The thin man was holding a gun with one barrel that looked like a rifle while the overweight man collected the belongings. (T. 162-63). Rojas gave him his cellular phone and his jacket. (T. 163). The overweight man collected the belongings from the two women and ran back to the car and started saying "let's go." (T. 163-64). The thin man was pointing the gun at them. (T. 164). The thin man got into the car and the car left. (T. 165). The car made a "u-turn" and headed west on 8th Street. (R. 165). A police officer arrived and Rojas provided a description of the car and the men; he also told the officer that there were a total of four people in the car including a female in the back seat; they were black Hispanics. (T. 166-67). The officer radioed other officers and, within five minutes, he was informed that the car had been stopped. (T. 167). The officer asked the victims to go to the car and attempt to identify the car. (T. 168). The car had been stopped at the McArthur Causeway, about eight minutes away from the crime scene. (T. 168). From a distance of no more than ten feet, with good lighting, the police showed them the four people who had been stopped; Rojas recognized three of them; he had not seen the driver and could not identify him; but he identified the two men and the girl in the back seat. (T. 169-70). He recognized the man who pointed the gun at him right away and he was "one

hundred percent sure" it was him. (T. 170). He also identified the car. (T. 171). He made an in-court identification of defendant as the man who pointed the gun at him. (T. 171). His cellular phone and jacket, and his friends' belongings, were recovered from the car and were returned to them by the police. (T. 171-72). Rojas "had a very good picture of [defendant's] face and the other guy's face;" he was not looking at his clothing, he was looking at his face. (T. 174).

Silvina Burstein testified as follows:

On October 31, 2002, at approximately 2:00 a.m., she was walking with Vladimiro and Dina Szejnblum on South Beach near 7th Street and Collins Avenue. (T. 178). Suddenly, she heard two persons loudly demanding her purse or they would kill her; one of the men was armed with a black gun with a long barrel. (T. 179). The man with the gun was thin and tall with short hair. (T. 180). She complied and gave them her purse containing all her documents including her social security card and credit cards, checks, a Nextel and cosmetics; the contents were worth more than $400 (T. 180-81). The men also took Vladimiro's and Dina's belongings. (T. 182). The car was a "very big old car with four doors and it was like a grayish silver;" there were four people in the car. (T. 183). Vladimiro ran off to find police but before he came back some witnesses had already arrived and had already called the police. (T. 184). The police arrived within a couple of

minutes and she told them what happened and described the car; a few minutes later they received a message on the radio that the car had been stopped by the McArthur Causeway. (T. 184). The police drove them to where the car was stopped, a couple of minutes away, and she identified the car, defendant and his accomplice. (T. 185-86). She made an in-court identification of defendant. (T. 186). Defendant was wearing a short sleeve t-shirt. (T. 186). She was able to get a look at his face during the robbery for ten to fifteen seconds. (T. 187). She immediately identified defendant the night of the incident and was one hundred percent sure of the identification. (T. 188). She identified some belongings taken from her by defendant and his accomplice. (T. 189). Her belongings were returned to her by the police that night. (T. 190). She did not recover her purse, other documents, keys, cosmetics, etc. (T. 190).

Officer Anton testified as follows:

On October 31, 2002 at approximately 2:02 a.m., he was dispatched to an armed robbery in progress at the corner of 8th Street and Collins Avenue. (T. 203). When he arrived, the suspects had already left the scene; there were three victims and two witnesses there. (T. 203-04). The three victims told him three Hispanic males and a female robbed them in a gold or brown colored Ford Grand Marquis that looked like a police car; the car made a u-turn and fled westbound on 8th

Street; the person in the front seat jumped out with a rifle. (T. 205-06). He immediately issued a BOLO describing the vehicle and advising that there were three males and a female in the car travelling westbound on 8th. (T. 206-07). He was advised that a vehicle had been stopped; he transported the victims to the vehicle for a show up identification. (T. 207). Dina had been afraid to look up during the robbery and never got a good look; but Vladimiro and Silvina had "gotten a good view;" they both positively identified defendant and his accomplice. (T. 207-08). Officer Anton made an in-court identification of defendant as the person Vladimiro and Silvina identified as the person holding the gun. (T. 208-09). Vladimiro and Silvina also identified the car. (T. 209).

Officer Ervin testified as follows:

On October 31, 2002 at approximately 2:00 a.m., he was working off duty in South Beach when he heard about an armed robbery at 8th and Collins over the police radio. (T. 590). The McArthur Causeway is the only way in and out of South Beach so he positioned his police car near the causeway. (T. 590-91). He heard the BOLO describing the vehicle as a Ford Grand Marquis or Crown Victoria, older model, missing hubcaps on the right side, containing three males and one female. (T. 591). Within five minutes, he spotted the car as it drove right by him heading westbound on 5th street; he followed it onto the McArthur

Causeway and pulled it over. (T. 592-93). The officers took all the suspects out of the vehicle and searched the vehicle. (T. 593-94). One of the officers found a rifle in the front seat. (T. 594). Two persons had been sitting in the front; a heavy set person in the right rear, and a female in the left rear seat. (T. 596). He made an in-court identification of defendant as the person sitting in the right front seat. (T. 596).

Officer Concus testified as follows:

On October 31, 2002, at approximately 2:00 a.m., he was leaving the police station when he heard on the radio about a robbery on 8th and Collins; he and Officer Mitchell drove south on 5th street; he heard an officer announce over the radio that the car was within sight; they headed to the McArthur Causeway where they participated in the stop of the vehicle; it was a 1992 four door Grand Marquis very similar to the description provided in the BOLO (T. 599-603). He helped remove four people from the car; defendant was the front passenger, a "really big guy" was sitting in the rear right, and a female was seated in the back left. (T. 603-04). Officer Concus made an in-court identification of defendant as the person sitting in the front passenger seat. (T. 604). A rifle was found on the front passenger seat. (T. 605-06). Some of the belongings of the victims were found inside the car. (T. 607).

Detective Teppenberg testified as follows:

On October 31, 2002, he responded to the police station at 4:15 a.m. (T. 614). The following colloquy ensued:

> Q. And when you got there what did you do?
>
> A. Well, I spoke to the victims and [Officer Anton]. There [sic] stories were consistent to that offense report about what occurred in the robbery. I also had requested I.D. to take pictures of the recovered stolen property. Along with the victims, the defendants wouldn't give any statements.
>
> [DEFENSE COUNSEL]: I reserve a motion on that.

(T. 614-15). Detective Teppenberg identified photographs of Vladimiro Rojas and Silvina Burstein, and property taken from them during the robbery and subsequently recovered. (T. 615-17). The following colloquy ensued:

> Q. You were informed by the officer what they did no [sic] the scene?
>
> A. Yes. The suspects were in custody and the defendant they declined to make statements.
>
> [DEFENSE COUNSEL]: I reserve a motion.
>
> THE COURT: Noted.

(T. 617-18). Detective Teppenberg then identified a photograph of a BB rifle recovered by police. (T. 618-20). The defense did not move for a mistrial until after the state finished its direct examination of Detective Teppenberg, the defense

completed its cross-examination of Detective Teppenberg, and the state rested its case. (T. 624). The defense then moved for a mistrial based on the comments made by Detective Teppenberg on defendant's silence. (T. 624). The trial court inquired as to whether the defense desired a proposed jury instruction and whether it had one. (T. 625). Defense counsel then stated: "Certainly I must submit that as an alternative to a mistrial I request cautionary instructions." (T. 625). The trial court found that "the detective should not of [sic] said what she did." (T. 625). However, the trial court denied the motion for mistrial. (T. 625). It then requested a proposed instruction. (T. 626).

Defense counsel prepared a jury instruction which read: "The defendant exercised a fundamental right by choosing not to make a statement to the police. You must not view this as an admission of guilt or let it influence you in any way by that decision." (T. 631-33). The jury was instructed as follows: "The defendant exercised a fundamental right by choosing not to make a statement to the police. You must not view this as an admission of guilt or be influenced in any way by that decision." (T. 665; R. 96).

During the defendant's closing argument, defendant emphasized that his defense was that he was incorrectly identified:

> I ask you on behalf of Mr. Ventura to consider first, as I told you in my opening statements it was strickly [sic]

> from the defense stand point, an identification case, and as you remember most of my questioning on cross, if not all of it on cross was directed about how the identification of Mr. Ventura was made in this case by the victims.

(T. 640).

> It's a case of identification. I told you that earlier. If you collectively and unanimously agree in the jury room that the testimony and the identification made court [sic] matches that, that was made in regard to the witness you will reach a verdict and find my client guilty, but before you do that I want you to . . . .

(T. 644-45).

During the state's closing argument, the assistant state attorney did not mention defendant's silence or refer to Detective Teppenberg's comments. (T. 646-55).

The jury found defendant guilty of robbery with a weapon as a lesser included offense in counts one and three. (T. 676-77; R. 106-07). Judgment was entered accordingly. (R. 112).

Defendant was sentenced as a prison releasee reoffender (PRR) to two concurrent sentences of thirty (30) years imprisonment with a thirty year minimum mandatory term. (R. 121-22; 134-36). During the sentencing hearing, the state introduced into evidence a "release-date letter" accompanied by a "crime and time report." (R. 123-29). Defendant's counsel objected to both of these documents

but raised only a "Blakely" objection because they had not been submitted to the jury during defendant's trial. (R. 159-60; 166-74). The trial court asked the defense whether it had any evidence to rebut the state's evidence of his release date and the defense admitted that it did not. (R. 174).

Defendant appealed to the Third District Court of Appeal. While that appeal was pending, defendant filed with the trial court a motion to correct sentence pursuant to Fla.R.Crim.P. 3.800(b), in which he contended the state had not submitted competent proof that he met the criteria for sentencing as a PRR. (S.R. 7-17). Defendant asserted that the only document that established that defendant was released from a correctional facility within three years of the offenses in this case was the "release-date letter;" he did not dispute that the "release-date letter" was self-authenticating, but argued that it was inadmissible hearsay. (S.R. 9-10; 118-19). The motion stated that defendant's "failure to object at sentencing to the absence of competent evidence of his release date can be remedied by this motion (or on appeal following the making of this motion)." (S.R. 16). Thus, defendant acknowledged that he had failed to object on this basis during his sentencing. The trial court denied defendant's motion. (S.R. 103; 120).

The Third District concluded "that the detective's testimony was improper, but harmless beyond a reasonable doubt given the overwhelming evidence of

guilt." Ventura v. State, 973 So.2d 634, 637 (Fla. 3d DCA 2008). The Third District also affirmed defendant's sentence as a PRR concluding that: (1) there was no proper, timely objection because defense counsel did not raise a hearsay objection during the sentencing hearing; (2) defendant has never alleged that the document relied upon by the trial court contains an error; and (3) the "release-date letter" "could be properly considered by the trial court under the public records exception to the hearsay rule" pursuant to Yisrael v. State, 938 So.2d 546 (Fla. 4th DCA 2006). Ventura v. State, 973 So.2d at 637-38.

SUMMARY OF ARGUMENT

The trial court's recognition of the error and curative instruction to the jury makes this case analogous to those cases in which an objection is sustained and/or the trial court gives a curative instruction. Accordingly, the correct appellate standard of review is whether the trial court abused its discretion in its denial of a mistrial. The comments were not so prejudicial as to vitiate the entire trial, defendant received a fair trial, and the trial court did not abuse its discretion in denying the motion for mistrial.

Even if the comments are subject to harmless error review, the Third District did not err in determining that the detective's comments did not contribute to the verdict and were harmless beyond a reasonable doubt in light of the overwhelming

permissible evidence of guilt, the fact that the comments were neither repeated nor emphasized, and the curative instruction given to the jury.

Defendant was properly sentenced as a PRR. During defendant's sentencing hearing the state introduced into evidence a signed, written under seal "release-date letter," accompanied by a "crime and time report." These documents were admissible as a public record and properly admitted. Indeed, defendant concedes these documents are admissible to prove his date of release. Further, defendant conceded at his sentencing hearing that he has no evidence to rebut the state's evidence of his release date.

Defendant failed to preserve his argument that the release date letter was inadmissible hearsay at this sentencing hearing. However, defendant concedes this issue is rendered moot by virtue of the admissibility of the release date letter and the crime and time report.

ARGUMENT

I. THE DETECTIVE'S COMMENTS ON DEFENDANT'S SILENCE DO NOT CONSTITUTE REVERSIBLE ERROR.

a. The trial court did not abuse its discretion in denying defendant's motion for a mistrial because the comments were not so prejudicial as to vitiate the entire trial.

Generally, "[e]rror involving comment on silence must be evaluated under a harmless error analysis." State v. Hoggins, 718 So.2d 761, 772 (Fla.1998). However, when an improper comment is made, objected to by counsel, and either sustained by the trial court or corrected by the issuance of a curative instruction, this Court has consistently held that the proper standard of review governing the denial of a motion for a mistrial based on improper comments is for an abuse of discretion. Salazar v. State, 991 So.2d 364, 371 (Fla. 2008); Chamberlain v. State, 881 So.2d 1087, 1098 (Fla.2004); Rivera v. State, 859 So.2d 495, 511-12 (Fla.2003); Anderson v. State, 841 So.2d 390, 403 (Fla.2003); Doorbal v. State, 837 So.2d 940, 956-57 (Fla.2003); Smithers v. State, 826 So.2d 916, 930 (Fla.2002); Card v. State, 803 So.2d 613, 621-22 (Fla.2001); Gore v. State, 784 So.2d 418, 427-28 (Fla.2001); Rodriguez v. State, 753 So.2d 29, 39 (Fla.2000). Goodwin v. State, 751 So.2d 537, 547 (Fla. 1999).

Here, when the trial court considered defendant's motion for a mistrial it recognized the error and issued a curative instruction to the jury. In denying the motion for mistrial, the trial court found that "the detective should not of [sic] said what she did." (T. 625). The trial court instructed the jury as follows: "The defendant exercised a fundamental right by choosing not to make a statement to the police. You must not view this as an admission of guilt or be influenced in any way by that decision." (T. 665; R. 96). Therefore, the trial court's recognition of the error and curative instruction to the jury makes this case analogous to those cases in which an objection is sustained and/or the trial court gives a curative instruction. Accordingly, the correct appellate standard of review is whether the trial court abused its discretion in its denial of a mistrial.

"A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial." Cole v. State, 701 So.2d 845, 853 (Fla.1997). "A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial." England v. State, 940 So.2d 389, 401-02 (Fla.2006), cert. denied, 549 U.S. 1325, 127 S.Ct. 1916, 167 L.Ed.2d 571 (2007). A trial court's ruling on a mistrial motion is reviewed for abuse of discretion. Id. at 402. Such a ruling is reversed "only when the error is deemed so prejudicial that it vitiates the entire trial." Floyd v. State, 913 So.2d 564, 576 (Fla.2005).

A mistrial was not necessary in this case to ensure that defendant received a fair trial. The victims provided to the police a description of the assailants and their vehicle. The victims told police the vehicle contained four persons: a male driver; a thin man who had the gun; a heavy man who collected their belongings; and, a female sitting in the back seat. The police stopped a vehicle matching the description within minutes. It contained four persons: a male driver; defendant who seated in the front passenger seat; a heavy man who was seated in the rear right; and a female who was seated in the back left seat. A rifle was found in the front passenger seat.

One of the victims, Rojas, positively identified three of the four occupants of the car; he could not identify the driver because he did not see the driver. He positively identified the vehicle and Petitioner as the man who pointed the gun at him. Rojas belongings were recovered from the vehicle. He again identified Petitioner in court. A second victim, Burstein, also positively identified the vehicle, defendant and his accomplice at the scene and made an in-court identification of defendant. She also identified some of her belongings taken from her and found in the vehicle. Thus, the evidence of defendant's guilt was simply overwhelming.

The isolated testimony of Detective Teppenberg did not undo this overwhelming evidence of guilt. The prosecutor never highlighted or commented that defendant failed to give a statement, nor made any argument that his failure to give a statement proved his guilt. Further, the jury was properly instructed on the fact that a defendant has the right to not testify. (T. 629, 665.)

"Absent a finding to the contrary, juries are presumed to follow the instructions given them." Carter v. Brown & Williamson Tobacco Co., 778 So.2d 932, 942 (Fla. 2000). See also Sutton v. State, 718 So.2d 215, 216 & 216 n. 1 (Fla. 1st DCA 1998), and cases cited therein, ("applying the well-established presumption that juries follow trial court instructions"). In Greer v. Miller, 483 U.S. 756, 107 S.Ct. 3102 (1987), the United States Supreme Court explained:

> We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, Richardson v. Marsh, 481 U.S. 200, 208, 107 S.Ct., 1702, ----, 95 L.Ed.2d 176 (1987), and a strong likelihood that the effect of the evidence would be "devastating" to the defendant, Bruton v. United States, 391 U.S. 123, 136, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476 (1968). We have no reason to believe that the jury in this case was incapable of obeying the curative instructions.

Greer v. Miller, 483 U.S. at 767, fn. 8. Similarly, here, there is no reason to believe that the jury was incapable of obeying the curative instruction.

Taken together, it is clear that the comments were not so prejudicial as to vitiate the entire trial, defendant received a fair trial, and the trial court did not abuse its discretion in denying the motion for mistrial.

b. Alternatively, the detective's comments were harmless beyond a reasonable doubt.

"Error involving comment on silence must be evaluated under a harmless error analysis." State v. Hoggins, 718 So.2d 761, 772 (Fla.1998). In Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005), this Court explained:

> In DiGuilio, we explained that improper comments on a defendant's invocation of his right to remain silent are subject to a harmless error analysis. See 491 So.2d at 1137. This Court explained the proper test that appellate courts must apply when performing a harmless error analysis:
>
> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

> Id. at 1139; see also Jones v. State, 748 So.2d 1012, 1021-22 (Fla.1999). Application of the harmless error test "requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." DiGuilio, 491 So.2d at 1138.

Fitzpatrick v. State, 900 So.2d 516-17.

Here, the Third District concluded that "the detective's testimony was improper, but harmless beyond a reasonable doubt given the overwhelming evidence of guilt." Ventura v. State, 973 So.2d at 637. As explained above, the Third District's determination that the evidence against defendant was overwhelming is correct.

The victims provided to the police a description of the assailants and their vehicle. The victims told police the vehicle contained four persons: a male driver; a thin man who had the gun; a heavy man who collected their belongings; and, a female sitting in the back seat. The police stopped a vehicle matching the description within minutes. It contained four persons: a male driver; defendant who seated in the front passenger seat; a heavy man who was seated in the rear right; and a female who was seated in the back left seat. A rifle was found in the front passenger seat.

One of the victims, Rojas, positively identified three of the four occupants of the car; he could not identify the driver because he did not see the driver. He

positively identified the vehicle and Petitioner as the man who pointed the gun at him. Rojas belongings were recovered from the vehicle. He again identified Petitioner in court. A second victim, Burstein, also positively identified the vehicle, defendant and his accomplice at the scene and made an in-court identification of defendant. She also identified some of her belongings taken from her and found in the vehicle. The disputed issue at trial was defendant's identification as the assailant and the evidence identifying as the assailant was clearly overwhelming.

The isolated comments of the detective were neither repeated nor emphasized; they were not mentioned during the prosecution's closing argument and the prosecutor did not comment on defendant's right to remain silent. Further, the trial court instructed the jury as follows: "The defendant exercised a fundamental right by choosing not to make a statement to the police. You must not view this as an admission of guilt or be influenced in any way by that decision." (T. 665; R. 96). As more fully set forth in the previous section, a jury is presumed the follow the instructions given to it.

Therefore, the Third District properly determined that the detective's comments did not contribute to the verdict and were harmless beyond a reasonable doubt.

This Court has similarly determined that an impermissible comment on a defendant's silence was harmless beyond a reasonable doubt in light of the overwhelming evidence of the defendant's guilt. In Fitzpatrick, the detective who interviewed the defendant testified that during his initial interview with the defendant, the defendant mentioned that he thought he needed an attorney. Fitzpatrick argued on appeal that his motion for mistrial should have been granted to ensure that he received a fair trial. Id. at 516. This Court found that the comment was "fairly susceptible of being interpreted by the jury as a comment on silence," id., but concluded, that based upon the overwhelming permissible evidence of Fitzpatrick's guilt and the fact that "the impermissible remark was neither repeated nor emphasized," the "isolated and singular comment [did] not constitute harmful error." Id. at 517. This Court stated:

> Application of the harmless error test "**requires** not only **a close examination of the permissible evidence on which the jury could have legitimately relied**, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *DiGuilio*, 491 So.2d at 1138.
>
> On this record, we conclude that there was no reasonable possibility that Bousquet's testimony affected the jury verdict, and it was therefore harmless beyond a reasonable doubt. **There was overwhelming permissible evidence of Fitzpatrick's guilt**. The jury was presented with DNA evidence matching Fitzpatrick to the source of the semen recovered from the victim and eyewitness testimony establishing that Romines was last

> seen alive with Fitzpatrick three hours before she was discovered. The only arguably impermissible testimony placed before the jury was the fact that Fitzpatrick simply stated that he thought he needed an attorney. This Court in Jones, stating that it was convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict," emphasized that "although the witness did improperly comment on the defendant's invocation of his right to silence, the remark was neither repeated nor emphasized." *Jones*, 748 So.2d at 1022; see also *Cole v. State*, 701 So.2d 845, 853 (Fla.1997) (concluding that a remark regarding the defendant's prior criminal history, which the witness had been instructed by the trial court not to mention, was isolated and was not focused on and therefore was not so prejudicial as to require reversal). Here, the impermissible remark was neither repeated nor emphasized, and the trial judge expressly indicated the lack of importance he felt the jury attributed to the remark. Based upon the review of the record, this Court concludes that this isolated and singular comment does not constitute harmful error.

Fitzpatrick v. State, 900 So.2d at 517. (Emphasis added).

Therefore, the fact that a reviewing court mentions that there was overwhelming permissible evidence of guilt should not be taken as an indication that it incorrectly applied the harmless error test.

In Jones v. State, 748 So.2d 1012, 1021-22 (Fla.1999), this Court concluded that although the detective impermissibly commented on the defendant's right to remain silent where he testified that he terminated his interrogation of Jones when Jones invoked his right to remain silent, the error was harmless beyond a reasonable doubt. In applying the harmless error analysis, this Court noted the

permissible evidence introduced at trial, and that the remark was neither repeated nor emphasized:

> In State v. DiGuilio, 491 So.2d 1129, 1137-38 (Fla.1986), we explained that improper comments on a defendant's invocation of his right to remain silent are subject to a harmless error analysis and need not require reversal if the Court is convinced, beyond a reasonable doubt, that the error did not contribute to the verdict. In this case, although the witness did improperly comment on the defendant's invocation of his right to silence, the remark was neither repeated nor emphasized. Further, the evidence against Jones included his confession to the crime, the fact that McRae was last seen alive with Jones before she disappeared, and the fact that Jones was arrested driving her vehicle with blood on his clothes and scratches on his face. The evidence also revealed that he attempted to use her ATM card and confidential ATM code over 100 times and was able to successfully withdraw over $600 between the time she was last seen alive and the time he was arrested just two days later. Considering this evidence and the fact that the error here was not repeated or emphasized, we are convinced "beyond a reasonable doubt that the that the error complained of did not contribute to the verdict." Id. at 1135. Accordingly, reversal is not required on this point.

Jones v. State, 748 So.2d at 1021-22.

Thus, in light of the overwhelming permissible evidence of guilt, the fact that the comments were neither repeated nor emphasized, and the curative instruction given to the jury, the Third District did not err in determining that the detective's comments did not contribute to the verdict and were harmless beyond a reasonable doubt.

Defendant contends the Third District erroneously applied the harmless error test. He alleges that the Third District "did not ask itself the question of whether the improper comments contributed to the conviction." (Initial Brief of Petitioner on the Merits, p. 12). However, the Third District specifically stated that the "harmless error test 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." Ventura v. State, 973 So.2d at 637. Thus, it is clear that the Third District was well aware of the proper harmless error analysis. Based on the lengthy recitation of facts set forth in the opinion, which included the detective's improper comments and defense counsel's argument that the comments were improper and highly prejudicial as a basis for defendant's motion for a mistrial, it is clear that the district court examined the entire record before concluding that the error was harmless beyond a reasonable doubt. Further, even if one were to assume, *arguendo*, that the Third District incorrectly applied the harmless error test, its conclusion that the detective's comments were harmless beyond a reasonable doubt is nonetheless correct. Moreover, as argued in the previous section, the correct test to be applied in this case is whether the trial court abused its discretion in denying a motion for mistrial, not a harmless error test.

Thus, the detective's comments did not constitute reversible error.

II. DEFENDANT WAS PROPERLY SENTENCED AS A PRR.

In Yisrael v. State, 993 So.2d 952, 960 (Fla. 2008), this Court held that a signed release date letter, written under seal, may be used to authenticate a DOC "Crime and Time Report," which would then render the entire report admissible as a public record.

Here, during the sentencing hearing the state introduced into evidence a signed, written under seal "release-date letter," accompanied by a "crime and time report." (R. 123-29). Therefore, these documents were admissible as a public record and properly admitted. Indeed, in both Petitioner's Reply to Order to Show Cause, and Initial Brief of Petitioner on the Merits, defendant concedes that the record contains both a release date letter and a crime and time report, and that these documents are admissible to prove his date of release. (Initial Brief, p. 14, n. 5).

Further, defendant conceded at his sentencing hearing that he has no evidence to rebut the state's evidence of his release date. (R. 174). The Third District correctly noted that "Ventura has never alleged that the document relied upon by the court contains an error." Ventura v. State, 973 So.2d at 638.

Thus, defendant was properly sentenced as a PRR.

Defendant correctly asserts that the Third District incorrectly stated that the release-date letter alone "could be properly considered by the trial court under the

public records exception to the hearsay rule" pursuant to Yisrael v. State, 938 So.2d 546 (Fla. 4th DCA 2006). Ventura v. State, 973 So.2d at 637-38. However, the decision of the Third District is nonetheless correct because in this case the release date letter was accompanied by a crime and time report.

III. DEFENDANT'S ARGUMENT THAT THE RELEASE DATE LETTER WAS INADMISSIBLE HEARSAY, AND THAT THE TRIAL COURT THEREFORE ERRED IN RELYING ON IT TO SENTENCE HIM AS A PRR, WAS NOT PRESERVED FOR APPELLATE REVIEW AND DOES NOT CONSTITUTE FUNDAMENTAL ERROR.

At defendant's sentencing hearing, his counsel objected to the admissibility of both the release date letter and the crime and time report, but raised only a "Blakely" objection because they had not been submitted to the jury during defendant's trial. (R. 159-60; 166-74). In affirming defendant's sentence as a PRR, the Third District noted that there was no proper, timely objection because defense counsel did not raise a hearsay objection during the sentencing hearing: "As to Ventura's argument that the trial court erred in relying on hearsay to sentence him as a PRR, no such objection was made by defense counsel during the sentencing hearing. Furthermore, Ventura has never alleged that the document relied upon by the court contains an error. Finally, had a proper, timely objection been made, we agree with [the Fourth District's decision in] Yisrael . . ." Ventura,

973 So. 2d at 637-38. (Emphasis added.) It is clear that the Third District determined that defendant failed to properly preserve this issue for appellate review.

In seeking review by this Court, defendant argued that the district court failed to recognize that his 3.800(b) motion preserved the issue for appellate review. (Petitioner's Brief on Jurisdiction, p. 9).

While defendant's appeal to the Third District was pending, defendant filed with the trial court a motion to correct sentence pursuant to Fla.R.Crim.P. 3.800(b), in which he contended the state had not submitted competent proof that he met the criteria for sentencing as a PRR. (S.R. 7-17). Defendant asserted that the only document that established that defendant was released from a correctional facility within three years of the offenses in this case was the "release-date letter;" he did not dispute that the "release-date letter" was self-authenticating, but argued that it was inadmissible hearsay. (S.R. 9-10; 118-19). The motion stated that defendant's "failure to object at sentencing to the absence of competent evidence of his release date can be remedied by this motion (or on appeal following the making of this motion)." (S.R. 16). Thus, defendant acknowledged that he had failed to object on this basis during his sentencing. The trial court denied defendant's motion. (S.R. 103; 120).

However, in Jackson v. State, 983 So.2d 562 (Fla.2008) this Court explained that "most trial court errors are subject to the contemporaneous objection rule." Id. at 567-68. It is well-established that "rule 3.800(b) was not intended to circumvent rules requiring contemporaneous objections or to substitute for ineffective assistance of counsel claims." Id. at 573. By its express language, rule 3.800(b)(2) allows a defendant to file in the trial court a motion to correct "a sentencing error." See id. at 565. "[R]ule 3.800(b) is intended to permit defendants to bring to the trial court's attention errors in sentence-related orders, not any error in the sentencing process." Id. at 572.

The alleged error about which defendant complains relates to the admissibility of the release date letter and whether the letter was hearsay. Rule 3.800(b) “was not intended to give a defendant a “second bite at the apple” to contest evidentiary rulings made at sentencing to which the defendant could have objected but chose not to do so.” Id. at 573. (Emphasis added). This is not an error "related to the ultimate sanctions imposed." Jackson, 983 So.2d at 573. As this Court made clear, referring to rule 3.800(b)(2):

> The rule was never intended to allow a defendant (or defense counsel) to sit silent in the face of a procedural error in the sentencing process and then, if unhappy with the result, file a motion under rule 3.800(b).

Jackson, 983 So.2d at 573.

Therefore, a claim of hearsay does not involve a sentencing error cognizable in rule 3.800(b)(2) and in Jackson. Accordingly, it may be considered on appeal "only under the stringent fundamental error standard." Jackson, 983 So.2d at 565.

Defendant does not argue that fundamental error occurred. In fact, the Third District noted that he "has never alleged that the document relied upon by the trial court contains an error." Ventura, 973 So. 2d at 638. In his Initial Brief on the Merits defendant states: "The decisions in this case and Yisrael, treat the error at issue as purely evidentiary rather than a failure of proof. To the extent that a defendant's motion may be characterized as a retroactive evidentiary objection, counsel concedes that Jackson forecloses any reliance on Rule 3.800(b)." (Initial Brief on the Merits, p. 15). Defendant further concedes that "[t]his issue is rendered moot by the resolution of the substantive Yisrael issue in this case, discussed in Argument II, above." (Initial Brief, p. 14, n. 6).

Thus, the release date letter was properly admitted as evidence at defendant's sentencing hearing and considered by the trial court when it sentenced defendant as a PRR.

CONCLUSION

WHEREFORE, the State of Florida respectfully requests an Order of this Court approving the decision of the Third District Court of Appeal.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS was mailed this _____ day of _____, 2009, to Andrew Stanton, Esq., Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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CERTIFICATE OF COMPLIANCE WITH TYPE AND FONT

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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