IN THE SUPREME COURT OF FLORIDA

CASE NO. SC

JAVIER D. VENTURA,

Petitioner,

-vs-

THE STATE OF FLORIDA.

Respondent.

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

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner seeks discretionary review of a Third District decision that conflicts with decisions of this Court and of other District Courts as to the application of the harmless error doctrine, and as to the admissibility of prison records as public records at sentencing. The symbol "A." refers to the lower court opinion, set forth in the Appendix.

STATEMENT OF THE CASE AND FACTS

The District Court stated the facts as follows (A. 2-5):

> Ventura was charged with three counts of armed robbery with a deadly weapon (a pellet rifle) of three different victims. At trial, Vladimiro Rojas testified that at about two a.m. on October 31, 2002, he was walking from a café toward his car at Collins Avenue and 8th Street with Silvina Burstein and her friend. At the corner, a car pulled up next to them. The car was a brown Ford, a Crown Victoria or a Grand Marquis. Two men got out with guns and demanded their property. One man was skinny; the other was fat. The skinny one had his head shaved, was wearing a white and black tank shirt, and was holding a gun that looked like a rifle. Rojas gave them his cellular phone and jacket. The two men took his friends' things and ran back to their car.
>
> When the car left, Rojas summoned police and reported what had happened. The police officers told him they had stopped the car he had described. An officer drove Rojas and his friends to where they had stopped the car, on the MacArthur Causeway. They brought out the suspects. Rojas identified Ventura as the person who pointed the gun at him, and he also identified the car. He also identified Ventura in the courtroom as the person who had pointed the gun at him.
>
> Silvina Burstein corroborated Rojas's testimony. She reported that at about two a.m. on October 31, 2002, she was walking with Rojas and her friend when she was robbed. Two men came at her and demanded her property; one of them had a gun - he was tall and thin with short hair. She gave them her purse, with her cell phone and credit cards. They drove off in a big, old greyish silver car. Police arrived and subsequently told Burstein that a car had been stopped on the MacArthur Causeway. The police took the victims there,

and she identified the car, and identified Ventura as one of her assailants. She also identified Ventura in the courtroom.

Detective Teppenberg identified a photograph of Rojas, with the property taken from him in the robbery and subsequently recovered from inside the car where Ventura was apprehended, a photograph of Burstein, with the property taken from her in the robbery and subsequently recovered, and a photograph of a BB rifle recovered by police during the investigation. During Detective Teppenberg's testimony, the following transpired:

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

A few moments later, Detective Teppenberg further testified:

> Q. You were informed by the officer what they did [at] the scene?
>
> A. Yes. The suspects were in custody and the defendant then declined to make statements.
>
> [Defense counsel]: I reserve a motion.
>
> THE COURT: Noted.

The State rested following Detective Teppenberg's testimony, and the jury was removed from the courtroom. Defense counsel then moved for a mistrial on the ground that Detective Teppenberg had improperly told the jury that Ventura had refused to make a statement explaining the stolen property in the vehicle when he was entitled to exercise his right to remain silent, and such comment before the jury was improper and highly prejudicial.

The trial court commented that the detective's remarks had been improper, but indicated they did not warrant a mistrial. The court denied the motion. . . .

On Ventura's motion, the court granted a judgment of acquittal as to Count 2 of the Information, alleging a robbery from the third victim, who had not testified. Only

> Counts 1 and 3 were submitted to the jury. The jury found Ventura guilty of two counts of robbery with a weapon, as a lesser offense of armed robbery with a deadly weapon. Ventura moved for a new trial on the ground that Detective Teppenberg's comments on Ventura's exercise of his right to remain silent had deprived him of a fair trial. The trial court denied the motion.

The District Court stated the facts pertaining to the sentencing issue as follows (A. 5):

> The trial court sentenced Ventura to thirty years in state prison as a PRR. Ventura then moved, pursuant to Rule 3.800(b), to correct the sentence on the ground that the State had not submitted competent proof that he met the criteria for sentencing as a PRR . . . .
>
> The trial court denied the motion, holding that the documents in the record were under seal, and thus self-authenticating documents, and that they authenticated themselves as public records admissible under the hearsay exception for public records, under *Yisrael v. State*, 938 So.2d 546 (Fla. 4th DCA 2006). The trial court further held that the documents were public records admissible under the public records exception to the hearsay rule under *Yisrael*. The trial court found that Ventura's release date was sufficiently shown by these public records.

The District Court ruled as follows (A. 5-7):

> The State does not contest the fact that it cannot use Ventura's silence to infer guilt. *See Love v. State*, 438 So.2d 142, 144 (Fla. 3d DCA 1983). It attempts to defend the detective's statement on the basis that the prosecutor did not elicit the testimony from Detective Teppenberg. We fail to see how this makes the statement any less harmful. The lead detective is as much a member of the prosecution team as the attorney asking the question. The fact that the prosecutor did not elicit the statement may mitigate the attorneys action, but the State has an obligation to prepare its witnesses. Even the most cursory trial preparation should have avoided the detective's testimony. Thus, whether intentional or negligent, the prosecution is not guiltless.
>
> But neither is defense counsel, who merely reserved a motion. By not requesting an immediate sidebar, counsel left open the possibility that the witness would repeat the accusatory silence of Ventura, as indeed occurred. Counsel also could have attempted to establish how these unsolicited

comments crept into the trial, whether it was the detective's idea to poison the jury, or whether it had been planned with the prosecutor. This detective testified that she had been with the Miami Beach Police Department for twenty-two-and-one-half years. She was a trained criminal investigator. We fail to see how the detective's comment, twice repeated, could have been anything other than an intentional cheap shot at Ventura's constitutional rights. Yet, defense counsel's lackadaisical attitude would seem to indicate that this Court is more offended than defense counsel, who, on this record, never made a valid objection, but merely reserved one. There was no contemporaneous objection.

"Error involving comment on silence must be evaluated under a harmless error analysis." *State v. Hoggins*, 718 So.2d 761, 772 (Fla.1998). "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 ..." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla.1986). We conclude that the detective's testimony was improper, but harmless beyond a reasonable doubt given the overwhelming evidence of guilt.

The District Court ruled as follows with respect to the sentencing issue (A. 7-8):

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 *Yisrael v. State*, 938 So.2d at 546, that the letter in evidence could be properly considered by the trial court under the public records exception to the hearsay rule, subsection 90.803(8), Florida Statutes (2005). [S]ubsection 90.803(8) provides that:

> Public Records and Reports: Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law

> enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

As this Court stated in *Ward v. State*, 965 So. 2d 308 (Fla. 3d DCA 2007):

> Under Florida law, the Department has a statutory duty to obtain and place in its permanent records information as complete as may be practicably available on every person who may become subject to parole ... An inmate's release date is the type of information falling within this statutory duty.

Id. at 309 (citations omitted).

Rehearing was denied on February 21, 2008 (A. 9).

SUMMARY OF ARGUMENT

The decision below is in conflict with the harmless error doctrine in *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), because it credits all the State's evidence in assessing whether the comment on silence was harmless.

The decision below holds that a release-date letter is admissible under the public records exception to the hearsay rule, and is in conflict with this Court's decision in *Yisrael v. State*, 33 Fla. L. Weekly S131 (Fla. February 21, 2008).

ARGUMENT

I

THE DECISION OF THE THIRD DISTRICT IS IN CONFLICT WITH THE HARMLESS ERROR DOCTRINE IN *STATE V. DIGUILIO*, 491 SO. 2D 1129 (FLA. 1986)

The harmless error question here is whether the State can prove "beyond a reasonable doubt" that the error from which it benefitted "did not contribute to the verdict." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986).[1]

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[1] The District Court's Opinion (at 6) indicates that "[t]here was no contemporaneous objection" to the improper comment. However, the opinion does not indicate that the improper comment was waived or not preserved for review. A contemporaneous objection is required "to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic." *Rhoden v. State*, 448 So. 2d 1013, 1016 (Fla. 1984) (citations omitted). Where the jury has heard the improper comment, and defense counsel waives any curative instruction, a motion for a mistrial serves that purpose as well as an objection would. Thus here, the trial court agreed that Detective Teppenberg's remark was an improper comment on silence, and then determined, erroneously we contend, that a mistrial was not needed. Established authority holds that trial error requiring a mistrial is properly preserved by a motion for a mistrial alone. In *Kearse v. State*, 770 So. 2d 1119, 1129 (Fla. 2000), the Florida Supreme Court explained that "defense counsel may conclude that a curative instruction will not cure the error and choose not to request one. Thus, a defendant need not request a curative instruction in order to preserve an improper comment issue for appeal. Moreover, even though Kearse's counsel did not specifically object to the

DiGuilio endorsed the rule stated in Chief Justice Roger Traynor's dissent in *People v. Ross*, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967), *rev'd sub nom*, *Ross v. California*, 391 U.S. 470 (1968), that "[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result." *DiGuilio*, 491 So. 2d at 1136.

In this case the issue at trial was whether the identification testimony of the two victims who testified was sufficiently reliable to find Ventura guilty beyond a reasonable doubt. The District Court approached the harmless error analysis by crediting all the State's identification testimony, and giving no weight to the evidence that impaired the

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prosecutor's comment, counsel's contemporaneous motion for mistrial at the time that the prosecutor made these comments was sufficient to preserve the issue for appellate review." *Kearse*, 770 So. 2d at 1129 (emphasis added, citations omitted).

identification of the perpetrators of a 2 AM street robbery who were initially identified at a suggestive show-up on the McArthur causeway in the middle of the night by only two of the three robbery victims. The jury may have doubted these identifications. We therefore cannot say beyond a reasonable doubt that the jury was not convinced by the improper comment on silence, indicating that defendant had not explained being in a car with the victim's stolen property.

Appellate judges do not properly assess the harmlessness of an improper comment that tends to enhance the credibility of the State's evidence if they start from the proposition that the State's evidence is legally sufficient and entirely credible.

II

THE DECISION OF THE THIRD DISTRICT IS IN CONFLICT WITH THIS COURT'S DECISION IN *YISRAEL V. STATE*, 33 FLA. L. WEEKLY S131 (FLA. FEBRUARY 21, 2008)

In *Yisrael v. State*, 33 Fla. F. Weekly S131 (Fla. February 21, 2008) this Court disapproved the reasoning of the Fourth District decision in *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th

DCA 2006), and held that a Department of Corrections release-date letter standing alone is inadmissible hearsay, not an admissible public record. The *Yisrael* Court also held that where the release-date letter properly authenticates a Crime and Time report and "(1) the State submitted the release-date letter and the Crime and Time Report as *one combined record* during Yisrael's sentencing proceeding; (2) the release-date letter certified Yisrael's former name, offense identification numbers, and release date; (3) the attached Crime and Time Report contained this *same information;* and (4) the DOC records custodian *signed the letter,* which was *written under seal,"* the combined record is an admissible public record. *Yisrael*, 33 Fla. L. Weekly at S133-34 (emphasis in original).

The disapproved Fourth District decision in *Yisrael* was the basis for the ruling below that "the [release-date] letter in evidence could be properly considered by the trial court under the public records exception to the hearsay rule, subsection 90.803(8), Florida Statutes (2005)" (A. 7). It was also the principal basis for the decision in *Ward v. State*, 965 So. 2d 308 (Fla. 3d DCA 2007), the only other authority relied upon below as to the public records issue.[2] Both rulings are expressly and directly in conflict with this Court's *Yisrael* decision.

[2] An application for discretionary review of the Third District's decision in *Ward* is presently pending under Docket No. SC07-1868.

The District Court did not find here, and on this record could not find, that the documents submitted at sentencing set forth the same information and met the criteria for admissible public records set forth in *Yisrael*.

Moreover, the District Court here failed to recognize that, as indicated in *Yisrael*, where there is no substantial and competent evidence to support the imposition of an enhanced sentence, the matter may be addressed by Rule 3.800(b) motion even where no objection was made to inadmissible evidence offered at sentencing.[3]

Accordingly, the Court should vacate the District Court's ruling affirming the denial of defendant's motion to correct sentence for reconsideration in light of this Court's *Yisrael* decision.

CONCLUSION

[3] "Mr. Yisrael did not object to the trial judge's consideration of the release-date letter during sentencing. Nonetheless, Yisrael later filed a timely Florida Rule of Criminal Procedure 3.800(b)(2) motion to correct sentence, alleging that (1) the letter was based upon inadmissible hearsay; (2) the letter was the only evidence the State produced to support its HVFO sentencing request; and (3) the trial court consequently could not have properly sentenced him as an HVFO. Yisrael, however, neither attacked the validity of his predicate felonies, nor did he challenge the accuracy of his predicate-offense release date." *Yisrael*, 33 Fla. L. Weekly at 131 (footnote omitted). The admission of hearsay evidence without objection does not make hearsay competent evidence warranting an enhanced sentence, and is insufficient where no other or competent evidence is offered.

The Court should grant discretionary review.

Respectfully submitted

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y:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Lisa Davis, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131 on March 7, 2008.

_____ ROY

Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point, except that the headings are in 14 point proportionately spaced Times New Roman.

_____

ROY A. HEIMLICH

Assistant Public Defender

APPENDIX