IN THE SUPREME COURT OF FLORIDA

JAMES RICHARD COOPER,	:	
Petitioner,	:	
vs.	:	Case No. SC09-1169
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner, James Richard Copper, was charged by information with two counts of lewd and lascivious molestation contrary to Section 800.04, Florida Statutes (2001) and four counts of sexual battery by a person in familial custody contrary to Section 794.011, Florida Statutes (2001). The information alleged six different sexual acts against a single victim.

Prior to the start of evidence a motion in limine was filed seeking to bar the prosecutor from eliciting any other evidence of crimes, wrongs, or acts of child molestation not charged in the information because the State had not given notice required by Section 90.404(2)(c), Florida Statutes. The motion in limine was denied by the trial court and Petitioner was convicted as charged following the introduction of evidence of numerous uncharged acts of sexual misconduct with the same victim.

The Second District Court of Appeal found the admission of the uncharged acts without the required notice to be error but found the error harmless:

> This case is similar to Wightman v. State, 982 So.2d 74 (Fla. 2d DCA 2008), review granted, No. SC08-1240 (Fla. Nov. 18, 2008), where we reversed for a new trial because the State did not justify the presentation of evidence of ongoing abuse. Wightman had been charged with two sexual acts, and the victim was permitted to testify to repeated molestation. Id. at 75-76.

> Here, as in Wightman, the information does not put the defendant on notice that he will be tried based on multiple instances of each type of sexual act. And, as in Wightman, no pretrial notice was filed under section 90.404(2)(c). In other words, the State could have justified the evidence offered in this case if it had either alleged in the information ongoing sexual acts that occurred "on one or more occasions," see Generazio, 691 So.2d at 611, or given Cooper notice ten days before trial of the State's intent to offer evidence of the other crimes, wrongs, or acts of child molestation, *see* § 90.404(2)(b), (c). But, as in Wightman, the State did neither of these things.
>
> As to whether the error of allowing the State to present evidence of extensive abuse did or did not contribute to the verdict, we note that if the case had been presented as six distinct acts as charged, the State's presentation of its case would have necessarily been different. On the other hand, the jury heard a taped statement where Cooper admitted engaging in sexual acts with the victim. Because the taped statement is strong evidence of Cooper's guilt, we conclude that the error of allowing the State to present evidence of multiple sexual acts did not affect the verdict and was harmless in this case. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Cooper v. State, 34 Fla. L. Weekly D1159 (Fla. 2d DCA June 10, 2009); (Appendix 3-4).

A notice to invoke the discretionary jurisdiction of this Court was timely filed.

SUMMARY OF THE ARGUMENT

In Cooper, the Second District Court of Appeal stated: "Because the taped statement is strong evidence of Cooper's guilt, we conclude that the error of allowing the State to present evidence of multiple sexual acts did not affect the verdict and was harmless in this case. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)."

This conflicts with the standard for harmless error analysis required by DiGuilio, Knowles v. State, 848 So. 2d 1055 (Fla. 2003), and State v. Lee, 531 So. 2d 133 (Fla. 1988), which rejects weighing of the evidence and focuses the analysis to examine the effect of the error on the trier of fact to hold that an error is harmful unless it is shown beyond a reasonable doubt that the verdict was not affected.

The Second District's holding in Cooper expressly and directly conflicts with this Court's holding in DiGuilio, Knowles, and Lee, on the same question of law. Pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), this Court should accept jurisdiction and review the Second District's decision.

ARGUMENT
ISSUE

THE DECISION OF THE SECOND DISTRICT IN COOPER V. STATE, 34 FLA. L. WEEKLY D1159 (FLA. 2D DCA JUNE 10, 2009), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN STATE V. DIGUILIO, 491 SO. 2D 1129 (FLA. 1986), STATE V. LEE, 531 SO. 2D 1033 (FLA. 1988), AND KNOWLES V. STATE, 848 SO. 2D 1055 (FLA. 2003), ON THE SAME POINT OF LAW.

The Second District found the admission of numerous erroneously admitted uncharged acts of sexual misconduct without proper notice to be harmless error by applying the wrong standard for harmless error analysis. The Second District held:

> As to whether the error of allowing the State to present evidence of extensive abuse did or did not contribute to the verdict, we note that if the case had been presented as six distinct acts as charged, the State's presentation of its case would have necessarily been different. On the other hand, the jury heard a taped statement where Cooper admitted engaging in sexual acts with the victim. Because the taped statement is ***strong evidence*** of Cooper's guilt, we conclude that the error of allowing the State to present evidence of multiple sexual acts did not affect the verdict and was harmless in this case. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986). (emphasis added)

Cooper v. State, Appendix Page 4.

The harmless error standard applied by the Second District is incorrect and conflicts with decisions of this Court in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), Knowles v. State, 848 So. 2d 1055 (Fla. 2003),and State v. Lee, 531 So. 2d 133 (Fla.

1988). The presence of "strong evidence" separate and distinct from erroneously admitted evidence is not a substitute for the required proof beyond a reasonable doubt that the error did not affect the jury's deliberations. As explained by this Court:

> Overwhelming 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.(citations omitted)

State v. Lee, 531 So. 2d at 137.

The standard used by the Second District improperly considers the strength of other available evidence while it omits the beyond a reasonable doubt standard demanded by DiGuilio:

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. 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. This rather truncated summary is not comprehensive but it

> does serve to warn of the more common errors which must be avoided.

DiGuilio, 491 So. 2d at 1139 (Fla. 1986).

In Knowles v. State, 848 So. 2d 1055 (Fla. 2003), the trial court allowed the State to introduce testimony of a former defense psychologist in violation of the defendant's attorney-client privilege. The Second District found the error to be harmless because it "did not substantially influence the jury's verdict." Id., at 1057. This Court reversed because the standard applied by the Second District was "an unwarranted departure from the DiGuilio standard." Id., at 1058.

The standard applied in this case is an equally unwarranted departure from the DiGuilio standard. This Court should find express and direct conflict because the Second District's Decision in Cooper conflicts with the decisions of this Court in DiGuilio, Knowles, and Lee on the same question of law by misapplying the standard for harmless error required by DiGuilio.

This Court should exercise its discretionary jurisdiction to review this case. The misapplication of the proper standard for determination of harmless error is especially critical in cases such as the present where a defendant is faced numerous incidents of uncharged incidents of sexual misconduct. The underlying facts of this case are strikingly similar to those of Wightman v. State, 982 So.2d 74 (Fla. 2d DCA 2008), review granted, No. SC08-1240 (Fla. Nov. 18, 2008), review dismissed, (Fla. July 2, 2009), which was recently dismissed by this Court.

Because the application of the wrong standard for harmless error analysis is likely to recur with frequency, this Court should provide guidance and address this issue of law just as it did in Knowles. Therefore, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv) and Article V, Section 3(b)(3), of the Florida Constitution, this Court should accept jurisdiction and review the Second District's decision in Cooper to insure that the DiGuilio standard is followed.

CONCLUSION

In light of the foregoing arguments, Petitioner respectfully requests this Court accept jurisdiction and review this case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Bill McCollum, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of July, 2009.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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APPENDIX