IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-966

AUNDRA JOHNSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

ON APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar No. 0230987

NICHOLAS MERLIN
Assistant Attorney General
Florida Bar Number 0029236
Criminal Appeals Unit
444 Brickell Avenue, #650
Miami, Florida 33131
(305) 377-5441

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

Cases **Page(s)**

FEDERAL AUTHORITY:

FLORIDA RULES OF CRIMINAL PROCEDURE:

FLORIDA STATUTES:

INTRODUCTION

Aundra Johnson ("the Petitioner") was the defendant in the trial court and the Appellant in the district court of appeal. The State of Florida was the prosecution in the trial court and the Appellee in the district court of appeal. The symbol "R." will refer to the Record on Appeal from Case Number 3D07-2145. References to the trial transcripts will be designated by the symbol "T."

STATEMENT OF THE CASE AND FACTS

Procedural History

On March 16, 2006, the State charged the Petitioner by information with the following crimes: (1) burglary of an unoccupied dwelling, a second degree felony violation of § 810.02(3)(b), Fla. Stat. and § 777.011, Fla. Stat. and (2) fleeing or attempting to elude a law enforcement officer at high speed, a second degree felony violation of § 316.1935(3), Fla. Stat. and § 777.011, Fla. Stat. (R. at 9-10, 12, 17).[1] On June 4-6, 2007, a jury trial was held, at the conclusion of which, the Petitioner was acquitted of the burglary charge but found guilty of the charge of fleeing or attempting to elude a law enforcement officer. (R. at 185-86, 189; T. at 665). The Petitioner was subsequently sentenced to thirty years imprisonment with credit for time served. (R. at 233-35).

[1] The State charged the Petitioner with several other crimes (R. at 9-17), but those counts were nolle prossed at the onset of trial. (T. at 4). The fleeing charge was originally numbered Count III but was renumbered as Count II when the other charges were abandoned. (R. at 9-11, 185; T. at 4-5).

On appeal, the Petitioner argued that the trial court committed reversible error when it instructed the jury that a simultaneous transcript of the proceedings was unavailable and that the jury must rely on its own recollection of the evidence, discouraging read-back testimony. The majority opinion from the Third District Court of Appeal found that the trial court's instruction to the jury was erroneous but concluded that such an error was harmless given the overwhelming evidence in this case. *Johnson v. State*, 10 So. 3d 680, 681 (Fla. 3d DCA 2009). However, the district court noted that opinion should not be read to suggest that an erroneous procedural instruction always constitutes harmless error. *Id*. Judge Cope filed a dissenting opinion in which he wrote that the harmless error doctrine did not apply to the type of error that had occurred in this case, but even if it did, the jury had reasonable doubt, as it acquitted the Petitioner of the burglary charge. *Id*. at 682.

Thereafter, the Petitioner filed a motion for rehearing, arguing that the Third District's opinion was in conflict with cases from the Fourth District on this issue, reasoning that it was impossible to apply the harmless error analysis since there was no way of knowing whether the jury wanted to have testimony read back. This motion was denied. The Petitioner then sought review in this Court, alleging that the Third District had misapplied the harmless error doctrine; that it was not possible to apply the harmless error doctrine to the type of error that had occurred; and that such error was per se reversible. This Brief follows.

FACTS ADDUCED AT TRIAL

On February 23, 2006, around 5:40 a.m., Robin Luckas ("the victim") received a phone call from his alarm company advising him that the alarm in his home had been triggered. (T. at 492-96, 552-53). Upon receiving the call, the victim drove home but parked next door at a church because he did not know if anyone was still inside his home. (T. at 495). In the parking lot, the victim saw an older model blue van, which was unusual because vehicles were not usually parked there at that time of day. (T. at 495-99, 507-08). The victim approached his house through a hedge that separates his house from the church; he noticed that the door to his house was open and that the lights were on in the basement even though the lights should have been off. (T. at 495, 497, 502-06). As a result, the victim called 911 to report a burglary. (T. at 511-12, 515-17, 553).

While he was on the phone with the operator, the victim saw the Petitioner coming and going from the house with the victim's property and personal items. (T. at 513-19, 536). Although it was early morning, there was enough light for the victim to get a good look at the Petitioner's face. (T. at 518-19). The victim also observed a silhouette of a second person standing in the open doorway of his house, and he realized that there were two burglars. (T. at 521-22). The victim then went to the front of the house, and when the police arrived, he told them where the burglars were; the police went to investigate, and the victim followed behind. (T. at

522-23, 568). Moments later, the Petitioner, alerted by noise or the presence of the officers, ran through the bushes separating the victim's home from the church parking lot; the Petitioner entered the driver's side door of the blue van and drove off. (T. at 523-25). The police, in turn, chased the van, and the victim followed along to make sure that the officers had the right vehicle. (T. at 525-28, 573). Shortly thereafter, the victim stopped pursuing the van and went back to the house to wait for the police to return. (T. at 528, 530, 569).

The Petitioner took electronics, professional recording equipment, handbags, shoes, clothes, wallets, and liquor from the victim's house. (T. at 519, 537). The victim recovered the property that the Petitioner had placed in the van and the property the Petitioner left outside the victim's house after leaving. The victim identified his property through photographs at trial. (T. at 538-42.) He also identified some of his property at the police station. (T. at 544). At some point while he was at the police station, the victim stepped outside to make a phone call. Outside of the station, without any prompting from detectives or other officers, the victim saw the Petitioner, accompanied by two men, and stated, "[T]hat's the guy. That's the guy. Right there. That's the guy that robbed me." (T. at 545-48, 571-72).

Juan Nodal, a City of Miami Police Officer, testified that on the date of the incident, he was on routine patrol in a marked police car when he heard over the radio that the police were chasing a blue van. While parked at an intersection, he

saw the blue van run through a red light at a high rate of speed. Officer Nodal activated his sirens and lights,[2] and proceeded to pursue the blue van through residential streets, past a number of stop signs. (T. at 411-20). During the chase, Officer Nodal noticed that the van's back tire was getting low; the rim was riding on the tire; the tire eventually broke apart, and the van slowed down. (T. at 418-25). The Petitioner then jumped out of the still-moving van, which continued to roll; Officer Nodal saw the Petitioner jump out of the driver's side of the vehicle and run into an alley. (T. at 425-37, 440). Without losing sight of the Petitioner, Officer Nodal exited his patrol car and ran after him, through the alley between a building and a backyard. (T. at 427-28, 434). The Petitioner ran to a fence, attempting to jump over it or climb under it, but Officer Nodal grabbed him; after a brief struggle, Nodal arrested the Petitioner and brought him back to the blue van. (T. at 428-34).

Jeniffer Welkner, the Petitioner's girlfriend, testified that four months prior to the Petitioner's arrest she met him at a crack house. (T. at 294). Ms. Welkner and the Petitioner became romantically involved and were homeless. As a result, they lived on the streets, in hotels, and in stolen cars. (T. at 296). Ms. Welkner

[2] Officer Nodal confirmed that on the day of the incident, he was dressed in full uniform with patches and insignia, a duty belt, a gun, and a badge; Nodal was driving a white Ford Crown Victoria patrol car; the police car had blue stripes, with a City of Miami Logo on the side, red and blue police lights on top, and strobe lights on the front. (T. at 411-16).

knew that the Petitioner was a married man with a family. She met the Petitioner's mother, brothers, wife, and children from October 2005 to February 2006, the four months she was romantically involved with the Petitioner. (T. at 296, 300-01).

Ms. Welkner also testified that she had been convicted ten times. She further stated that prior to October of 2005, she had no convictions. (T. at 301, 380). Following this testimony, defense counsel objected. (T. at 301). The trial court overruled defense's counsel objection and Ms. Welkner proceeded to acknowledge that she racked up ten felony convictions during the four months she was romantically involved with the Petitioner. She also acknowledged that she was under the influence of crack cocaine when she committed the crimes. (T. at 302, 380). Ms. Welkner further acknowledged that she entered into an agreement with the State. She pled guilty to all the crimes and agreed to cooperate in exchange for a twelve year sentence in state prison followed by 10 years probation. Ms. Welkner was facing life sentences in all the crimes that she committed, not including the burglary that occurred on February 23, 2006.[3] (T. at 302-05, 328-29, 380).

During the early hours of February 23, 2006, Ms. Welkner was with the Petitioner when they decided to burglarize the victim's house. (T. at 306). The Petitioner parked the car in the parking lot of the church next to the victim's house. Thereafter, they went to the victim's house. While the Petitioner was trying to get

[3] At the time of the trial in this case, Ms. Welkner faced pending charges of grand theft auto and grand theft in Monroe County. (T. at 331-34).

into the victim's house, she was looking out for the police. (T. at 307). Eventually, she got into the house and began carrying out items from the victim's house to the side lawn and then to the van. No one else but the Petitioner and Ms. Welkner, were in the van or the victim's house. (T. at 308-09).

In the process of taking items out of victim's house, Ms.Welkner heard the house's alarm, and subsequently, a phone in the house ringing. Consequently, she advised the Petitioner that they should leave because they police were coming. (T. at 311-12). After noticing and advising the Petitioner of the car parked in the church's lot, which Ms. Welkner thought belonged to a police officer or the owner of the house, she and the Petitioner got into the van. The Petitioner went into the van through the driver's side and she entered through the passenger side. Thereafter, they took off. (T. at 313-14). No one else was inside the van but them. (T. at 313-15, 321). Approximately two minutes after taking off, the Petitioner and Ms. Welkner noticed that the police were following them. (T. at 313-15). The Petitioner then accelerated the van, and a chase ensued. The chase culminated sometime after the van's tires were blown out and the van's engine died, causing the Petitioner and Ms. Welkner to jump out of the van. Ms. Welkner was able to escape, while the Petitioner was caught by the police. (T. at 316-17, 324-25).

Through pictures shown at trial, Ms. Welkner identified the property that she and the Petitioner took out of the victim's house. The property was placed outside

of the victim's house, and both of them carried the items through the hedge separating the victim's house to where the van was parked. (R. 320-28). Ms. Welkner confirmed that the Petitioner was the one driving the van. (T. at 320-24).[4]

Following the parties' closing arguments, the trial court the read the standard jury instructions to the jury. (R. at 164-84; T. at 636-58). Thereafter, the trial court instructed the jury as follows:

> Now let me caution you regarding the communication, if you want to ask a question regarding the facts, let me caution you that we don't have I [sic] simultaneous transcript of these proceeding so we don't have a transcript and any questions regarding the facts, I will tell you that you must rely upon your own recollection of the evidence. If you have a question regarding the law, I will tell you that you have all the laws that pertains [sic] to this case in those instructions, there are no other laws. And please don't give me any numerical division if you guys are in any way split don't put any numerical division in any note.

(T. at 658-59). Immediately thereafter, defense counsel objected; the defense asked for a sidebar, and the following exchange ensued:

> MR. TREVILLA: Judge, my objection is respectfully to Your Honor's instructions. They have a right to have the transcript they have the right to have read back maybe not like in true nice and neat but a right to review the transcript and have it read back.
>
> THE COURT: What I told them is that we do not have a simultaneous transcript which is true. Objection is overruled. Let's go.

[4] Sergeant Reinaldo Tejera arrived at the scene after the Petitioner was arrested and transported him to the police station. (T. at 447-48). During transport, the Petitioner stated: "[S]he's a good girl. She had nothing to do with anything." (T. at 448-49). Sergeant Tejera stated that the Petitioner's statement was an incriminating one. (T. at 452).

(T. at 659). Before the jury retired for deliberations, the judge instructed the jury as follows:

> All right. Ladies and gentlemen and, again, if you have a question regarding the fakes [sic] I cannot reopen the facts. I cannot explain the evidence to you. The normal answer that I give you is that you must rely upon your own recollection of the evidence. If you have differences of opinion you must hash them out amongst yourselves.

(T. at 661).

Following the trial court's instructions, defense counsel renewed all prior objections and motions. (T. at 661). The Petitioner was subsequently convicted.

SUMMARY OF ARGUMENT

The Petitioner alleges that the trial court committed per se reversible error when it instructed the jury that a simultaneous transcript of the proceedings was unavailable and that the jury was required to rely on its own recollection of the evidence. However, as a general rule, most errors that occur during a trial are harmless, and per se reversal is an extreme outcome that is only warranted where the proceedings were fundamentally unfair or where the basic guarantees of due process were vitiated. In the instant case, the trial court's read-back instruction simply does not fall within the limited class of cases involving structural error, and given the facts of this case, the lower court's instruction, was at most, harmless. The trial court's instruction was announced after all the evidence had been presented. All of the witnesses, including the Petitioner's girlfriend, collectively

and consistently indicated that the Petitioner was at the scene of the crime; that he fled while being chased by the police in a car and on foot; and that he was apprehended a short while later. While the Petitioner alleges that the district court below misapplied the harmless error analysis, it is clear that the majority opinion considered the totality of the circumstances and that the applicable standards were followed. Moreover, the Petitioner points to nothing in the record, either in general or in particular, which might have generated confusion among the jurors, or which would have affected the outcome his case. Given the facts of this case, a per se rule would lead to an absurd result, requiring reversal even in those situations where a defendant received an otherwise fair trial, and but for the judge's statement, would not even have been an issue. Moreover, such reasoning would be inconsistent with the tenor of this Court's prior holdings. For any and all of those reasons, the trial court's erroneous instruction about read-back testimony should not require reversal in all cases.

ARGUMENT

THE COMPLAINED ERROR OF DISCOURAGING THE JURY FROM REQUESTING A READ-BACK OF TESTIMONY WAS HARMLESS AS IT DID NOT CONTRIBUTE TO THE PETITIONER'S CONVICTION.

The Petitioner alleges that he is entitled to a new trial because the trial court's instruction effectively discouraged the jury from asking to have portions of the transcript or the testimony of the witnesses read back. The Petitioner contends

that the court's instruction amounted to reversible error, even though there is no indication that such testimony would have been requested or that he was denied a fair trial. In support of his claim, the Petitioner cites to Florida Rule of Criminal Procedure 3.410, which provides the following:

> **Jury Request to Review Evidence or for Additional Instructions**
> After the jurors have retired to consider their verdict, ***if they request*** additional instructions or to have any testimony read to them they ***shall be conducted*** into the courtroom by the officer who has them in charge and the court ***may give*** them the additional instructions ***or may order*** the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Id. (emphasis added). "Under this rule, the trial court has wide latitude in the area of the reading of testimony to the jury. In this respect, the trial court may provide a limited, or partial, readback of testimony specifically requested by the jury, as long as that testimony is not misleading." *Avila v. State*, 781 So. 2d 413, 415 (Fla. 4th DCA 2001); *see also Rigdon v. State*, 621 So. 2d 475 (Fla. 4th DCA 1993); *Biscardi v. State*, 511 So. 2d 575 (Fla. 4th DCA 1987); *cf. Diaz v. State*, 567 So. 2d 18, 19 (Fla. 3d DCA 1990); *Davis v. State*, 760 So. 2d 977, 978 (Fla. 3d DCA 2000) ("We find that the trial court erred by instructing the jury that the law did not allow the court to read back testimony. *See* Fla. R. Crim. P. 3.410. This preemptive instruction by the trial judge was obviously intended to deter any requests to have testimony read back. While it is understandable that no trial judge wishes to encourage read-back requests, given the mandate of rule 3.410, it is error to

discourage them. In our view, however, this error does not constitute fundamental error. Therefore, as the issue was not preserved by defense counsel with an objection to the offending instruction, it has been waived for appellate purposes."), *rev'd on other grounds by State v. Davis*, 791 So. 2d 1085, 1086 (Fla. 2001).[5]

Here, the State notes that generally, most errors that occur during trial are harmless, even though some errors will always invalidate a conviction. *Sullivan v. Louisiana*, 508 U.S. at 275, 279 (1993) (citing *Arizona v. Fulminante*, 499 U.S. 279, 306-07, 309-10 (1991)). For instance, structural defects in the trial mechanism defy harmless-error analysis because "[t]he entire conduct of the trial from beginning to end is obviously affected." *Fulminante*, 499 U.S. at 309-10. Constitutional violations that defy harmless-error analysis affect the framework within which the trial proceeds, rather than merely an error in the trial process itself. *Neder v. United States*, 527 U.S. 1, 8 (1999) (citing *Fulminante*, 499 U.S. at

[5] There is a difference between "per se reversible error" and "fundamental error." The general rule is that a reversal in a criminal case must be based on a prejudicial error that was preserved by a timely objection in the trial court. *See* § 924.051, Fla. Stat. (2006). A fundamental error is an exception to the contemporaneous objection rule. *See* § 924.051(3), Fla. Stat. (2006); *Reed v. State*, 837 So. 2d 366, 370 (Fla. 2002). A fundamental error reaches "down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *State v. Weaver*, 957 So. 2d 586, 588 (Fla. 2007) (quoting *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991)). The Fourth District has held that a per se reversible error means that a reviewing court does not undertake harmless error analysis to decide if a prejudicial error occurred. A per se reversible error is not necessarily a fundamental one. *Rodan v. State*, 967 So. 2d 444, 446-47 (Fla. 4th DCA 2007).

310). Furthermore, structural errors "necessarily render a trial fundamentally unfair." *Rose v. Clark*, 478 U.S. 570, 577 (1986). They "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *See Neder*, 527 U.S. at 8-9 (quoting *Rose*, 478 U.S. at 577-78). Such errors in a trial "are so intrinsically harmful as to require automatic reversal (*i.e.*, "affect substantial rights") without regard to their effect on the outcome." *Id*. at 7.

In contrast to structural errors that require automatic reversal, errors subject to harmless-error review require the beneficiary of the error "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *See e.g.*, *Chapman v. California*, 386 U.S. 18, 24 (1967). Under the harmless-error test of *Chapman*, the State, as beneficiary of the error, must prove "that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (citing *Chapman*, 386 U.S. at 24)). The focus of the harmless-error analysis is on the effect of the error on the trier of fact. *Id*. at 1139. Furthermore, both the per se reversible-error rule and the harmless-error rule are concerned with the due process right to a fair trial. *Id*. at 1135. In acknowledging the shared concern of the two rules and the relationship between the two rules, this Court has explained:

> [A] per se rule is nothing more than a determination that certain types of errors are always harmful, i.e., prejudicial. Per se reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23, 87 S. Ct. at 827-28. In other words, those errors which are *always* harmful. The test whether a given *type* of error can be properly categorized as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible.

DiGuilio, 491 So. 2d at 1135; *see also* § 924.051(1)(a), Fla. Stat. ("Prejudicial error means an error in the trial court that harmfully affected the judgment or sentence.").

The denial of the right to trial by jury is one type of error that has been recognized as always harmful. In *Sullivan*, the United States Supreme Court addressed the denial of a defendant's Sixth Amendment right to a jury trial through a constitutionally deficient reasonable-doubt instruction. 508 U.S. at 276-78. The Court concluded that the deprivation of the right to a jury verdict of guilt beyond a reasonable doubt was "structural error." *Id*. at 281-82. The Court explained that the jury guarantee is a "'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Id*. at 281 (quoting *Rose*, 478 U.S. at 577).

While a defective reasonable-doubt instruction and the resulting denial of a jury trial is one instance in which the United States Supreme Court has found a

structural defect, another situation in which other courts have found a structural defect is where a defendant has been tried without a jury, and there has been no proper waiver of the right to a jury trial. At least two Florida courts have explicitly characterized such a denial of the right to trial by jury as structural error. *See Gyulveszi v. State*, 805 So. 2d 84, 85 (Fla. 2d DCA 2002) (concluding that the absence of a jury-trial waiver by the defendant in writing or on the record was structural error requiring reversal); *Abrams v. State*, 777 So. 2d 1205, 1206 (Fla. 4th DCA 2001) (describing the denial of a jury trial as a structural defect requiring automatic reversal).

This Court has also approved of the reversal of a conviction obtained without a valid waiver of the right to a jury trial. *See State v. Upton*, 658 So. 2d 86, 87-88 (Fla. 1995) (approving of a district court decision that reversed a defendant's conviction and sentence where the defendant's attorney, alone, waived a jury trial); *Tucker v. State*, 559 So. 2d 218, 220 (Fla. 1990) ("District courts have properly reversed convictions when the record contained no written waiver of a jury trial and the trial court failed to inquire into the defendant's waiver of a jury trial or conducted an insufficient inquiry.") (citing *Shuler v. State*, 463 So. 2d 464 (Fla. 2d DCA 1985); *Tosta v. State*, 352 So. 2d 526 (Fla. 4th DCA 1977)). Likewise, structural error has been found to occur where a defendant was totally deprived to the right to counsel at trial, as well as situations including a biased judge, unlawful

exclusion of members of the defendant's race from a grand jury, and denial of the right to self-representation at trial. *Fulminante*, 499 U.S. at 309-10.

On the other hand, in *Neder*, the United States Supreme Court held that the harmless-error test of *Chapman* may be applied to a jury instruction that omitted an element of the offense. *Neder*, 527 U.S. at 4. Specifically, the Court held that the harmless-error rule applied to the trial court's erroneous refusal to submit the issue of materiality, as an element of the charge of tax fraud, to the jury. *Id*. The Court reasoned that "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id*. at 9. The Court explained that its conclusion was "consistent with the holding (if not the entire reasoning) of *Sullivan v. Louisiana*." *Neder*, 527 U.S. at 10. The Court observed that unlike the error in *Sullivan*, the error in the case before it did not "vitiat[e] *all* the jury's findings." *Id*. at 11.

Similarly, in Florida, courts have found error to be harmless when, even absent the error, the same result would have been reached. For instance, a police witness' improper reference to the State's blood alcohol limit for the operation of a motor vehicle, in a prosecution for operating an aircraft while intoxicated or in a careless or reckless manner, was harmless beyond a reasonable doubt, where the evidence against the defendant was overwhelming and the State did not refer to the

police witness' reference in its closing argument. *Cloyd v. State*, 943 So. 2d 149, 165 (Fla. 3d DCA 2006), *review denied*, 959 So. 2d 715 (Fla. 2007). In addition, any error in a trial court's allowing the state to elicit testimony that the defendant had possessed weapons before, that he had handled concealed weapons before and had gone to jail as a result, and that he had handled firearms long ago when he was 18 years old, which was an improper line of questioning under the *Williams* rule for admitting evidence of collateral crimes, was harmless, in a trial for attempted murder, even though the defendant had an alibi witnesses; the victim and two of her family members unequivocally identified the defendant as the shooter, the alibi witnesses came forward for the first time on the second day of trial, and the testimony of at least one alibi witness was riddled with inconsistencies. *Sibert v. State*, 884 So. 2d 450, 451-52 (Fla. 3d DCA 2004).

Likewise, a trial court's error of admitting a detective's testimony that items found at the crime scene constituted a destructive device under state law was harmless in a prosecution for possession and discharge of a destructive device, since another investigator gave essentially the same testimony under questioning by the defense, and the defendant never argued that the object was not a destructive device. *Wallace v. State*, 860 So. 2d 494, 496 (Fla. 4th DCA 2003).

In the instant case, the trial court's read-back instruction simply does not fall within the limited class of cases involving structural error, and given the facts of

this case, the error, was at most, harmless. *See DiGuilio*, 491 So. 2d at 1135. Here, the trial court's instruction was announced after all the evidence had been presented. All of the witnesses, including the Petitioner's girlfriend, collectively and consistently indicated that the Petitioner was at the scene of the crime; that he fled while being chased by the police in a car and on foot; and that he was apprehended a short while later. In *Smith v. State*, 990 So. 2d 1162 (Fla. 3d DCA 2008), for example, the instruction given to the jury was as follows:

> I will caution you, as I did earlier in the trial, that we do not have a simultaneous transcript of these proceedings. If you have a question regarding the facts, I will tell you that the jury must rely upon its recollection of the evidence. We cannot reopen the case or give you any further evidence to clear up any doubts. If you have a question regarding the law, the answer that I will give is that the jury has all the law that pertains to this case in those instructions. There are no other laws that apply to this case.

Id. at 1164. While finding such an instruction to be error, the district court held that that the error was not fundamental because it did not vitiate the defendant's right to a fair trial. *Id*.

Similarly, in *Diaz*, 567 So. 2d at 19, the trial court's instructions did not deprive the defendant of a fair trial. In that case, a defendant was convicted of the sale or delivery of cocaine after a brief two-witness trial. The State demonstrated, without dispute, that the defendant had sold two cocaine rocks to a police officer while he was being observed by another one. The defendant appealed the conviction, claiming a right to a new trial because the trial court instructed the jury,

at the beginning of the case, that they could not take notes or request transcripts of testimony like they saw jurors do on television. The defendant did not object to the instruction. The district court affirmed, holding that while the instruction might well have been technically ill advised, it could not result in reversal. There was no reason to believe that the note-taking or transcript issues were of any concern to the jury at all in the case, which was utterly straightforward, an "utterly open-and-shut case." 567 So. 2d at 19. The charge did not result in a denial of due process or affect the defendant's right to an essentially fair trial. The Third District Court of Appeal also noted parenthetically that although it did not need to reach the point, "the instruction, even if subject of an objection at the trial, was no more than harmless."*Id*. at 19 n.3.

Based on the above, the State notes that even if a jury is, in fact, discouraged from requesting a read-back that it might have otherwise requested, the jury still has the ability to become deadlocked and not reach a verdict at all, because the absence of a read-back impairs the ability of one or more jurors to join in a verdict. The deadlock can then be conveyed to the court, along with the reason for it, and the court can then determine whether it will provide the read-back after all or eventually declare a mistrial. Thus, the jury, even after such an instruction, still holds considerable power to avoid rendering a verdict in the absence of a read-back that the jury deemed necessary. If jurors cannot agree among themselves as to what

a particular witness said or did not say on a critical point, the most likely result, absent a readback, is going to be such a deadlock. Consequently, once the jury does not become deadlocked and renders a verdict, the jurors are polled and they indicate that they individually concur that that is the verdict. At the time of such polling, if any juror, as a result of the absence of a desired read-back, has doubts about the validity of the verdict and that juror's own vote, the juror again has an opportunity to note that, so that the court can decide not to accept the verdict.

Likewise, courts in other jurisdictions, for similar reasons, have specifically found that an erroneous read-back instruction, even over the objection of counsel, is amenable to harmless error analysis. For example, in *United States v. White*, 23 F.3d 404, 1994 WL 177280 (4th Cir. 1994) (table), a defendant was charged with, and convicted of, conspiracy to possess with intent to distribute more than 50 grams of cocaine base; distribution of more than 50 grams of crack cocaine; and attempted murder of a potential government witness. *Id*. at *1. During the course of giving the jury its instructions, the district judge explained that the verdict:

> must be unanimous. Each of you must agree to it. Do not be concerned that each of you cannot remember everything that was said. That is why we have 12 jurors instead of one. No one juror is expected to remember everything, but some of you will remember parts of it, and that will remind others of other parts of it; and, collectively, you can recall what went on in the case and what the evidence was. And it will have to be your recollection, *since it will not be permissible to begin reading back to you portions of the testimony.* (emphasis in opinion).

Id. Defense counsel objected to "the Court prohibition against read-backs." The court responded that "the problem with that is that if they want one thing to be read back that is favorable to the Government, then you want something that is balancing, and before you know it you have got the whole trial read back to them." On appeal, the defendant argued that the blanket prohibition of read-backs was reversible error. *Id*.

The Fourth Circuit Court of Appeals found that although the trial court's instruction had been erroneous, such an error did not foreclose its analysis of the question. After analyzing cases on the differences between trial error and structural error, the Fourth Circuit noted, in relevant part:

> By way of limning the two categories-trial error and structural defect-the Chief Justice listed sixteen examples of other errors that can be harmless. *Fulminante*, 499 U.S. at 306-07. These reviewable errors include jury instructions misstating an element of the offense or containing an erroneous conclusive presumption, improper comment on a defendant's silence at trial, and the admission of evidence obtained illegally. Also listed are examples of 'structural defects' that are *per se* reversible error: the lack of an impartial judge, the total denial of right to counsel, the right to a public trial, the denial of self-representation, and the exclusion from a grand jury of members of the defendant's race. *Id*. at 309-10. The giving of a constitutionally deficient reasonable-doubt instruction was added to this latter group by a unanimous Court in *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993).
>
> Our task is to decide into which category of errors the read-back prohibition falls. In determining which of these categories a given error belongs, "[t]here is a strong presumption that any error will fall into the [trial error] categor[y]. It is the rare case in which a constitutional violation will not be subject to harmless-error analysis."

Sullivan, 113 S. Ct. at 2083 (Rehnquist, C.J., concurring) (citations omitted).

Can the effect of a blanket prohibition on read-backs be "quantitatively assessed in the context of other evidence" in the case? The argument for denominating the read-back prohibition as a structural defect is that we cannot assess the effect of the jury's possible confusion if we cannot even tell *whether* the jury was confused. The danger is that the jurors, unable to agree on what was said on the witness stand and not permitted to ask the court to refresh their collective memory, will base their verdict on a mistaken recollection. Thus (the argument continues), while the guilty verdict might be based in part on something that was not testified to at trial, the appellate court, unable to pinpoint what was (incorrectly) guessed at, would be unable to assess the effect of the jury's misapprehension in relation to the other evidence in the case.

Unlike a deficient reasonable-doubt instruction, "which vitiates *all* the jury's findings" and which results in *no* valid verdict or "object upon which harmless error scrutiny can operate," *Sullivan*, 113 S. Ct. at 2082, the read-back prohibition does not fundamentally alter the fact-finding process. Other errors affecting the jury's deliberative process have been categorized as trial errors that are amenable to review for harmless error. *See*, *e.g.*, *Rose v. Clark*, 478 U.S. 570 (1986) (erroneous burden-shifting instruction). Each juror, after proper instructions, found that each fact necessary to show each element of each offense of conviction was proved beyond a reasonable doubt. The read-back prohibition simply does not approach the few acknowledged structural errors in terms of the latter group's fundamental role in our system of justice or in the importance to the fact-finding function.

Of course we have no way of knowing whether the jury in White's trial would have asked for a read-back of any testimony, just as a reviewing court can never know with absolute certainty what weight a jury put on an erroneously admitted piece of evidence. It is difficult, and no doubt sometimes nigh impossible, to gauge the effect on a jury's verdict of, say, a coerced confession, but we are bound to do so when presented with such a case. The difficulty of applying the harmless error test in some (or even most) cases, however, is an

> inadequate basis for declaring a per se rule for all cases. *See Fulminante*, 499 U.S. at 312 (noting that the possibility of a "devastating" effect of admitting an involuntary confession "is not a reason for eschewing the harmless error test entirely."). In turning to our review of the effect of the error in this case, we recognize that the difficulty of review increases as the length and complexity of the trial increase.
>
> White's trial lasted one day (half as long as the trial in *Criollo*) and he was the only defendant. The trial judge's decision to prohibit any read-backs was announced *after* all the evidence had been presented. Four of White's coconspirators, including his own brother, testified for the government, and, collectively, they told a consistent story. White and his girlfriend testified in his behalf. The defense was not based on fine distinctions-Eric testified that he had never met Brooks or Taj Parker, that he had nothing whatsoever to do with the two trips to Virginia, that he never ordered the shooting of Robinson, etc. On appeal, White points to nothing, either in general or in particular, that might have generated confusion among the jurors. *Cf. United States v. Zarintash*, 736 F.2d 66, 70-71 (3rd Cir.1984) (reversing conviction on grounds that the portion of testimony that the jury asked to be reread, which request was refused by the court, "went to the heart of the jury's determination of guilt or innocence."). Accordingly, we hold that the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

Id. at *3 (footnotes omitted); *cf. United States v. Anderson*, 23 F.3d 404, 1994 WL 200738 (4th Cir. 1994) (table) (where the Fourth Circuit found similar error to be harmless even where no objection is made by counsel on this issue).

In *Anderson*, the defendant was tried on four counts of bank robbery. *Id*. at *1. In the first trial, at the conclusion of the testimony, the court instructed the jury and asked defense counsel if he had any objections. Counsel stated that he was "satisfied." The court further instructed the jury that the record was not available

on request; rather, the jurors were to rely on their collective recollection as to the testimony given. Neither party objected. *Id*. In the second trial, at the conclusion of all the testimony, including the witness' identification, the court instructed the jury. The final instruction was that a copy of the record and the jury charge would not be available, and the jurors should rely on their recollection as to the trial facts, witnesses' testimony, and applicable law. Following the charge, the defense was satisfied with the instructions. *Id*. at *2. On appeal, the Fourth Circuit noted:

> Anderson contends that the district court committed plain error when it instructed the jury that no read-backs would be permitted of the testimony or the charge. *See United States v. Criollo*, 962 F.2d 241 (2d Cir. 1992) (error to announce prohibition against read-backs of testimony). To reverse for plain error, this Court must identify an error which is plain, which affects substantial rights, and which "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 61 U.S.L.W. 4421, 4424 (U.S. 1993).[6] For purposes of this appeal, we will assume that the instruction was erroneous.
>
> We must determine whether the alleged error is "plain," or "clear under current law." *Olano*, 61 U.S.L.W. at 4424. *Criollo* is the only law on the issue, and the Second Circuit's opinion is not binding upon this Court. We have held that upon request by the jury, the district court has discretion to read back testimony. *United States v. Meredith*, 824 F.2d 1418, 1425 (4th Cir.), *cert. denied*, 484 U.S. 969 (1987). We find that the alleged error is not clear under current law, and therefore is not plain. *See Olano*, 61 U.S.L.W. at 4424.

[6] *United States v. Olano*, 507 U.S. 725 (1993) (discussing plain error and explaining that such an error must affect a defendant's substantial rights, i.e., rights that seriously affect the fairness, integrity or public reputation of judicial proceedings).

> The third prong of the plain error analysis addresses whether the alleged error resulted in prejudice. *Olano*, 61 U.S.L.W. at 4424. We reject Anderson's contention that prejudice is presumed from the prohibition of read-backs. *See Criollo*, 962 F.2d at 244 (applying harmless error analysis to prohibition of read-backs); *United States v. McCaskill*, 676 F.2d 995, 1001-02 (4th Cir.) (requiring showing of prejudice from error in jury instructions), *cert. denied*, 459 U.S. 1018 (1982). Rather, Anderson must show that the error had an impact on the outcome of the trial. Anderson admits that "there is no way to determine whether the improper jury charge affected the jury's deliberations." (Reply Brief at 7). We find that Anderson failed to show that the alleged error affected his substantial rights; therefore, reversal for plain error is not warranted on this basis also. *See Olano*, 61 U.S.L.W. at 4424.

Id. at *3; *see also United States v. Lang*, 39 F.3d 1182, 1994 WL 629393, *9 (6th Cir. 1994) (table) (in which there, like the instant case, the trial court said that "transcripts of testimony would not be available during their deliberations, so they should pay close attention."), *rev'd on other grounds by Wingo v. United States*, 517 U.S. 1116 (1996); *see Slater v. Patrick*, 2009 WL 3055224, *9 (E.D. Cal. Sept. 21, 2009) (noting, in part, that discouraging readback testimony is not equivalent to prohibiting readbacks, and does not constitute trial error) (citing *United States v. Medina Casteneda*, 511 F.3d 1246, 1249 (9th Cir. 2008).

Based on the above, the State submits that, like *White*, the error in this case was harmless. As in *White,* the Petitioner objected to the trial court's erroneous instruction, but he was not deprived of a fair trial; there was nothing, either in general or in particular, which might have generated confusion among the jurors, or which would have affected the outcome his case. Further, there is nothing in the

record to indicate that the jury may have wanted to have testimony re-read but did not ask because of the isolated instruction by the judge.

Here, after a brief trial and several eyewitnesses' detailed accounts, the jury collectively and consistently heard that the victim saw the Petitioner getting into the van by the driver's side door; that the Petitioner fled from the scene; and that the police chased him. (T. at 523-28, 573). The Petitioner's girlfriend, in turn, confirmed that the Petitioner went into the van through the driver's side door and that she entered through the passenger side. (T. at 313-14). No one else was inside the van but them. (T. at 313-15, 321). Approximately two minutes after taking off, the Petitioner and the girlfriend noticed that the police were following them. (T. at 313-15). The Petitioner then accelerated the van, and a chase ensued. The chase culminated sometime after the van's tires were blown out and the van's engine died, causing them to jump out of the van. The girlfriend was able to escape, while the Petitioner was caught by the police. (T. at 316-17, 324-25). Officer Nodal saw the blue van run through a red light at a high rate of speed and pursued the van through residential streets, past a number of stop signs. (T. at 411-20). During the chase, Officer Nodal saw the Petitioner jump out of the still-moving van from the driver's side and run into an alley. (T. at 425-37, 440). Without losing sight of the Petitioner, Officer Nodal exited his patrol car and ran after him, through the alley between a building and a backyard. (T. at 427-28, 434). The Petitioner ran to a

fence, attempting to jump over it or climb under it, but Officer Nodal grabbed him; after a brief struggle, Nodal arrested him and brought him back to the blue van. (T. at 428-34). Given those circumstances, the trial court's instruction to the jury, prior to deliberations, was merely a snapshot, which did not undermine confidence in the result or render the proceedings unfair, and any error was harmless.

Nevertheless, the Petitioner alleges that the Third District Court of Appeal misapplied the harmless error analysis because "the majority opinion failed to even attempt to evaluate how the improper jury instruction may have affected the verdict, which is the proper test when applying harmless error in this state." (Petitioner's Brief at 5). Here, the State notes that Petitioner's motion for rehearing did not argue that *DiGuilio* was misapplied or that the Third District failed to refer to the totality of the circumstances. Having failed to give the district court the opportunity to consider revising the language in its opinion regarding harmless error analysis, the Petitioner should not be able to seek review on that basis, and this Court should find that the argument was either waived or unpreserved. *See, e.g.*, *Asbell v. State*, 715 So. 2d 258, 258 (Fla. 1998) ("We also decline to review petitioner's second point on review as it is beyond the scope of the conflict issue."); *Williams v. State*, 863 So. 2d 1189, 1190 (Fla. 2003) ("We decline to address the additional issue raised by Williams that is beyond the scope of the conflict issue."); *see also Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982).

Further, to the extent that the Petitioner raises this argument now, although the district court's opinion indicated that the evidence was "overwhelming," there is no reason to believe that the use of this single word foreclosed the district court from applying the proper analysis or that the court failed to comply with such a firmly established principle of Florida law; *DiGuilio* 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 influenced the jury verdict. *Id*. at 1135.

In this case, the Third District Court of Appeal undoubtedly reviewed the record and transcripts; the district court listened to oral arguments and considered all of the facts and circumstances surrounding this case; this included the collective and consistent explanations from the witnesses about the Petitioner, the getaway vehicle, the high speed chase, and the apprehension, all of which was heard by the jury throughout the trial before the instruction and which was described in the majority opinion. This also included consideration of the trial court's instruction to the jury at the end of trial, which did not undermine confidence in the result. Indeed, given the fact that the jury acquitted on the primary charge, either the jury did not have any problems in this case, or, if there was any problem with respect to

a desired read-back, the jury resolved that doubt in favor of the Petitioner. As this Court noted in *DiGuilio*:

> The test of whether a given type of error can be properly categorized as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible. If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless.

Id. at 1135 (citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *United States v. Mechanik*, 475 U.S. 66 (1986); *United States v. Lane*, 474 U.S. 438 (1986).

Here, the Petitioner's argument would lead to an absurd result, requiring reversal even in those cases where a defendant received an otherwise fair trial, and even where there is no indication that the jury wanted or would have needed to have such testimony re-read. Moreover, as noted above, a rule of per se reversal is an extreme remedy that would be inconsistent with the tenor of this Court's prior holdings; such an error is not a structural defect and would affect an indeterminate number of convictions regardless of the outcome of the trial. For any and all of those reasons, this Court should not apply a per se rule of reversal; the harmless

error analysis is applicable to read-back errors, and the lower court's decision should be affirmed.

CONCLUSION

Based upon the arguments and authorities cited herein, the State of Florida, respectfully requests that this Court affirm the decision of the Third District Court of Appeal.

Respectfully submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

BY: _____
NICHOLAS MERLIN
Assistant Attorney General
Florida Bar Number 0029236
Criminal Appeals Unit
444 Brickell Avenue, #650
Miami, Florida 33131
(305) 377-5441

_____
RICHARD L. POLIN
Miami Bureau Chief
Florida Bar Number 230987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was mailed to Robert Kalter, Assistant Public Defender, the Office of the Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125, this ___ day of December 2009.

_____
NICHOLAS MERLIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
NICHOLAS MERLIN
Assistant Attorney General