IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-966

LOWER TRIBUNAL NO. DCA: 3D07-2145

AUNDRA JOHNSON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, Aundra Johnson, was the defendant in the trial court and the Appellee in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the Appellant in the Third District Court of Appeal. The parties shall be referred to as they stand in this court.

STATEMENT OF THE CASE AND FACTS

Procedural History

Following a jury trial, Petitioner was convicted of fleeing and eluding a police officer. The pertinent facts as found by the district court were as follows:

> A City of Miami officer, while on routine patrol in his police vehicle, overheard a BOLO that the police were involved in a chase of a blue van that had been involved in a burglary. After learning of the chase, the officer saw the blue van run through a red light at a high rate of speed. The officer proceeded to turn on the patrol car's siren and emergency lights and began to chase the van. During the chase, the officer noticed that the tires of the van had blown out and eventually an individual, whom the officer at trial identified as Johnson, jumped out of the driver's side of the van. After Johnson jumped out of the van, the officer exited his vehicle and proceeded on foot to chase Johnson. Eventually, after a struggle, Johnson was arrested.

Johnson v. State, 2009 WL 1139290, *2 (Fla. 3d DCA April 29, 2009) ("*Johnson 2009*").

On appeal, the sole issue considered by the district court was whether the trial judge erred in instructing the jury that the law did not permit him to read back testimony. The district court wrote, in relevant part, the following:

> Johnson contends that the trial judge erred in instructing the jury that the law did not permit him to read back testimony. Specifically, 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 proceedings 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.
>
> Additionally, prior to the jury retiring to deliberate, the trial court again instructed the jury as follows:
>
> Ladies and gentlemen and, again, if you have a question regarding the facts 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.

Johnson 2009, at *1.

The majority opinion cited to Florida Rule of Criminal Procedure 3.410, writing:

> 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.
>
> "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) (citations omitted).

> In this case, the record shows that the issue was properly preserved for appellate review as Johnson specifically objected to the trial court's instructions to the jury. As this Court has previously held, it is error for the trial court to discourage the jury from requesting a read-back of testimony. *See Davis v. State*, 760 So. 2d 977, 978 (Fla. 3d DCA 2000). Indeed, "[w]hile the trial court has the discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a readback is prohibited." *Avila*, 781 So. 2d at 415.
>
> Although the State concedes that the trial court erred in instructing the jury, the State argues that the error was harmless. Given the facts of this case, we agree that this error was harmless.[FN2] The evidence presented at trial was overwhelming as to the charge for which Johnson was convicted-fleeing a police officer.
>
> FN2. While we find the instruction in this case harmless, this opinion should not be read to suggest that an erroneous procedural instruction always constitutes harmless error.

Johnson 2009, at *1.

> Judge Cope filed a dissenting opinion, which stated:
>
> We should order a new trial. Defense counsel timely and correctly objected to the trial court's instruction. Neither the State nor the majority opinion has cited any authority for the proposition that this type of error is subject to harmless error analysis. Assuming arguendo that such an analysis could be applied, it is inappropriate here, where the jury had enough reasonable doubt about the State's case to acquit the defendant on a number of charges.

Johnson 2009, at *2.

On May 6, 2009, Petitioner filed a motion for rehearing or in the alternative, motion to certify conflict. In that motion, Petitioner argued that the Third District Court of Appeal's decision in the *Johnson* case was in direct conflict with cases from the Fourth District Court of Appeal on the use of harmless error analysis

when a jury is improperly instructed. On May 21, 2009, the Third District Court of Appeal denied Petitioner's motion. The Petitioner now seeks discretionary review in this Court, and the State has filed this Brief in response.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction to address the Petitioner's claims because there is no express and direct conflict among any of the cases upon which he cites, and his reliance on the case law is distinguishable or inapplicable.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT COURT APPEAL BELOW IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL.

As a general rule, conflict jurisdiction exists when a decision of a court of appeal expressly and directly conflicts with another court of appeal or the Florida Supreme Court "on the same question of law." Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *see also The Florida Bar v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988). A dissenting opinion, even though it represents the opinion of at least one member of the panel, cannot be considered because it is not the opinion of the court and therefore has no precedential value.

In this case, Petitioner argues that "[the] conclusion by the Third District directly conflicts with several cases from the Fourth District Court of Appeal that have specifically held that if the trial judge gives the type of improper jury instruction which was given in this case, the error is automatically prejudicial since it is impossible to determine how the improper jury instruction may have affected the jury deliberations." (Petitioner's Brief at 4-5). This is incorrect.

In *Biscardi v. State*, 511 So. 2d 575, 581 (Fla. 4th DCA 1987), a trial judge, over the objection of counsel, told the jury that there was no provision for reinstruction or read back testimony. There, the Fourth District noted:

> The appellant contends that when the trial court told the jury "there is really no provision" for reinstruction or to have testimony read back, and ***particularly in view of the trial court's early-on refusal to advise the jury they could take notes,*** the court committed reversible error. We think he is correct.
>
> ***
>
> The state points out that rule 3.410, Florida Rule of Criminal Procedure, leaves reinstruction to the judge's discretion, and from this argues that the above comment to the jury was not error; or, if error, then harmless, because appellant is unable to show prejudice. Obviously, without going into the jurors' heads or their communication with each other appellant cannot demonstrate prejudice.

Id. at 581 (emphasis added).

Similarly, Petitioner cites to *Huhn v. State*, 511 So. 2d 583, 591 (Fla. 4th DCA 1987), where a trial judge told the jury that there was no provision for

reinstruction or read back testimony. In that case, the Fourth District held that the instruction was harmful since the jurors may have asked questions pertaining to the instructions or sought to have certain testimony read to them if they thought it was possible. *Id*. at 591.

Finally, Petitioner cites to *Rigdon v. State*, 621 So. 2d 475, 479-80 (Fla. 4th DCA 1993). In that case, the defendant raised several issues on appeal, including a claim that the trial court erred because it told the jury that any request to have testimony read back would be refused. In its analysis, the Fourth District noted that although it was error for the judge to refuse to read back testimony such instructions did not constitute fundamental error. However, under the reasoning in *Biscardi* and *Huhn*, the Fourth District concluded that the lower court's instruction was reversible because it may have conveyed to the jurors that it would be futile or prohibited to ask for a rereading of the testimony. *Id*. at 480.

It is clear from the Fourth District's own case law that harmless error analysis can apply to errors in advising juries regarding an inability to read back testimony. In *Farrow v. State*, 573 So. 2d 161 (Fla. 4th DCA 1990) (en banc) (cited in *Rigdon*), the Fourth District recognized that such errors are not fundamental error. As the errors are not fundamental and require preservation in order to assert on appeal, the Fourth District recognizes that such errors need not go to the heart of a case and need not arise to the level of rendering a trial

fundamentally unfair; thus, they are subject, within the Fourth District, to a consideration of harmlessness, as the errors are not per se reversible, as evidenced by *Farrow*. Thus, the Fourth District cases which Petitioner relies on do not stand for the proposition that in the Fourth District the error is per se reversible and not subject to harmless error analysis. They merely stand for the proposition that in those particular cases, the Fourth District did not find facts upon which the error could be deemed harmless. As the facts of the respective cases are not the same, the holding of the Third District, based on the harmlessness and the totality of the evidence, cannot be in conflict with the Fourth District cases.

II. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DID NOT CONFLICT WITH THIS COURT'S APPLICATION OF THE HARMLESS ERROR DOCTRINE.

Petitioner alternatively argues that "[n]ot only does the Third District's opinion conflict with the Fourth District opinions as to whether the harmless error doctrine should apply in this case, it also conflicts with this Court's decisions as to how to apply the harmless error doctrine assuming it should apply in this case." (Petitioner's Brief at 7). As such, Petitioner alleges that the Third District's finding of harmlessness was based "exclusively on their conclusion that the evidence was overwhelming," which was a misapplication of the harmless error doctrine. (Petitioner's Brief at 7) (citing *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) and *Rigterink v. State*, 2 So. 3d 221, 256 (Fla. 2009)).

In *DiGuilio*, this Court found that remarks made by a prosecutor regarding the defendant's silence were not harmless and constituted reversible error. This Court explained that application of the harmless error test "requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *Id*. at 1135. The Court explained:

> 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.

In *Rigterink*, this Court found that admission into evidence of a videotaped interrogation which lacked proper *Miranda* warnings constituted reversible error. There, the Court noted:

> Where, as here, the State makes a defendant's inculpatory videotaped statement a fixture of its opening statement, case-in-chief, and closing argument, and, thereafter, where the jury specifically requests to review this tape yet again during its deliberations just before rendering its verdicts, we *cannot* say "beyond a reasonable doubt that the error

> ... did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."

Id. at 257 (citations omitted).

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, Petitioner should not be able to seek review on that basis, and the argument should be deemed waived. Further, to the extent that Petitioner raises this argument now, the Third District's opinion discussed the facts of this case in detail, including Petitioner's arrest and the instructions made by the trial judge. To that end, it is clear that the district court examined the entire record before concluding that the error was harmless, and thus, did not run afoul of *DiGuilio* and its progeny.

As such, there is no express and direct conflict between the instant case and the decisions upon which the Petitioner relies, and jurisdiction should be denied. Fla. R. App. P. 9.030(a)(2)(A)(iv).

CONCLUSION

WHEREFORE, the State respectfully requests this Court to decline discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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