IN THE SUPREME COURT OF FLORIDA

CASE NO.

LOWER COURT CASE NO. DCA:07-2145

AUNDRA JOHNSON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

Petitioner, Aundra Johnson, seeks discretionary review of a decision of the Third District Court of Appeal that directly conflicts with decisions from this court and other district court of appeals. The symbol "A" refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner, Aundra Johnson appealed his conviction and sentence for fleeing a police officer.[1] On direct appeal Johnson contended 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.

---

[1]The jury found Johnson not guilty of burglary.

The majority opinion recognized that the trial court's impromptu jury instruction, which wrongfully told the jury that they could not have any testimony re-read, was a clear violation of Florida Rule 3.410. The majority opinion also recognized that defense counsel objected to the improper instruction and, therefore, the issue was preserved for appeal. Despite these factors the majority opinion concluded that since the evidence was overwhelming the improper jury instruction which prohibited the jury from asking to have any testimony re-read was harmless error. (See Appendix A).

Judge Cope filed a dissenting opinion wherein he concluded that the error in this case was not subject to harmless error analysis. He went on to conclude that "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." (See Appendix A).

A motion for rehearing was filed wherein, it was argued that the Third District's conclusion that the harmless error doctrine can be applied to the error in this case was in direct conflict with numerous cases from the Fourth District Court of Appeal which held that it is impossible to apply the harmless error doctrine to this type of error, since there is no way of knowing how the improper instruction affected the jury deliberations. The motion for rehearing was denied. (See Appendix B).

A timely notice to invoke this Court's jurisdiction was filed.

QUESTIONS PRESENTED

I.

THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH CONCLUDED THAT THE HARMLESS ERROR DOCTRINE APPLIES WHEN A TRIAL JUDGE WRONGFULLY TELLS THE JURY THEY COULD NOT HAVE ANY TESTIMONY RE-READ DIRECTLY CONFLICTS WITH CASES FROM THE FOURTH DISTRICT COURT OF APPEAL WHICH HOLD THAT THE HARMLESS ERROR DOCTRINE IS NOT APPLICABLE TO THIS TYPE OF ERROR.

II.

THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH CONCLUDED THAT THE ERROR WAS HARMLESS BASED EXCLUSIVELY ON THE FACT THAT THE COURT CONCLUDED THE EVIDENCE WAS OVERWHELMING AND WITHOUT CONSIDERING HOW THE ERROR MAY HAVE AFFECTED THE JURY'S DELIBERATION DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS FROM THIS COURT.

SUMMARY OF ARGUMENT

The Third District' decision which holds that the harmless error doctrine can be applied to an error wherein, the trial judge improperly instructs the jury that they are not allowed to ask to have testimony re-read directly conflicts with decisions from the Fourth District which hold that it is impossible to apply the harmless error doctrine to this type of error since, there is no way of knowing how the improper jury instruction affected the jury deliberations.

In the alternative, even if this Court concludes that the opinion in this case does not conflict with the Fourth District cases concerning whether the harmless error doctrine should be applied to the error in this case, this Court should still accept jurisdiction since the opinion of the Third District which concluded the error was harmless based solely on its conclusion that the evidence was overwhelming, directly conflicts with numerous cases from this court which have held that the harmless error test requires more than just a finding that the appellate court believes the evidence was overwhelming.

ARGUMENT

I.
THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH CONCLUDED THAT THE HARMLESS ERROR DOCTRINE APPLIES WHEN A TRIAL JUDGE WRONGFULLY TELLS THE JURY THEY COULD NOT HAVE ANY TESTIMONY RE-READ DIRECTLY CONFLICTS WITH CASES FROM THE FOURTH DISTRICT COURT OF APPEAL WHICH HOLD THAT THE HARMLESS ERROR DOCTRINE IS NOT APPLICABLE TO THIS TYPE OF ERROR.

Both the majority opinion and dissenting opinion recognized that the jury instruction given by the trial judge wherein, he twice told the jury that they could not ask to have any testimony re-read was error. However, the majority opinion concluded that since the court felt the evidence was overwhelming the trial judge's improper jury instruction which prohibited the jury from asking to have testimony re-read, was harmless error. This 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 error since it is impossible to determine how the improper jury instruction may have affected the jury deliberations.

In ***Biscardi v. State***, 511 So.2d 575 (Fla. 4th DCA 1987), the trial judge over the objection of counsel, told the jury that there was no provision for reinstruction and or to have testimony read back. The state, similar to the state in this case, argued that the improper jury instruction was harmless error. In refusing to apply a harmless error analysis to this type of error, the court held the following:

> 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.**

Therefore, the Fourth District Court of Appeal in ***Biscardi*** recognized that it is impossible to apply the harmless error to this type of improper jury instruction since, without going into the jurors' heads or their communication with each other, appellant cannot demonstrate prejudice. *See also* ***Huhn v. State***, 511 So.2d 583 (Fla. 4th DCA 1987).(court concluded that since it is impossible to know whether jury decided not to ask questions based upon improper instruction the error was harmful.).

In ***Rigdon v. State***, 621 So.2d 475 (Fla. 4th DCA 1993), the defendant was convicted of aggravated assault with a firearm. On appeal defendant raised numerous issues including the fact that the trial judge made several erroneous evidentiary rulings

and, that the trial judge erred in instructing the jury, over the objection of counsel that the court was not permitted to read back testimony. As to the evidentiary issues, the court concluded that the trial judge had committed error but that the errors were harmless. However, as to the judge's improper instruction as to whether the jury can have testimony read back, the court refused to apply the harmless error doctrine and instead, relied upon the cases of ***Biscardi*** and ***Huhn*** and concluded that since the instruction given to the jury may have lead the jury to believe they could not ask to have testimony read back, the error was harmful. This is evidenced by the following holdings:

> . . . this court in Biscardi v. State, 511 So.2d 575, 580-81 (Fla. 4th DCA 1987), and Huhn, 511 So.2d at 591, where defense counsel had voiced an objection, held that similar instructions which indicated to the jury that there was really no provision for reinstruction of the jury or review of testimony, particularly where the trial court had earlier refused to advise the jury it could take notes, was harmful error because the comments may reasonably have conveyed to the jurors that to ask for clarification of instructions or rereading of testimony would be futile or was prohibited.

Since a conflict now exists between the opinion in this case and the opinions in the Fourth District Court of Appeal concerning whether it is possible to apply the harmless error test to an error wherein, a trial judge improperly tells a jury that they are not allowed to ask to have any testimony re-read, this Court should accept jurisdiction to resolve the conflict.

II.
THE THIRD DISTRICT COURT OF APPEAL'S DECISION WHICH CONCLUDED THAT THE ERROR WAS HARMLESS BASED EXCLUSIVELY ON THE FACT THAT THE COURT

CONCLUDED THE EVIDENCE WAS OVERWHELMING AND WITHOUT CONSIDERING HOW THE ERROR MAY HAVE EFFECTED THE JURY'S DELIBERATION DIRECTLY CONFLICTS WITH NUMEROUS DECISIONS FROM THIS COURT.

Not 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. In concluding that the error was harmless the Third District relied exclusively on their conclusion that the evidence was overwhelming. In ***State v. DiGuilio***, 491 So. 2d 1129 (Fla. 1986), this Court clearly stated merely finding that the evidence is overwhelming without evaluating how the error may have contributed to the jury verdict is a misapplication of the harmless error doctrine. Specifically, the ***DiGuilio*** Court defined the harmless error test as follows:

> Application of the 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....**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 remains 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.

DiGuilio, 491 So. 2d at 1135-1139.

Recently in ***Rigertink v. State***, 2 So.2d 221(Fla. 2009), this Court once again reaffirmed the long standing principle that a mere finding by an appellate court that the evidence was overwhelming is insufficient to establish harmless error. This Court further recognized:

> We are not nor do we consider ourselves a super-jury; rather, we are an appellate tribunal charged with the task of determining "whether there is a reasonable possibility that the error affected the verdict." Id. at 1139 (emphasis supplied). If such a possibility exists, it is our duty to remand for a new trial, which shall be free from the offending error. **The test is not whether the jury reached what we believe to be the correct result but is, instead, whether a reasonable possibility exists that the constitutional violation contributed to the defendant's convictions.**

In this case the Third District Court of Appeal concluded that the error was harmless based soley on its conclusion that the evidence was overwhelming. The court never engaged in any analysis as to how the improper jury instruction may have affected the jury deliberations and their verdict. Clearly, if the Third District would have attempted to consider how the error may have contributed to the jury verdict the court would have come to the same conclusion that the Fourth District has already reached, which is that it is impossible to apply the harmless error doctrine to this type of error because it is impossible to know whether the jury would have requested to have testimony re-read if they were not given the improper instruction.

Since the Third District's conclusion that the improper jury instruction which prohibited the jury from asking to have testimony re-read was harmless error based soley on its conclusion that the evidence was overwhelming directly conflicts with this Court's cases concerning the application of the harmless error doctrine this Court should grant jurisdiction in this case.

CONCLUSION

Since the Third District Court of Appeal's decision directly conflicts with cases from the Fourth District Court of Appeal concerning whether the harmless error doctrine should apply to an error wherein, the trial judge wrongfully instructs the jury that they are not allowed to ask to have any testimony re-read this court should accept jurisdiction of this case. In the alternative, even if this Court concludes that the Third District's decision does not conflict with the Fourth District decisions, this Court should still accept jurisdiction in this case since the Third District's application of the harmless error doctrine based soley on the fact that the court concluded the evidence was overwhelming, directly conflicts with numerous cases from this Court.

Respectfully submitted,

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BY:____________________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this _____ day of June, 2009.

CERTIFICATE OF FONT

Undersigned certifies that the font used in this brief is 14 point proportionately spaced Times New Roman.

____
ROBERT KALTER
Assistant Public Defender

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LOWER COURT CASE NO. DCA:07-2145

AUNDRA JOHNSON,

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STATE OF FLORIDA,

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Appendix

Opinion of the Third District Court of Appeal
Dated: 4.29.09 .... (A)

Order Denying Motion for Rehearing
Dated: 5.21.09 .... (B)