IN THE SUPREME COURT OF FLORIDA

DARIUS JAMINE POLITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. SC10-1812

PETITIONER'S REPLY BRIEF

On Review From the
District Court of Appeal
Fifth District

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ARGUMENT

I. THE ALLEGED VICTIM'S WRITTEN STATEMENT WAS IMPROPERLY ADMITTED INTO EVIDENCE BECAUSE THE STATE FAILED TO ESTABLISH THE PREDICATE FOR THE PAST RECOLLECTION RECORDED EXCEPTION FOR HEARSAY.

The trial court erred in admitting into evidence Falisa Levine's written statement. The written statement was not properly admitted pursuant to the hearsay exception for past recollection recorded contained in Fla. Stat. § 90.803(5), because Ms. Levine never testified that the statement accurately represented her knowledge at the time it was made or that she was being truthful at the time she wrote it.

"Section 90.803(5) requires the recorded recollection be 'shown to have been made by the witness when the matter was fresh in the witness's memory **and** to reflect that knowledge correctly.'" *Montano v. State*, 846 So.2d 677, 681 (Fla. 4th DCA 2003) (emphasis added).

The State contends that these two requirements were established because Ms. Levine identified her written statement at the time of trial and because she swore to its veracity at the time she wrote it. (State's Answer Brief at 8-9). As previously asserted, the State's argument overlooks the fact that both elements of the predicate must be established at the time of trial.

"Unlike exceptions to the rule against hearsay which derive their ability from the circumstances that surround the making of an out-of-court statement, the reliability of a recorded recollection depends on the credibility of its maker." *Montano*, 846 So.2d at 681. In *Garrett v. Morris Kirschman & Co.*, 336 So.2d 566 (Fla. 1976), this Court concluded as follows:

> When a witness identifies as such a writing made contemporaneously (or nearly so) with events as to which testimony is elicited, **and testifies that he knew at the time it was written that it was accurate, he incorporates into his testimony by reference the record or past recollection. On this basis, the writing becomes admissible since it is supported by the witness' oath, and he is available for cross-examination.** If the writing is by another, it may be admitted notwithstanding the rule against hearsay. As with any other exception to the hearsay rule, however, it is necessary that the predicate be established for the exemption for the rule.

336 So.2d at 570 n.6 (emphasis added).

Here, neither element was established at the time of trial. First, when she was asked whether the matter was fresh in her mind

when she completed the written statement, Ms. Levine responded by stating, “Not really. The police and everybody was pressuring me.” (TT1 at 42).

Second, Ms. Levine never testified at trial that the written statement accurately reflected the facts she allegedly observed on the date of the charged offenses or that she was being truthful at the time she wrote the statement. (TT1 at 31-46). Ms. Levine actually testified that she may have made a mistake when she wrote the statement because the police were pressuring her when she wrote it. (TT1 at 49).

Under those circumstances, the record reflects that the State failed to establish the predicate for the admissibility of her written statement pursuant to Fla. Stat. § 90.803(5). Therefore, the trial court erred in admitting the written statement into evidence at trial.

The State contends that any error made by the trial court in this regard was harmless. (State’s Answer Brief at 13). This argument also lacks merit.

In *Ventura v. State*, 29 So.3d 1086 (Fla. 2010), this Court held that its previous decisions in *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), and *Rigertink v. State*, 2 So.3d 221 (Fla. 2009), have clearly established that the proper test for harmless error is not guided by a “sufficiency of the evidence, correct-result, not clearly wrong, substantial evidence, more probable-than-not, clear-

and-convincing, or even an overwhelming-evidence test." The Court held that the proper test to be applied is whether the record demonstrates beyond a reasonable doubt that there is no reasonable probability that the error in question contributed to the jury's verdict. The burden to show that the error in question is harmless is on the State. 29 So.3d at 1088-90.

The State cannot meet that burden in this case. The admission of the written statement into evidence was severely prejudicial to Mr. Polite because it was the only evidence which provided any detailed explanation of the events underlying the offenses for which Mr. Polite was charged and convicted. The State re-read it to the jury and referred to it during closing argument repeatedly. (TT2 at 234, 236, 239, 262). The improper admission of this statement contributed to the jury's verdict and requires reversal of Mr. Polite's convictions. Accordingly, this Court should quash the decision of the district court.

II. EVIDENCE CONCERNING THE ALLEGED VICTIM'S OUT-OF-COURT IDENTIFICATION OF MR. POLITE FROM A PHOTO LINEUP WAS HEARSAY THAT WAS IMPROPERLY ADMITTED AT TRIAL.

Mr. Polite continues to rely on the arguments raised in his Initial Brief on the Merits.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Petitioner's Reply Brief is submitted in Courier New 12-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to Kristen L. Davenport, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on this 17th day of June, 2011.

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