Filing # 50690530 E-Filed 01/03/2017 12:51:15 PM

IN THE SUPREME COURT OF FLORIDA

ROBERT GRESHAM,

APPELLANT,

V.

STATE OF FLORIDA,

APPELLEE.

Case No. SC 16-359

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

MICHAEL SCHAUB
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0101189
OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)

COUNSEL FOR APPELLEE

RECEIVED, 01/03/2017 12:53:41 PM, Clerk, Supreme Court

TABLE OF CONTENTS

.... Page#

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT 5

STATEMENT OF THE CASE AND FACTS 5

SUMMARY OF ARGUMENT 5

ARGUMENT 8

ISSUE I: WHETHER THE RULE 3.853 MOTION WAS FACIALLY SUFFICIENT. 8

ISSUE II: IF THE RULE 3.853 MOTION WAS FACIALLY SUFFICIENT WAS THE TRIAL COURT'S DENIAL OF THE MOTION WITHOUT ALLOWING THE STATE TO RESPOND SUBJECT TO HARMLESS ERROR ANALYSIS. 20

ISSUE III: IF THE DENIAL IS SUBJECT TO HARMLESS ERROR AND THE MOTION WAS FACIALLY SUFFICIENT WAS THE COURT'S DENIAL HARMLESS. 25

CERTIFICATE OF SERVICE 31

CERTIFICATE OF COMPLIANCE 31

TABLE OF CITATIONS

Cases

Cardona v. State,

109 So.3d 241, (Fla. 4th DCA 2013) 14, 21

Gonzalez v. State,

41 So.3d 1050 (Fla. 2d DCA 2010) 7, 9

Gresham v. State,

181 So.3d 1207, (Fla. 1st DCA 2016) .... passim

Harris v. State,

183 So.3d 1065, (Fla. 2nd DCA 2015) 19, 22

Hitchcock v. State,

866 So.2d 23 (Fla. 2004) 12

Jordan v. State,

950 So.2d 442, (Fla. 3rd DCA 2007) 7, 9

Knighten v. State,

829 So.2d 249 (Fla. 2d 2002) 7, 9

Lebron v. State,

100 So.3d 132 (Fla. 5th DCA 2012) 10

Moore v. State,

701 So. 2d 545 (Fla. 1997) 24

Rodas v. State,

967 So. 2d 444 (Fla. 4th DCA 2007) 22

Rosa v. State,

147 So.3d 583, (Fla. 4th DCA 2014) 14, 15

Scott v. State,

46 So.3d 529, (Fla. 2009) 21, 22

Spera v. State,

971 So.2d 754 (2007) 17

State v. DiGuilio,

491 So. 3d 1129 (Fla. 1986) 20,24

White v. Means,

280 So. 2d 20(Fla. 1st DCA 1973) 21

Statutes
925.111, Fla. Stat 18

Rules
Fla. R. Crim. P. 3.853 .... passim

PRELIMINARY STATEMENT

Appellant, Robert Gresham, was the Defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

This appeal consists of two volumes. The Post Conviction Record will be referenced as, "R." followed by any appropriate volume number(s), then the appropriate page number(s). The Supplemental Record will be referenced as, "SR.", then the appropriate page number. "IB." will designate Appellant's Initial Brief, followed by any appropriate page number(s). "JB." will designate Appellant's Jurisdictional Brief followed by any appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

On June 30th 2004, the Appellant was convicted of two counts of sexual battery on a person less than 12 years of age by a person over 18 years age and one count of lewd or lascivious molestation on a child under 12 years of age. (R. 132). The Appellant filed a motion for post conviction DNA testing on April 7th, 2014 which the trial court denied. (Case Docket pg. 7). The Appellant filed a second Rule. 3.853 motion for post conviction testing on August 27th, 2014. (R.9). In his motion, the Appellant requested the court to "issue an order to compare the articles of clothing for epidermal cells and sebaceous secretions against his DNA epidermal cells and sebaceous secretions."(R. 8).

The trial court denied the second motion for post conviction testing. (R.132). The Appellant appealed the denial alleging the trial court failed to follow Rule 3.853(c)2 by summarily denying the motion without ordering the prosecuting authority to respond. (IB.16-17). The First District affirmed the trial court's denial of motion. *Gresham v. State*, 181 So.3d 1207, (Fla. 1st DCA 2016). The First District found the Appellant's motion to be facially insufficient and therefore the court was not required to order the State to respond. *Id.*

SUMMARY OF ARGUMENT

Issue I

The First District correctly found the Appellant's motion was facially insufficient because it didn't meet the content requirements of Rule 3.853. Rule 3.853(b) states the motion must include a 1)statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue, or in the alternative 2)an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence. Fla. R. Crim. P. 3.853(b)(4). The appellate court applied Rule 3.853(b) and found the Appellant failed to sufficiently allege either option under the rule. *Gresham v. State,* 181 So.3d 1207, (Fla. 1st DCA 2016). Appellant failed to explain how DNA testing would exonerate him in light of the evidence and issues, and also never alleged identity was an issue. Thus, the First District didn't err in finding that the Appellant's motion for post-conviction testing was facially insufficient.

Issue II

This Court should apply harmless error to the denial of Rule 3.853 motions if a court denies the motion without allowing the State to respond. This type of alleged error can't be considered per se reversible because it is not harmful. The Court may violate the State's due process right if it granted the motion without giving the State an opportunity to respond, however because the only error the appellant is alleging is denying the motion without a opportunity for the State to explain why it should be denied, the error will always be harmless when the motion is denied. Thus, harmless error should apply to cases where the courts fail to follow the procedural requirements of Rule 3.853(c)2.

Issue III

The Appellant argues that if this Court finds the motion to be facially sufficient, the trial court's denial of the 3.853 wasn't harmless. However any alleged error would have been harmless because the record established there was no reasonable probability that DNA testing would have led to an acquittal. As the First District found it was "apparent from the face of the record the Appellant's claims are meritless." *Gresham* 181 So.3d at 1207.

ARGUMENT

ISSUE I: WHETHER THE RULE 3.853 MOTION WAS FACIALLY SUFFICIENT.

Jurisdictional Criteria

The Appellant failed to establish how this Court has jurisdiction over this issue. The Appellant claims that the decision conflicts with 1) the *Amendment to Fla Rules of CR. Proc. 3.853*, 807 So.2 633, 634 (Fla. 2001)., 2) *Knighten v. State*, 829 So.2d 249 (Fla. 2d 2002), 3) *Gonzalez v. State*, 41 So.3d 1050 (Fla. 2d DCA 2010), and 4) *Jordan v. State*, 950 So.2d 442, (Fla. 3rd DCA 2007). However to establish jurisdiction, the Appellant must demonstrate the First District's opinion "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question." Art.V, 3(b)(3), Fla. Const. However as previously mentioned in the State's jurisdictional brief, the Appellant failed to demonstrate how the First District's decision "expressly and directly" conflicts with another jurisdiction's decision.

The Appellant first alleges conflict with the amendment which created Rule 3.853 and implies the First District's decision is at conflict with the rule itself. (JB. 4). However to establish conflict jurisdiction the decision below must conflict with a decision from another jurisdiction. Even if this Court were to consider the rule as a decision, the First District's decision doesn't expressly and directly conflict with the rule 3.853. The Appellant's argument ignores the First District's analysis of

the issue which demonstrates the court correctly applied the rule and found the motion insufficient because the Appellant neither sufficiently alleged identity as a genuine issue nor explained how the DNA testing would exonerate him. *Id.* Thus, the First District opinion didn't expressly or directly conflict with the rule because the court properly applied Rule 3.853(b)(4) in finding the motion facially insufficient.

The Appellant also cites a conflict with *Gonzalez v. State,* and *Knighten v. State*. As previously discussed in both *Gonzalez* and *Knighten*, the appellate courts found the motion to be facially sufficient and met the content requirements under Rule 3.853(b)(4). In contrast, the First District found the Appellant's motion was facially insufficient due to failure to explain 1) why identification was an issue or 2) how DNA exonerated the defendant. Thus there was no direct and express conflict with either *Gonzalez* or *Knighten* because the First District decision's found the motion to lack the content requirements of Rule 3.853(b)(4).

Likewise, this case doesn't directly and conflict with *Jordan v. State*, 950 So.2d 442 (Fla. 3rd DCA 2007). In *Jordan*, the Third District found that the trial court had erred by summarily denying Jordan's motion for DNA testing without holding a hearing or attaching portions of the record to refute the claim. The *Jordan* court never addressed the sufficiency of the defendant's motion whereas in the instant case the appellate court's denial of the motion hinged on the facial sufficiency.

Despite the Appellant's argument, the First District's decision doesn't

directly and expressly conflict with another jurisdiction's decision. Moreover, this is a fact specific case in which petitioner seeks to resolve a fact specific issue, not public policies which would affect cases throughout the state. Thus there is no conflict to establish jurisdiction or any other reason to exercise jurisdiction.

Standard of Review

The State agrees with the Appellant that the facial sufficiency of a Rule 3.853 Motion should be reviewed de novo. See *Lebron v. State*, 100 So.3d 132,133 (Fla. 5th DCA 2012).

Merits

The First District did not err in finding the Appellant's motion for post-conviction DNA testing facially insufficient. Rule 3.853(b) states the motion must include a "1) statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue *or* 2)an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence." Fla. R. Crim. P. 3.853(b)(4). In denying the Appellant's motion, the First District found the Appellant failed to sufficiently allege either of these alternatives. *Gresham v. State,* 181 So.3d 1207, (Fla. 1st DCA 2016). Thus, First District correctly affirmed the denial of the Petitioner's motion because it was facially insufficient under the content requirements of Rule 3.853.

In the initial brief, the Appellant argues the court misread Rule 3.853(b)(4) and thereby erred in ruling it was facially insufficient. (IB.

11). As evidence, the Appellant cites the First District's substitution of the conjunction "or" for "and" when it stated "in order to allege a facially sufficient claim for DNA testing, a defendant must allege that identification was a genuinely disputed issue at trial ***and*** explain how the DNA testing will exonerate him."*Id.* (IB.4). However, The First District's analysis of the issue demonstrated it correctly applied the rule in finding the Appellant's motion facially insufficient.

Rule 3.853(b)(4) requires either the defendant to allege identity was an issue or in the alternative explain how DNA testing will exonerate him. The First District's opinion went through an analysis of both options:

> Appellant did not and cannot allege that identify was genuinely disputed in the case. He was the boyfriend of the victim's mother and lived in the home with victim. Moreover, Appellant confessed to police officers that he sexually abused the victim. Appellant also failed to explain how DNA testing would exonerate him in light of the fact that the State admitted at trail that there was no DNA evidence linking him to the crime. *Id.*

Therefore the First District considered both alternatives under Rule 3.853(b)(4) and found that the Appellant failed to sufficiently allege either.

If the First District had found the motion was facially insufficient solely because the Appellant failed to allege one alternative without consideration of the other, then the Appellant might have an argument. However in finding the motion was facially insufficient, the First District followed the rule and found the Appellant failed to allege either alternative provided. Thus the court didn't err in applying Rule 3.853 in

finding the Appellant failed to meet its content requirements.

The Appellant further argues his motion sufficiently alleged how the DNA evidence would exonerate him. (IB. 13). The Appellant's motion does make conclusory statements DNA testing will exonerate him by stating "the tested evidence does exonerate him… and tests of EPI [skin cells] and Seubus [sweat oils] will exonerate him." (R. 3). However the rule requires the Appellant to explain how the new testing will exonerate him. Despite the Appellant's blanket statements of exoneration, the motion never specifically explains how the testing he wants the court to order will exonerate him. If the Court accepted Appellant's argument that the simple statement "a DNA test will exonerate me", courts would have to hold a hearing in every case in which a defendant filed a motion for DNA testing, which is why the rule requires the Appellant to explain how testing will exonerate him.

On appeal, the Appellant claims the motion explained how DNA would exonerate him because it alleged 1)when FDLE compared the skin cells and sweat oils found on the swabs it would not be consistent with his DNA and 2) the contact of the victim's clothing against his skin would have left DNA. (IB. 13) However as this Court held:

> A movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be e tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case. *Hitchcock v. State,* 866 So.2d 23, 27 (Fla. 2004).

The Appellant motion fails to explain how the presence of DNA or lack thereof would exonerate him in light of the evidence and issues at trial.

The Appellant's motion appears to assert that if testing for skin cells or sweat cells did not disclose the presence of the his DNA in the victim's genital area then it would mean that the defendant did not, or could not have done it. However, the Appellant fails to cite anything in support of the proposition that his DNA's absence means he did not or could not have done it. There is no scientific or legal authorities cited for the proposition that not only can a person skin or sweat cells be located and tested but that they would, of necessity, be present. Thus the absence of his DNA or presence of someone else would not prove anything as to him.

Furthermore, Appellant confessed to sexually assaulting the victim, accordingly Appellant failed to explain how absence of his sweat or skin DNA on the clothing or swabs would exonerate him. Additionally, the jury was told at trial there was no DNA evidence linking the Appellant to the crime, thus testing would only reveal something the jury was already aware of. (R. 154). As the First District found "the Appellant failed to explain how DNA testing would exonerate him in light of the fact that the State

admitted at trial that there was DNA evidence linking the Appellant to the crime." *Gresham,* 181 So.3d at 1208.

The motion fails to address how this DNA evidence would exonerate given evidence of 1) his written admission to the crime, 2) admission he was alone in the house with the victim on the day of the alleged incident, and 3) admission he sexually abused the same victim in the past. (R. 111-125). Therefore, there the Appellant failed to sufficiently allege the nexus between the potential results of DNA testing and the issues in the case.

The instant case is comparable to *Rosa v. State.* In *Rosa,* the court found the Appellant Rule 3.853 to be facially insufficient because it failed to explain how the results would exonerate the defendant. *Rosa v. State,* 147 So.3d 583, (Fla. 4th DCA 2014). In *Rosa,* the defendant alleged new DNA testing would demonstrate that none of Appellant's DNA would be found in the victim's sexual assault kit. *Id.* at 584. However the court still found the motion insufficient because he did not explain under the circumstances of the case, how it would exonerate him or mitigate his sentences. *Id.*

Similarly the Appellant alleges his DNA wouldn't be found on the sexual assault kit or on the Appellant's clothes. Like *Rosa*, the Appellant never alleges how under the circumstances of the case this new test would have exonerated him. Therefore as in *Rosa*, the Appellant's motion was not facially sufficient under rule 3.853(b).

The Appellant also argues his motion demonstrated how DNA testing would result in exoneration because it alleged that "the DNA test results, which were not disclosed to jury, demonstrated the testimony of an alleged ejaculation to be false'" (IB. 13). Again this is conclusory statement that does not provide when the test was conducted, how long ago the crime occurred, or what the victim did in the interim.

Additionally this allegation doesn't explain how *new testing* results would exonerate him, rather the Appellant appears to be referencing the lab results of the sexual assault kit which indicated no semen was found on either the saliva standard, labial swab, or genital swab. (R. 38). Throughout his motion, the Appellant attempted to frame the Sexual Assault Kit results as "newly obtained documents" which were "withheld and failed to be heard by the jury." (R.3-5). However, Rule 3.853 is not vehicle for arguing whether evidence was withheld rather the purpose of the rule is to provide a way "for a convicted defendant to have physical evidence examined for possible exoneration or mitigation of sentence." *Cardona v. State*, 109 So.3d 241, (Fla. 4th DCA 2013).

Furthermore, the trial stipulations in the record establish the Appellant was well aware of these FDLE lab results before and during trial. (R.81). Before trial, both parties stipulated to the FDLE results done on March 3rd, 2013. (R.81). Thus, any arguments of how previous "withheld" test results would exonerate the Appellant are meritless, and not applicable to the issue of whether the motion is facially sufficient.

The Appellant also alleges his motion met the requirement of Rule 3.853 because the motion implicitly alleged identification was an issue and why it was an issue. (IB. 14). However, Rule 3.853(b)(4) requires "a **statement** that identification of the movant is a genuinely disputed issue in the case and why it is an issue." Fla. R. Crim. P. 3.853(b)(4). As the Appellant concedes his motion never expressly alleges identification as a genuinely disputed issue. (IB. 14). The Appellant argues the issue of identity was implied, but the rule requires a "statement" that identity is an issue rather than an implication. Thus by failing to state that identity is genuine issue, the Appellant failed to sufficiently allege the requirements of the rule.

Furthermore there is never even an implicit allegation that identification of the movant was a genuinely disputed issue in the case or why it is an issue. The motion never explains why identity might be an issue given that the victim knew the Appellant from living with him and his written admission to the crime. The Appellant never alleges mistaken identity or a third party potentially being involved in the case. In fact during the trial, the Appellant admitted on the day of the incident, he and the victim were the only ones in the home. (R.107). Additionally though the Appellant claims his motion implicitly alleges a genuine issue of identity, his initial brief fails to demonstrate what in the motion would imply such an allegation. (IB. 14-17).

In *Sierci v. State*, this court found the defendant's motion contained

a statement that "the identification of the true murderer of the victim is as genuinely disputed now as it was at trial." *Sierci v. State,* 908 So.2d 321, 324 (Fla. 2005). The defendant's motion specifically alleged Barbara Perkins to be the killer and explained DNA testing would support the claim. *Id.* This Court found the motion to contained a statement the identity was in dispute pursuant to Rule 3.853(b)(4). *Id.*

In contrast, the Appellant made no express or implicit statement concerning the issue of identity in his motion. The motion fails explains why the Appellant's identity is at issue especially given the circumstances of the case. For example unlike *Sierci*, the motion never alleges a third party being involved in the crime. Thus the Court correctly found that the Appellant failed to sufficiently allege that identity was a genuinely disputed issue and why it was an issue.

The First District correctly found the Appellant's motion was insufficient because it didn't meet the content requirements of Rule 3.853. Rule 3.853(b) states the motion must include a 1)statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue, or in the alternative 2)an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence. Fla. R. Crim. P. 3.853(b)(4). The appellate court applied Rule 3.853(b) and found the Appellant failed to sufficiently allege either option the rule provides. *Gresham v. State,* 181 So.3d 1207, (Fla. 1st DCA 2016). Thus, the First District didn't err in finding the Appellant's motion for post-

conviction testing facially insufficient

The Appellant additionally argues if the motion was facially insufficient the court should have gave the Appellant an opportunity to amend his motion. However this Court shouldn't consider this argument because the Appellant failed to make it before the circuit court below. Thus the claim was not preserved and should be procedurally barred.

Even if this Court were to consider this claim on the merits it would still fail. In support of the argument, the Appellant cites to *Spera v. State*, 971 So.2d 754 (2007), which holds that when a Defendant's initial rule 3.850 motion for post conviction relief is determined to be legally insufficient for failure to meet the pleading requirement, the trial court abuse its discretions when it fails to allow the Defendant at least one opportunity to amend the motion. (IB. 13) *Spera v. State*, 971 So.2d 754 (2007).

However, the case docket indicates this wasn't the Appellant's first rule 3.853 motion. The case docket reflects Appellant filed a 3.853 motion on April 7th,2014 and it was denied May 12th 2014. Furthermore the First District titled the denial "Order Denying Second Motion for Post-Conviction DNA Testing". (R.132). While the Apellant's first motion is not in the record, the Appellant's Initial Brief to the First District reflects

> On April 7th, 2014 Appellant filed a motion for postconviction DNA testing pursuant to Fla. R. Crim. P., 3.853 and section 925.111, Fla. Stat., asking trial court to enter an order for DNA resting of the evidence that was collected during the investigation of the present case. Specifically, the items presented to the jury during deliberation of thje present case, also the DNA that was collected form Appellant and articles of clothing not processed. (Appellants Initial Brief to the DCA pg. 3)

Therefore, even if the Court were inclined to apply *Spera* to DNA testing, the record doesn't make clear whether the trial court had given petitioner an opportunity to amend his motion. Thus, this is not the case to address this issue.

<u>ISSUE II</u>: IF THE RULE 3.853 MOTION WAS FACIALLY SUFFICIENT WAS THE TRIAL COURT'S DENIAL OF THE MOTION WITHOUT ALLOWING THE STATE TO RESPOND SUBJECT TO HARMLESS ERROR ANALYSIS.

Jurisdictional Criteria

In regards to this issue, The Appellant cites a direct and express conflict with *Harris v. State*, 183 So.3d 1065, (Fla. 2nd DCA 2015). (JB. 6). In *Harris,* the court reversed the lower court's denial of a Rule 3.853 motion because the court violated the procedural Rule 3.853(c)2. *Id.* The appellate court found the lower court violated the rule by denying a facially sufficient motion on the merits without the state's response, and held a response is required even when the record shows the defendant is not entitled to relief. *Id.* In contrast to *Harris*, The First District's affirmance was based on the motion's lack of facial sufficiency, whereas *Harris'* decision was based on the court's failure to follow Rule 3.853(c)(2). While the First District did hypothesize that even if the motion had been sufficient it would have been harmless error, their reason for affirming was based on the sufficiency of the motion. Thus the First District's decision does not directly and expressly conflict with *Harris.*

Merits

The Appellant argues if the motion had been facially sufficient, the court would have erred by denying the motion before the state responded. Rule 3.853 states if the court finds a motion facially sufficient, the

prosecuting authority shall be ordered to respond. Fla. R. Crim. P. 3.853(c)(2). After receiving a response, the court should enter an order on the merits or set the motion for hearing. Fla. R. Crim. P. 3.853(c)(3).

However a court denying a facially sufficient motion without ordering the state to respond is not error. The Appellant's argument assumes that the statute's use of the word "shall" should be construed as mandatory but courts have found the interpretation of "shall" should be determined by its context. see *White v. Means*, 280 So.2d 20, (Fla. 1st DCA 1973)(holding that mandatory or permissive nature of "shall" in a statute depends upon the context in which it is found and upon the intention of the legislature as expressed in the statute).

In the instant case, the context in which "shall" is used, is that if the motion facially sufficient, the State's written response is intended to assist the court in determining whether the motion has merit or requires an evidentiary hearing. The section is a form of assistance to the court; a function which the court can handle on its own if the court invested time in reviewing the record. Thus given the context in which the word "shall" is found in the statute its meaning should be interpreted as discretionary rather than mandatory. Therefore there is no error when a court denies a facially sufficient motion without ordering the state to respond.

Furthermore if this Court found the First District court to have erred, then this type of procedural error should be considered harmless rather than per se reversible. The test for whether a given type of error

can be properly categorized a per se reversible is the harmless error test. *State v. Digulio*, 491 So.2d 1129 , 1135(Fla. 1986).[1] The test for harmless error is whether there was a reasonable possibility the error affected the verdict or decision. *Id.* If the application of this test to the type of error will always result in finding the error is harmful, then it's proper to categorize the error as per se harmful. *Id*

In the instant case, the type of error considered is not denying the motion, but rather the court's denial of a facially sufficient Rule 3.853 motion without requiring a response from the State first. Again, the only error the Appellant alleges is not requiring the State to respond. This type of error is not per se reversible because the error is not harmful. For example, if the court were granting relief it would be advisable to seek input from the State before doing so. However when the court denies relief, as in this case, if additional input was required from the State it would either provide the same reasons as set forth in the Court's Order Denying the Petitioners Motion or provide additional reason why petitioners is not entitled to DNA testing. Either way the outcome of the motion for DNA testing would be the same. Thus, the type of error is not per-se reversible because the error won't always result in harmful error.

The trial court's application of harmless error to the denial of a

---

[1] When an issue is not properly preserved, the Court reviews the error for fundamental error and the burden is on the defense to establish that the error vitiated the trial. When an error is preserved, the burden is on the State to establish that the error was harmless. However, there are a limited number of issues when a prejudice is presumed during the harmless error analysis. Nevertheless, the per se reversible standard only applies when the issue is preserved. See *Rodas v. State,* 967 So.2d 444 (Fla. 4th DCA 2007).

Rule 3.853 motion is in the line with this Court's opinions in *Sierci v. State*, 908 So.2d 321 (Fla. 2005) and *Scott v. State*, 46 So.3d 529, (Fla. 2009). In both of these cases, the Court applied the harmless error doctrine to review of the merits of the claim rather than the failure to follow a procedural requirement. These cases demonstrate this Court has repeatedly used the harmless error analysis when a lower court erred in denying a Rule 3.853 motion. It should follow that harmless error should have been applied in the instant case if the lower court had erred in denying the Appellant's rule 3.853 motion.

The Appellant argues that *Sierci* is distinguishable because the post-conviction courts followed the procedural requirements of Rule 3.853(c)(2) by ordering the State to respond before addressing the motions merits. The Appellant cites to *Harris v. State* in support of his argument. In *Harris*, the post conviction court denied the Appellant's motion on the merits without ordering a response from the state. *Harris* 183 So.3d at 1065. The *Harris* court held a response from the state is required even when an examination of the record conclusively shows the defendant is not entitled to relief. *Id.* The appellate court reversed the trial court's denial. *Id.* The Appellant argues that *Harris* supports a bright line rule that it is per se reversible error to deny a facially sufficient Rule 3.853 motion before the State has responded.

However, *Harris* is incorrect because it fails to take into consideration why an error is categorized as per se reversible error. As

previously mentioned, per se error is limited to those errors which are always harmful. It can't be said that failure for the court to follow the procedural requirement of Rule 3.853 always results in harmful error. For example when the merits of the Appellant's motion are conclusively refuted by the record there is no reasonable possibility that failing to follow the procedural requirements of Rule 3.853(C)2 would affect the outcome. Thus, this Court should find harmless error should apply if the court fails to follow the procedural requirement of allowing the state to respond.

This Court should apply the harmless error to denial of Rule 3.853 motions even if a court errs by denying the motion without allowing the State to respond. This type of error can't be considered per se reversible because it won't always be harmful. Thus, harmless error doctrine should apply to cases where the courts fail to follow the procedural requirements of Rule 3.853(C)2.

ISSUE III: IF THE DENIAL IS SUBJECT TO HARMLESS ERROR, WAS THE COURT'S DENIAL HARMLESS.

Jurisdictional Criteria

The Appellant failed to establish that this court has jurisdiction over this issue. The Appellant doesn't cite how the issue is at direct and express conflict with another decisions or any other way this Court has jurisdiction. Thus this court lacks jurisdiction to determine this issue.

Merits

The Appellant argues that if this Court finds the motion to be facially sufficient, the trial court's denial of the 3.853 wasn't harmless. This Court has previously found that when a court errs in finding a motion technically insufficient, then the error can be harmless if the motion failed to establish that DNA testing would have led to a reasonable probability that Scott would have been acquitted. See *Scott* 46 So.3d at 535. Any alleged error, in the instant case, would have been harmless because the record established there was no reasonable probability that DNA testing would have led to an acquittal. As the First District found it was "apparent from the face of the record the Appellant's claims are meritless." *Gresham* 181 So.3d at 1207.

In the instant case, the Appellant DNA testing to compare his bucal swabs "epidermal and sebaceous" DNA to the articles of clothing "epidermal and sebaceous" DNA. However, evidence that Defendant's DNA was or wasn't on the victim's clothes wouldn't establish a reasonable probability of

acquittal. As the trial court stated "there is no purpose in testing the physical evidence listed in Defendant's motion for non seminal and non saliva DNA because Defendant and victim lived together, meaning the existence or absence of Defendant's non-seminal and non-saliva (i.e., from skin or sweat) DNA on these items is irrelevant." *Id.*

Furthermore in the initial brief, the Appellant argues the testing would introduce DNA evidence that showed the saliva and sweat oils found in the victim's labial swabs didn't come from him. (IB.24). However the presence of saliva on the labial swabs came as inconclusive, thus there could be no comparison done in that regard. (R. 38). Additionally results showing the Appellant's buccal swabs failed to match the labial swab don't establish a reasonable probability for acquittal, in the light of the evidence presented at trial.

During the trial, the Appellant's written statement was entered into the evidence which he made a full confession.

> State: Showing you whats been presented into evidence as State's Exhibit 16
>
> Defendant: Okay
>
> State: do you recognize that? That's the written statement that you wrote on March 13th to- -or while you were at Levy Count Sheriffs Office, wasn't it?
>
> Defendant: Yes
>
> State: When it says I, Robert Nujent Gresham III, do hereby state that I had false intercourse with Beck [victim], you wrote that didn't you?
>
> Defendant: Yes, sir, I did

> State: And when it says, I have eight- and penetrated Becka with my tongue, you wrote that as well.
>
> Defendant: Yes
>
> State: When it says. I've ejaculated on Becka's[victim's] stomach and clitoris. That was written by you.
>
> Defendant: Yes
>
> State: When it says, I've asked her to have oral intercourse on me, you wrote that
>
> Defendant: Yes
>
> State: When it says I have sucked and fondled Becka's [victim] breast you wrote that
>
> Defendant: Yes
>
> State: When it says I have requested Becka [victim] ejaculate me with her hands on in her, your the one that wrote that
>
> Defendant: Yes
>
> State: And as a matter of fact, you even signed it, didn't you
>
> Defendant: Yes, sir I did. (R.111).

Furthermore, the evidence also showed the Appellant and victim lived in a trailer together and on the day of the incident they were alone in the residence together. (R.107&113). The Appellant also admitted to an officer that he sexually abused the victim in the exact same manner the year prior. (121-125). Thus there would have been no reasonable probability the testing the Appellant sought would have led to an acquittal, in light of the

evidence presented at trial.

The case is comparable to *Sierci v. State* and *Scott v. State*. In *Sierci,* this Court found that the Appellant court erred in finding the defendant's motion failed to meet the technical requirements of rule 3.853. *Sierci* 908 So.2d at 325. However this Court went on to explain the error was harmless because of the Appellant's failure to demonstrate a reasonable probability the DNA evidence would have led to an acquittal. *Id.* This Court cited evidence like Appellant's admission of guilt as demonstrating there was no reasonable probability the DNA testing would have led to a acquittal. *Id.* Thus this Court found harmless error because in light of the other evidence of guilt, there was no reasonable probability DNA testing would have led to an acquittal.

In *Scott*, the trial court denied the defendant's 3.853 motion because it was "technically legal insufficient". *Scott* 46 So.3d at 531. This Court found the Appellant's motion to have facially fulfilled the technical requirements of the rule 3.853(b). *Id.* at 534. Despite the trial court's error, this Court held "any error was harmless because the motion failed to show any reasonable probability that Scott would have been acquitted or received a lesser sentence." *Id.* The Court found "the presence or absence of Scott's Blood at the crime scène has no bearing on whether he committed the crime because Scott's presence at Mr. Alesssi's home is not in question. Consequently, even if DNA testing revealed Scott's blood was not at the scene, it wound not tend to establish his innocence." *Id.* at 533.

Similarly, in the instant case in light of the other evidence of the Appellant's guilt there is no reasonable probability the DNA tests sought would have led to an acquittal. At best the DNA testing the Appellant sought would not be consistent with the DNA found on the clothing or swabs. However there was no reasonable probability the testing still would overcome the evidence presented at trial. The Appellant argues this testing "points toward innocence", however just because evidence is favorable for the Appellant doesn't mean the evidence establishes reasonable probability of acquittal. (IB.24) Thus as in *Sierci* and *Scott* any alleged error was harmless because the testing the Appellant seeks doesn't establish a reasonable probability for acquittal.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the lower court's denial of the Appellant's Rule 3.853 motion for post conviction testing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by electronic mail to the following: Thomas Burns, counsel for Appellant, at tburns@burnslaw.com, this 3rd day of January, 2017.

CERTIFICATE OF COMPLIANCE

I certify that this document was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Michael Schaub
____

By: Michael Schaub
Attorney for the State of Florida
Assistant Attorney General
Florida Bar No. 0101189
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
michael.schaub@myfloridalegal.com
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)