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IN THE SUPREME COURT OF FLORIDA

FRANCISCO RODRIGUEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC17-805

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

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner, Francisco Rodriguez, seeks this Court's review on a claim that the district court of appeal did not analyze his case under the correct harmless error standard. The district court of appeal reviewed whether statements admitted at trial qualified as hearsay exceptions and concluded that any error was harmless.

Petitioner was tried before a jury on a charge of armed burglary of an occupied dwelling with assault.[1] There were three victims, George Henriquez, Emmanuel Londo, and Yeovanny Tavarez. Victims George Henriquez and Emmanuel Londo were roommates. They had an ongoing dispute with their next-door neighbor, Coral Negron. (T. 305-06, 509-101). Coral Negron and Petitioner were friends.

In the days leading up to the burglary, Coral Negron told victim Emmanuel Londo that "[she] was going to send someone to come fuck [him] up." (T. 513, 567). On the day of the incident, Coral Negron accused victims George Henriquez and Emmanuel Londo of having turned off her electricity. (T. 332-33, 515-16, 816-17).

Coral Negron called the police. (T. 515). The police talked to the parties. The police told the parties to stay away from each other. (T. 515-16). Victims Emmanuel Londo and Yeovanny Tavarez then heard Coral Negron say: "I'm going to call someone over to bust a cap in your ass." (T. 516, 813-14, 817). Victim Emmanuel Londo became worried and locked the front door. (T. 516, 554, 819). Coral Negron

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[1] A charge of possession of a firearm by a convicted felon was severed.

called Petitioner. Twenty minutes later, Petitioner forcefully knocked on the victims' door with a gun. (T. 340, 342, 344, 516-17, 519-22, 579, 820, 1054-56).

When the victims would not let him in, Petitioner kicked open the locked door. He charged into the home carrying a firearm. (T. 344-45, 378-79, 385-86, 461-63, 523, 544-45, 553, 580, 607, 821, 860; State's Exhibit 10, 14,16). Victim Emmanuel Londo ran into the bathroom and hid. (T. 523-24). Petitioner put the gun barrel to Yeovanny Tavarez' head. (T. 821-22). Victim George Henriquez tried to call 911. Petitioner pushed him against a wall. (T. 344-45, 522-23, 822-23).

Petitioner alternately aimed the firearm at victims George Henriquez and Yeovanny Tavarez. (T. 346). When the gun went off, victim George Henriquez jumped on Petitioner and attempted to disarm him. (T. 346-47, 823). Victims George Henriquez and Yeovanny Tavarez wrestled Petitioner to the ground. (T. 347-50, 525, 823-25). The firearm discharged again when victim Yeovanny Tavarez gripped Petitioner's wrist. (T. 350, 492-93, 548-49, 826-28).

Victim George Henriquez bit Petitioner's wrist, causing Petitioner to loosen his grip on the firearm. Victim Yeovanny Tavarez grabbed the gun. (T. 828-30, 834-35). When sirens could be heard, Petitioner ran from the apartment. (T. 351, 526-29,

832). The victims chased Petitioner into the street where they tackled him. The victims held Petitioner until the police arrive. (T. 355-58, 532-33).[2]

Prior to trial, the State filed a motion in limine seeking the introduction into evidence of Coral Negron's threatening statement. (ROA. 61, 73; Electronic Page "EP." 72, 84). The State sought to introduce the statement pursuant to Florida Statute section 90.803(3) (2013), which permits the admission of a statement describing a "then-existing mental, emotional, or physical condition." The State argued that the purpose of the exception was to permit the statement's admission to show that Coral Negron's intention was not merely to call someone. (T. 290). Rather, it was to "make a phone call and request that certain things . . ." (T. 291).

The defense filed a motion in limine seeking to prevent the State from introducing the statement into evidence. (ROA. 69; EP. 80). The defense also made an alternative motion seeking a limiting instruction explaining that the statement was only relevant to show that Coral Negron telephoned Petitioner. (T. 287-88, ROA. 245; EP. 256).

The court granted the State's motion but denied the defense motion seeking a limiting instruction.

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[2] Three 911 recordings of the incident were played for the jury. (T. 361-72, State's Exhibit 7).

The jury found Petitioner guilty of burglary of an occupied dwelling. (ROA 258; EP. 269). The court sentenced Petitioner to 72 months' imprisonment, followed by ten years' probation. (R. 311; EP. 322).

On appeal, Petitioner argued that Coral Negron's statements were erroneously admitted under the "state of mind to prove subsequent acts" hearsay exception. He asserted that the alleged error required reversal. In response, the State argued that the statements were properly admitted as a hearsay exception under section 90.803(3), Florida Statutes (2013), because they qualified as a statement to prove Coral Negron's subsequent conduct. The State argued, in the alternative, that any error was harmless beyond a reasonable doubt, because the alleged error did not contribute to the verdict.

The Third District Court of Appeal affirmed the judgment and sentence. The opinion, in its entirety, states:

> Any error by the trial court in admitting the hearsay statements at issue was, at best, harmless. See § 59.041, Fla. Stat. (2015) ("No judgment shall be set aside or reversed ... on the ground of ... the improper admission or rejection of evidence ... unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.")

Rodriguez v. State, 215 So. 3d 194 (Fla. 3d DCA 2017).

Petitioner did not file a motion for rehearing. Instead, he sought discretionary review in this Court. The State's answer follows.

SUMMARY OF ARGUMENT

The district court properly affirmed Petitioner's conviction where the statements in question qualified as a hearsay exceptions under section 90.803(3), Florida Statutes (2013). Alternatively, they were verbal acts, not hearsay. Further, the district court's mere citation to Florida Statutes section 59.041 does not mean it did not apply the State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), harmless error test. This is evidenced by the court's use of the word "harmless," which is not contained in section 59.041. Finally, any error was, in fact, harmless beyond a reasonable doubt, because it did not contribute to the verdict.

ARGUMENT

THE DISTRICT COURT PROPERLY AFFIRMED THE JUDGMENT AND SENTENCE.

JURISDICTIONAL CRITERIA

Petitioner has failed to establish how this Court has jurisdiction over this issue. He contends that this Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a) (2) (A) (iv), which parallels Article V, section 3(b)(3), Fla. Const. The constitution provides: "The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Further, neither the record, a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002). Finally, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

The Third District's opinion under review is brief and does not explain the analysis in which the court engaged. The opinion lacks the operative facts necessary to conclude that it conflicts with DiGuilio and its progeny.

Equally as important, this Court and commentators have noted that even when a form of discretionary jurisdiction is established, the discretion of the Court to act is not always boundless.

> [E]ven when discretion is not limited by the law, the Court still can refuse to exercise its discretion to hear any case falling within a discretionary category. Typically, this may occur if the Court determines that the case does not present a significant issue or the result was essentially correct. For this reason, jurisdictional briefs in discretionary cases should always demonstrate that the case is significant enough to be heard. It is not enough to establish that jurisdiction exists and that discretion is unrestricted for present purposes, except in the rare case perhaps where the importance is obvious.

Harry Lee Anstead et. al., The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova L. Rev. 431, 485 (2005).

Here, Petitioner's argument is simply premised on the fact the opinion cites to the Florida harmless error statute and does not include an additional citation to DiGuilio. A motion for rehearing filed in the district court could have resolved this issue. This case does not present a significant issue and its importance is not obvious. This Court should find that jurisdiction was improvidently granted.

MERITS

Petitioner argues that the Third District Court of Appeal utilized the incorrect harmless error analysis. Specifically, he maintains that the court's citation to section 59.041, Florida Statutes (2015), demonstrates that it applied a miscarriage of justice standard, rather than the standard set forth in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). He is incorrect.

Notably, the opinion under review does not state that the district court found that the admission of the testimony was erroneous. Nor does it state that reversal was unwarranted because no manifest injustice had resulted from the alleged error. Instead, the court simply wrote:

> **Any error by the trial court in admitting the hearsay statements at issue was, at best, harmless**. See § 59.041, Fla. Stat. (2015) ("No judgment shall be set aside or reversed ... on the ground of ... the improper admission or rejection of evidence ... unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice.")

Rodriguez v. State, 215 So. 3d 194 (Fla. 3d DCA 2017) (emphasis added).

In State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986), this Court required the State to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or that there was no reasonable possibility the error contributed to the verdict. In State v. Lee, 531 So. 2d 133 (Fla. 1988), this Court reaffirmed DiGuilio holding that if the erroneous admission of evidence did not

result in a miscarriage of justice, yet the State could not show beyond a reasonable doubt that the error did not contribute to the verdict, reversal was warranted.

As noted above, the opinion in the instant case is brief and does not explain the analysis in which the court engaged. It is noteworthy that the court employed the term "harmless," which is not contained in section 59.041. The additional citation to section 59.041 does not mean that the district court did not apply the DiGuilio test, if it did find error. The defense assertion to the contrary is speculative.

Further, because the trial court did not abuse its discretion when it admitted Coral Negron's threatening statements, no harmless error analysis was necessary. In the district court, Petitioner argued that the trial court abused its discretion by admitting these statements, which he characterized as inadmissible hearsay. Contending that they were admitted under a "state of mind to prove subsequent acts" hearsay exception, he argued that reversal was required.

First, if hearsay, Coral Negron's statements were properly admitted under the hearsay exception found at section 90.803(3), Florida Statutes (2013). The statute provides:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
> …
> **(3) Then-existing mental, emotional, or physical condition.—**
>
> (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a

> statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.
>
> (b) However, this subsection does not make admissible:
>
> 1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.
> 2. A statement made under circumstances that indicate its lack of trustworthiness.

§ 90.803(3), Fla. Stat. (2013).

On appeal, Petitioner highlighted three statements. (ROA 19-20). At trial, Emmanuel Londo recounted Coral Negron's first statement:

> Q So let's get to the words that she says to you that's threatening.
>
> A She was -- she threatened to send somebody to come whoop my ass.
>
> Q Do you remember exactly those were the words that she used?
>
> A I'm going to send somebody to come fuck you up.

(T. 513).

Yeovanny Tavarez testified about the second statement:

A. What were the words exchanged between this [Coral Negron] woman and [George Henriquez]?

A Curse words. She was blaming them for (unintelligible), making threats on him and his roommate.

Q What were those threats?

A She was going to get somebody to shoot them, beat them up.

Q What were the words she used?

A She was going to get somebody to put a cap in his ass.

(T. 814).

Finally, Petitioner cited to testimony that when Coral Negron was on the phone she told someone the victims' apartment number:

Q What did [Coral Negron] do?

A She cursed a few times. Another time, she came back and looked into the apartment and told somebody on the phone the apartment number.

Q You are seeing on the television screen what?

A The front door of the apartment.

Q. And what am I pointed right here?

A. The number of the apartment.

Q. Is that what [Coral Negron] was looking at when she was on the phone?

A Yes.

Q What were the words she used?

> A She walked out. She looked in, because at the time the door was open. She looked into the apartment and told whoever was the phone, "Yes. It is apartment 14. They are here now."

(T. 818).

Coral Negron's state of mind was relevant to her subsequent conduct in calling Petitioner. She, and her conduct, was the link between the victims and Petitioner. Further, the statements were relevant to rebut the defense argument that Petitioner was chivalrously saving a helpless, pregnant woman and was pulled into the victims' apartment against his will.

Second, the statements were not hearsay. Statements offered as evidence of commands or threats directed to the witness, rather than for the truth of the matter, are not hearsay. United States v. Bellomo, 176 F.3d 580, 586 (2d Cir. 1999); see also State v. Holland, 76 So. 3d 1032, 1034 (Fla. 4th DCA 2011)("Verbal acts are not hearsay because they are admitted to show they were actually made and not to prove the truth of what was asserted therein."); Harden v. State, 87 So. 3d 1243, 1249-50 (Fla. 4th DCA 2012)(Messages sent in response to threats not hearsay). Here, the statements were not presented for the truth of the matter asserted. Instead, they were relevant to show that they were made and how the crime unfolded.

Finally, Petitioner maintains that the district court did not analyze whether the statements contributed to the verdict, and argues that under a proper DiGuilio

harmless error analysis, the State cannot prove beyond a reasonable doubt that the admission of statements did not contribute to the verdict. Petitioner is incorrect.

Here, the State introduced cell phone records showing that Coral Negron called Petitioner shortly before he came to the victims' apartment. Petitioner admitted that Coral Negron asked him to come over and speak to her neighbors. (T. 988). His witness, who drove him to the victims' apartment, testified that Petitioner told him that he needed to get to Coral Negron's in a hurry because she was being harassed by her neighbor. The jury considered evidence of the victims' broken door. Petitioner's footprint was on the door. The jury heard the 911 calls. Although Petitioner argues that the jury found the victims' testimony lacked credibility, this testimony cannot be the basis of harmful error as the jury found that he did not use or carry a firearm.

Further, Petitioner's own testimony at trial was that he went to the victims' door to speak to them. Once there, he got angry and agitated when one of the victims disparaged Coral Negron. (T. 998-1002). He admitted that he banged on the door and kicked it on the bottom. (T. 1001-02, 1004-05). While Petitioner's testimony was that the victims' pulled him into the apartment, the jury rejected that testimony. This was a question of fact that was resolved in the State's favor. Thus, any error in this matter was harmless beyond a reasonable doubt as it did not contribute to the ultimate verdict.

Accordingly, based on the foregoing, the State first maintains that this Court should decline to exercise its jurisdiction as this case is not in conflict based on the four corners of the opinion. The issue could have been resolved by the Third District had Petitioner filed a motion for rehearing. Should this Court reach the merits of Petitioner's claim, it should conclude that they are without merit. The trial court did not abuse its discretion as the statements either were not hearsay or fell under an exception to the hearsay rule. The district court's use of the word "harmless" undermines the argument that it applied "manifest injustice" analysis. Finally, assuming arguendo that the trial court abused its discretion, the error, beyond a reasonable doubt, did not contribute to the verdict.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court find that jurisdiction was improvidently granted.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by email on January 9th, 2018: Natasha Baker-Bradley, Assistant Public Defender, at appellatedefender@PDMiami.com; nbaker-bradley@pdmiami.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14-point font.

Respectfully submitted and certified,
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