IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NUMBER 1D04-140

MICHAEL TYSON
Appellant-Petitioner

v.

STATE OF FLORIDA
Appellee-Respondent.

A DIRECT APPEAL OF A JUDGMENT AND SENTENCE FROM THE
CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT
NASSAU COUNTY, FLORIDA

BRIEF OF APPELLANT
(ORIGINAL)

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STATEMENT OF THE CASE AND OF THE FACTS

Michael Tyson ("Tyson") was charged in a three count information with possession with intent to distribute heroin in violation of Florida Statutes, § 893.13(1)(a)(1), a second degree felony, (count one), possession with intent to distribute cocaine in violation of Florida Statutes, § 893.13(1)(a)(1), a second degree felony, (count two), and possession of less than 20 grams of marijuana in violation of Florida Statutes, § 893.13(6)(b), a misdemeanor, (count three). The offenses were alleged to have taken place on March 28, 2003. There were no co-defendants charged with Tyson in this information. [RIII-55]

Tyson's trial began with jury selection on December 17, 2003 before the Honorable Robert Mallory Foster, Judge of the Circuit Court, Fourth Judicial Circuit, in the Nassau County Courthouse annex in Yulee, Florida. [RI-1] Yulee is not the county seat of Nassau County. Fernandina Beach is the county seat of Nassau County.

During the voir dire, Assistant State Attorney Philip Bavington ("ASA" or "Bavington") engaged in a discussion with the jury panel about co-defendants:

> [ASA] Now, another technique that's used in drug cases and in cases generally is you might hear, if you are selected to be on the jury, testimony from a co-defendant. And a co-defendant is somebody who has been charged out of the same circumstances, or even probably the same

crime as the person who is on trial.

Mr. Logue, I'll pick on you again. Are you familiar with the term co-defendant?

[A Prospective Juror] Not really.

[ASA] Okay. You have never dealt with co-defendant cases in your shoplifting?

[A Prospective Juror] No.

[ASA] Okay. Can everyone here agree if you hear from someone who is a co-defendant whose been arrested or convicted out of the same circumstances as this defendant who is on trial, does everyone agree to judge them by the same standards as every other witness?

Does everyone agree that they can do that, judge them independently?

[The Prospective Jurors] (No response).

[ASA] Does anyone here have a problem with the fact they may hear from somebody who may have even been convicted of crimes out of this same transaction, the same day that this happened?

Does anyone have an inherent problem listening to someone as a witness who is a co-defendant?

[The Prospective Jurors] (No response).

[ASA] Can anyone not be fair listening to a co-defendant?

[The Prospective Jurors] (No Response).

[RI-46-47]

No cautionary instruction was given to correct the Assistant State Attorney's misstatement of the law that a convicted felon's testimony should be viewed the same as any other witness, or to explain that a cooperating witness who has struck a plea agreement should be viewed with special caution, or to caution that the fact that a co-defendant has pled guilty to the same offense as the defendant is on trial for, should not be considered as evidence against the defendant in this trial.

The State's opening statement focused on the testimony of the so-called co-defendant, William Gooding ("Gooding"), because the entire case was based on the testimony of Gooding. Assistant State Attorney Satasha Williston ("ASA Williston") told the jury in opening:

> On March 28th of this year the Fernandina Beach Police Department Special Enforcement Unit was conducting an undercover drug buy. Now, the Special Enforcement Unit used a confidential informant, a woman named Christy, to contact a person named Mr. Will Gooding, who was known to her as someone she could buy heroin from. And who exactly

was to supply that heroin to Mr. Gooding, his supplier, was the defendant, Mr. Tyson.

You will have a chance to meet Mr. Gooding today, and he'll tell you about the call that he received from Christy. You will hear how he set up a time and place to meet her. And you will also hear how Mr. Gooding brought with him his supplier, the defendant.

Gooding will also tell you how he had to act as the go-between between Christy and the defendant because the defendant just didn't like to sell drugs one to one to strangers. They were to meet at the Smile Gas Station over here on Sadler Road, and the defendant drove a rental car over to that area and parked his car just across the street from the Smile Gas Station, that's a Food Lion parking lot right there, with his car facing the Smile Gas parking lot station. And with Mr. Gooding and the defendant was also two females that they had brought along.

Now, Mr. Gooding and the woman that he brought exited the vehicle and walked across the street to the gas station to meet Christy. They had a brief conversation, and Christy gave Mr. Gooding $400 cash, and she was given this cash by the Special Enforcement Unit prior to the sale.

Now, the defendant, with his drugs, remained in the car across the street and waited. . . . And you will hear Mr. Gooding tell you about how he told Christy that the defendant didn't want to do the sale there, he wanted to get in the car and do the sale while they were rolling or driving. Not wanting to get in the car, that not being what she expected, Christy gives the signal to the detectives to do the takedown.

. . . upon searching the defendant's [rental] car . . . not only did they find a digital scale in the back seat of the car, they found cocaine, marijuana and heroin that the defendant had planned on selling this day. [RII-12-15]

Indeed, Gooding was the first witness presented by the State:

[ASA] Mr. Gooding, do you know Christy Price?

[Gooding] Yes, I do.

. . .

[Q] And on March 28th of this year, did you get a phone call from Christy Price?

[A] Yes, I did.

[Q] And as a result of that phone call, what were you planning on doing that night of March 28th?

[A] Ah, getting her a gram of heroin.

[Q] And where were you going to get the drugs from?

[Q] Who is Mike?

[A] Somebody I knew.

[Q] How long have you known him?

[A] For two or three years.

[Q] Do you see Mike sitting in court today?

[A] Yes. [identifying the defendant Tyson]

. . .

[Q] Now, why didn't Christy call Mike directly?

[A] Because she didn't know him.

[Q] And did you call the defendant?

[A] Yes.

[Q] What number did you call?

[A] I don't know the phone number. It was his cell phone number. I don't know the number.

[Q] Tell me about the conversation you had with the defendant.

[A] I just asked him if he could deliver it out to Fernandina.

. . .

[Q] How were you and the defendant going to meet up?

[A] Pick me up at my house.

[Q] Was anyone with you when the defendant picked you up?

[A] My ex-girlfriend . . . Annette Robinson . . . Annette and I were sitting in the back seat, he was driving, and a female was in the passenger seat, I had never seen her before.

. . .

[Q] Okay. Now, did Mike drop you off at the Smile Gas?

[A] He parked across the street in the Food Lion parking lot.

. . .

[Q] And did you go across the street to the Smile Gas?

[A] Yes, I did. . . Annette and I walked across the street.

[Q] And tell me what happened at Smile Gas?

[A] We walked across the street. Annette walked in the gas station to get a pack of cigarettes. And while she was in there, I met Christy Price, and she gave me the money to get the gram.

[Q] And did you give her the gram there?

[A] No.

[Q] Why not?

[A] Because I didn't have it. . . . I told her they were across the street with Mike.

[Q] Okay. And so what did you tell her about giving her the drugs at that point?

[A] That I had to go back across the street and get in the car, and that I would bring it back to her.

[Q] Okay. And then what happened next?

[A] I went across the street, and that's when I was arrested.

[Q] Now, at that point did you tell the police where you were going to get the drugs?

[A] No.

. . .

[Q] Were you convicted of anything as a result of your arrest that night?

[A] Yes, sir.

[Q] And what was that?

[A] Conspiracy to sell or deliver heroin.

. . .

[Q] And how were you going to split the drugs?

[A] I had a scale.

[Q] Okay. So the scale found in the car, that was yours?

[A] Right.

[RII-20-26]

During cross examination, Gooding testified that part of his "deal" on his conviction in this case was that he get probation and that a special condition of his probation was that he would testify here in court today. [RII-29] When defense counsel attempted to cross-examine Gooding to have him admit that the only reason he got probation was due to his willingness to implicate Tyson, the State objected and the objection was sustained. [RII-32]

The next State witness was Maria Richardson. [RII-37] Richardson testified that she knew Tyson and he had asked her to rent him a car because his was broke and he didn't have a credit card to rent a car with himself, so she did. [RII-38] Richardson testified that she let Tyson have the rental car once she rented it on March 22 and she was not in the car again until the evening of the arrest, March 28, 2003. [RII-39-40] She said she had told Tyson she needed to go with him to the airport [car rental company] to have his name added to the contract and she was with him on the way to the airport when his cell phone rang and a friend needed a ride to take his wife to work. [RII-40-41] She agreed and they picked up "some guy and a girl." [RII-41] On the way to take the woman to her job, Tyson stopped and the man and woman got out of the car

and ran across the street. Tyson told her that they were going to buy cigarettes. [RII-42] The next thing she knew there were blue lights and a shotgun in her face. [RII-43] Richardson said that she had not seen the scales in the vehicle. [RII-46-47] Richardson also said that there had been no talk of a drug deal between Tyson and the man and woman who got in the car for the ride. [RII-48]

The State's third witness was Annette Robinson. [RII-49] she testified that on March 28th, 2003 in the evening she was getting ready to go to work at the Seabreeze next to Shoney's. She was going to get to work by a ride from a friend of her ex-boyfriend, William Gooding. [RII-50-51] She did not know Tyson. [RII-51] Her understanding was that they were going to give her a ride to work. She said that they stopped off at the Smile Gas because she was going to get a pack of cigarettes. [RII-52] Gooding got out and went with her. [RII-53] There was a girl there named Christy and Gooding was going to talk to her while Robinson went in the store for the cigarettes. When she came out of the store Gooding was still talking to the girl. Robinson was running late for work and got mad and said, "[L]ook, I will just walk." So she started to walk off when the police came out and told everyone to get down. [RII-53] Robinson said that she did not know that there were drugs in the car. [RII-54]

The State's fourth witness was Detective Matthew Bowen. [RII-57] Det. Bowen testified that he was doing a buy/bust with a confidential informant who was going to

call "Will" [Gooding], who in turn "was going to call his supplier, Mike . . . " The Defense objected that this statement was hearsay, the objection was sustained, but no curative instruction was given the jury to disregard the improper testimony. [RII-60] Det. Bowen was listening through a listening device place on Christy Price while sitting parked in the parking lot across from the Smile Gas station. He was parked in the same parking lot that Tyson's car stopped in. [RII-60-61] Det. Bowen heard Christy Price give Gooding the $400 of marked money she had been provided to buy the drugs with and once he heard that, he ordered the takedown. [RII-63] He determined that the car that Tyson, Gooding, Robinson and Richardson were in was a rental car in the name of Maria Richardson. [RII-65] Richardson consented to a search of the car and they found some marijuana above the sun visor on the passenger's side of the car and ultimately found heroin between the headliner and the roof of the car on the driver's side. [RII-66] No fingerprints were found on the bags of drugs. [RII-75]

On cross examination Det. Bowen testified that this was to be a heroin buy/bust, not a cocaine buy/bust. [RII-76-77]

The State's final witness was Detective Jack L. Bradley. [RII-78] He testified that he was the one who actually found the drugs. [RII-84] Det. Bradley testified that Tyson had $1,900 in cash on him, and Maria Richardson had $9,000 of cash on her. [RII-86]

Det. Bowen was put back on the witness stand by the State ostensibly to address only one point, what statements, if any, were made by Tyson about his possession of the drugs. [RII-89; RII-102] Instead, after eliciting that Tyson had made no statements about the drugs [RII-105], Det. Bowen was tendered by the state, but never accepted by the court, as an expert "in the area of street level narcotics." [RII-106-107] Without objection from the defense, Det. Bowen was allowed to testify that "*the narcotics that were found on the driver's side of the car"* were not packaged "consistent with individual use." [RII-108]

Detective Bradley, who had found the drugs, described the drugs found on both the driver's side and the drugs found on the passenger's side as "narcotics." [RII-85] He only identified one drug by name, that is, heroin, which he said was on the driver's side. [RII-89]

Detective Bowen had testified that the police found marijuana on the passenger's side and heroin on the driver's side. [RII-66] Detective Bowen identified State's Exhibit 3 as the bag that he took from the driver's side of the car. [RII-68] Detective Bowen identified State's Exhibit 4 as the bag of marijuana that he took from the passenger side of the car. There was no testimony from any witness about the presence of cocaine or any intent to distribute cocaine. [RII-70] The only reference to cocaine in evidence is found in State's Exhibit 1, the FDLE lab report, which was admitted

without objection as a business record [*sic*] [RIII-54], and which listed Exhibits 1 and 2. [RIII-137] showing Exhibit 1 to consist of both heroin and cocaine. The FDLE lab report showed that the drugs consisted of 0.49 grams of cocaine, 0.44 grams of heroin and 4.2 grams of cannabis. [RII-109-110]

The defense moved for a judgment of acquittal when the state rested, arguing in part that there was no evidence to support counts two and three, possession of intent to distribute cocaine, and possession of marijuana.[1] [RII-111-113] Defense counsel argued:

> There was no testimony from any witness that this was anything other than a heroin buy/bust type of enterprise.
>
> Mr. Gooding had no knowledge of the existence of marijuana. None of the other witnesses had any knowledge of the existence of marijuana, prior to the search of the vehicle, of course. The police were not anticipating, or we heard no evidence at least from them that this was supposed to be an undercover transaction involving marijuana.
>
> The marijuana itself was found in the passenger side. In fact, the

[1] Because the defense had advised the Court it did not intend to present any witnesses or evidence, to save time, the Court suggested that the jury be excused and the motion be presented just one time, then the jury recalled without having to send the jury in and out twice. The parties and court agreed that this would be sufficient for the record. [RII-103-104]

- - Ms. Richardson was the one arrested regarding the marijuana by the police.

Under the jury instructions that the Court is about to give the marijuana was not reasonably accessible to Mr. Tyson.

Similarly, the cocaine count, which is Count II, again, this was not supposed to be anything other than a heroin buy/bust. The distinction that we have here as opposed to the marijuana is that this is more than simple possession that the defendant is charged. The defendant is charged with possession with intent to distribute cocaine. And there is simply no evidence that anyone was expecting a transaction involving cocaine, or that this defendant had any cocaine in his possession or control . . . [b]ut there was no testimony linking the defendant to any of the drugs other than heroin.

[RII-111-113]

The court gave the pattern jury instructions applicable to the offenses, but was not requested, and did not give *sua sponte* any *Tillery* instruction.[2] [RIII-58-79; RII-

[2] *Tillery v. United States*, 411 F.2d 644, 647 (5th Cir. 1969). It is not clear from the record when the defendant entered the court room, if at all, during the charge conference. When the charge conference commenced he was not present. [RII-91] However as soon as the parties and court concluded its discussion of the proposed jury instructions, the court inquired of defense counsel if he had had an

91-96; RII-139-152]

Only nineteen minutes after the jury retired for their deliberations, the jury sent out a single question:

"Clarification or definition of "intent" to sell or deliver"

[RII-152; RII-154; RIII-57]

The trial judge stated that the elements did not define the word "intent," but that he would be willing to read the instruction again of the definitions that it did have. The defense asked for permission to adjourn to the law library "for a moment." This request was denied, and without further objection the judge offered to simply reread the elements instruction again, without answering the jury's question for a definition or clarification of the word "intent." [RII-154-155] After another twenty-two minutes the jury returned with a guilty verdict on all three counts. [RII-157]

Tyson was sentenced December 23, 2003 to four years imprisonment on each of counts one and two, to run concurrent, and eight days time served as to the misdemeanor, count one. [RIII-112-133] This appeal followed in a timely manner by notice of appeal filed December 31, 2003. [RIII-108]

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opportunity to discuss with the defendant whether he will testify or not, and at that point the defendant is present, because he is placed under oath and questioned about his decision to not testify. [RII-96] The record simply does not reflect when Tyson reentered the courtroom and whether he was present during the charge conference.

STANDARDS OF REVIEW

General Principals

Under Florida Statutes, § 924.051(7), the defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection. *See, e.g., Castor v. State,* 365 So.2d 701, 703 (Fla.1978); *Driver v. State,* 46 So.2d 718, 720 (Fla.1950). When the defendant satisfies the burden of demonstrating the existence of preserved error, the appellate court then engage in a *DiGuilio* harmless error analysis.

DiGuilio defined "harmful error" as error about which "an appellate court cannot say beyond a reasonable doubt . . . did not affect the verdict." As explained in *DiGuilio,* harmful error is the converse of harmless error. 491 So.2d at 1139. *Goodwin v. State,* 751 So.2d 537, 544 (Fla. 1999).

If an error is unpreserved, the conviction can be reversed only if the error is "fundamental." *See, e.g., Chandler v. State,* 702 So.2d 186, 191 (Fla. 1997), *cert. denied,* 523 U.S. 1083, 118 S.Ct. 1535, 140 L.Ed.2d 685 (1998); *Whitfield v. State,* 706 So.2d 1, 4 (Fla.1997), *cert. denied,* 525 U.S. 840, 119 S.Ct. 103, 142 L.Ed.2d 82 (1998); *Larkins v. State,* 655 So.2d 95, 98 (Fla. 1995); *Goodwin v. State,* 751 So.2d 537, 544 (Fla. 1999).

Issue I

The failure to give a *Tillery* instruction can be fundamental error depending on the circumstances of the case. *Boykin v. Florida*, 257 So.2d 251 (Fla. 1971).

Issue II

Lack of jurisdiction can be raised at any time. *C.W. v. State,* 637 So.2d 28, 29 (Fla. 2nd DCA 1994); *Booker v. State,* 497 So.2d 957 (Fla. 1st DCA 1986); *Page v. State,* 376 So.2d 901, 904 (Fla. 2nd DCA 1979); *Wesley v. State,* 375 So.2d 1093, 1094 (Fla. 3rd DCA 1979); *Waters v. State,* 354 So.2d 1277, 1278 (Fla. 2nd DCA 1978).

Issue III

The *de novo* standard of review is applied when reviewing a trial court's denial of a motion for judgment of acquittal. *Pagan v. State,* 830 So.2d 792 (Fla.2002). "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." *Pagan,* 830 So.2d at 803 (citing *Banks v. State,* 732 So.2d 1065 (Fla.1999)).

In reviewing the denial of the defendant's motion for judgment of acquittal in a circumstantial evidence case, it must be determined whether the inferences reasonably to be drawn from the evidence are not only consistent with guilt of the accused, but

inconsistent with every reasonable hypothesis of innocence. *Hernandez v. State,* 305 So.2d 211 (Fla. 3rd DCA 1974), *cert. denied,* 315 So.2d 192 (Fla.1975); *Duran v. State,* 301 So.2d 486 (Fla. 3rd DCA 1974). The test to be applied on a motion for judgment of acquittal and review of that denial is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude. *Green v. State,* 408 So.2d 1086, 1089 (Fla. 4th DCA 1982). *Accord Zuberi v. State,* 343 So.2d 664 (Fla. 3rd DCA), *cert. denied,* 354 So.2d 988 (Fla.1977); *Andreasen v. State,* 439 So.2d 226, 230 (Fla. 3rd DCA 1983).

SUMMARY OF ARGUMENTS

I. The Court's Failure to Give a *Tillery* Instruction, When (1) The State's Case Rested Solely on the Testimony of a Cooperating Coconspirator, (2) The State Misadvised the Jury Panel in Voir Dire That It Must Agree to Weigh the Testimony of this Cooperating Witness Who Had Pled Guilty the Same as it Would Weigh Any Witness's Testimony, and (3) The Cooperating Coconspirator Testified That a Condition of His Probation Was That he Testify Against Tyson, Was Plain Error.

The state's case rested on the testimony of a single witness, William Gooding. Gooding, according to his version of the events, was appellant Tyson's coconspirator or accomplice. Gooding had pled guilty to conspiracy to possess heroin with intent to distribute prior to Tyson's trial. Tyson was charged with possession with intent to distribute the same heroin.

During voir dire the state affirmatively misadvised the jury panel that even though Gooding was a codefendant or accomplice, that the jury must weigh or consider his testimony the same as any other witness.

In its opening, the state focused on Gooding's anticipated testimony. Gooding was the first state witness and but for his testimony the only evidence against Tyson was inconclusive circumstantial evidence. There was no evidence to corroborate Gooding.

The court failed to give a *Tillery* or any special cautionary accomplice instruction. On the unique facts of this case, this was fundamental error.

II. The Court Lacked Jurisdiction to Conduct Tyson's Criminal Jury Trial Proceeding at an Annex Courthouse at a Location Outside the County Seat.

The trial of this case was held in a courthouse annex in Yulee, Florida, which is not the county seat of Nassau County, the county in which the crime occurred. Under Article 8, § 1, Florida Constitution, the court lacked jurisdiction to conduct Tyson's jury trial in a courthouse outside the county seat. This was fundamental, jurisdictional error.

III. The Court Erred in Denying Tyson's Motion for Judgment of Acquittal on Count Two, Possession of Cocaine With Intent to Distribute, and Count Three, Possession of Marijuana, Because No Legally Sufficient Evidence Was Introduced to Prove Beyond a Reasonable Doubt Any Intent to Distribute Cocaine, and No Evidence Was Presented to Establish Tyson Had Knowledge of the Presence of the Marijuana.

There was no evidence to show Tyson had knowledge or actual or constructive possession of either the cocaine or the marijuana charged in counts two and three. In particular, count two charged possession of cocaine with intent to distribute. The quantity of cocaine was .49 gram, that is, less than one-half gram. There was no evidence presented at trial about this cocaine whatsoever. Its only appearance in evidence is on a laboratory report. A detective who was proffered but never expressly accepted as an expert witness in street level narcotics, testified that the manner in which the "narcotics" were packaged was inconsistent with personal use. His testimony does not clearly refer to the cocaine, and may have referred only to the

heroin. In any event, the United States Supreme Court has held that possession of .73 gram of cocaine is such a small quantity as to be legally insufficient to support an inference of intent to distribute. Florida's courts have held that where the state's only evidence of intent to distribute is the manner in which drugs are packaged, then the quantity of drug must be sufficient to support an inference of intent to distribute as well. The evidence in this case is legally insufficient to support any inference of intent to distribute.

ARGUMENTS

I. The Court's Failure to Give a *Tillery* Instruction, When (1) The State's Case Rested Solely on the Testimony of a Cooperating Coconspirator, (2) The State Misadvised the Jury Panel in Voir Dire That It Must Agree to Weigh the Testimony of this Cooperating Witness Who Had Pled Guilty the Same as it Would Weigh Any Witness's Testimony, and (3) The Cooperating Coconspirator Testified That a Condition of His Probation Was That he Testify Against Tyson, Was Plain Error.

The rule in *Tillery's* case is that the failure to warn a jury about accomplice testimony may be plain error if there is no substantial evidence other than the testimony of the accomplice to support the verdict. *Tillery* held:

> The failure to warn a jury about accomplice testimony is not necessarily reversible error in all cases. The verdict of a jury must be sustained, if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). In determining whether there is substantial evidence in cases where a conviction rests upon the uncorroborated testimony of an accomplice, the general rule is that the uncorroborated testimony of an accomplice may support a conviction if it is not incredible or otherwise unsubstantial on its face. It is the better practice, however, to caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence. The warning is not an absolute necessity in all cases. However, as Judge Learned Hand indicated in *United States v. Becker*, 2 Cir. 1933, 62 F.2d 1007, the failure to give the warning in close cases, " . . . may turn the scale."

Tillery v. United States, 411 F.2d 644, 647 (5th Cir. 1969).[3]

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[3] *Tillery* has been applied by the Florida Supreme Court in *Boykin v. Florida*, 257 So.2d 251 (Fla. 1971). Although in *Boykin* the Florida Supreme Court refused to reverse Boykin's conviction under a plain error standard, that was due to the facts

In Tyson's case, there was no special cautionary instruction given to warn the jury that the testimony of alleged coconspirator William Gooding should have been viewed with special caution and should not have been accepted unless the jury found corroborating testimony to support it.

There was *no corroborating testimony to support Gooding's version* of the events. Gooding was the only witness to incriminate Tyson. If the court had given the jury a *Tillery* instruction, the jury would have been required to find Tyson not guilty.

Although the failure to give such an instruction may not in every case be fundamental error, in Tyson's case it was. First, we know that the failure to request the instruction could not have been a matter of strategic choice on Tyson's part, because no rational competent strategic reason can be conceived to support such failure.

Second, and most important, the state *affirmatively misadvised the jury in voir dire* that Gooding's testimony should be given the same consideration as any other

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of the *Boykin* case, in which the instruction was substantially covered by the presentation of counsel to the jury and in the general instructions given. That is not so in the instant appeal, in which the state affirmatively misadvised the jury in voir dire as to the standard by which accomplice testimony should be evaluated. *Boykin* explained: "The content of the charge was in fact clearly referred to and covered by counsel in their presentations to the jury; furthermore, the general charge, with regard to how a jury is to treat the testimony of witnesses and to give it such weight as they see fit under all of the evidence, substantially covers the question raised here. We do not recommend that such a charge in these circumstances not be given; we simply say that it was not fundamental error which would justify reversing the jury's verdict."

witness.

> [Assistant State Attorney] Okay. Can everyone here agree if you hear from someone who is a co-defendant whose been arrested or convicted out of the same circumstances as this defendant who is on trial, does everyone agree to judge them by the same standards as every other witness?

[RI-46-47]

This misadvice went uncorrected. The error was compounded when the state took it a step further and had the jury agree:

> [Assistant State Attorney] Does anyone here have a problem with the fact they may hear from somebody who may have even been convicted of crimes out of this same transaction, the same day that this happened?
>
> Does anyone have an inherent problem listening to someone as a witness who is a co-defendant?

[RI-46-47]

Of course the correct answer is that there is an inherent problem with any witness who has a felony conviction, particularly when the conviction arises out of the same offense as the defendant who is on trial. At this point the court should have stepped in and advised the jury that (1) they can consider the fact that the witness has

a felony conviction in weighing his testimony; *cf.* Florida Standard Jury Instruction, § 2.04(9),[4] (2) that the jury should view the testimony of an accomplice with special caution, and required that it be supported by some corroborating testimony before accepting it, and (3) that the jury should not consider as evidence against the defendant the fact that the accomplice has pled guilty to the same crime; *cf.* Florida Standard Jury Instruction, § 2.08(b) and (c).

None of these warnings were given the jury. Instead the only instruction the jury was given about Gooding's accomplice testimony was an instruction from the state that is flatly contradictory to the *Tillery* rule.

Florida has in effect incorporated the *Tillery* rule in Florida Standard Jury Instructions in Criminal Cases (2002), § 2.04(b). Jury instruction 2.04(b) provides:

> **2.04(b) Accomplice**
>
> You should use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime. This is particularly true when there is no other evidence tending to agree with what the

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[4] *Cf.* Eleventh Circuit Pattern Jury Instructions (Criminal Cases), 2003, § 6.2, Impeachment - Inconsistent Statement and Felony Conviction, reads: [You should consider] t]he fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe that witness. Florida Standard Jury Instruction, § 2.04(9) was given at the close of the case.

witness says about the defendant.

However, if the testimony of such a witness convinces you beyond a reasonable doubt of the defendant's guilt, or the other evidence in the case does so, then you should find the defendant guilty.

Similarly, Florida Standard Jury Instruction, § 2.04, Weighing the Evidence, provides in part:

Note to Judge The court may also wish to give as part of this instruction the instructions covered under 2.04(a) and (b), concerning expert witnesses and accomplices.

This was not done, and the accomplice instruction in § 2.04(b) was not given.

The focus of the state's case necessarily rested on the uncorroborated testimony of the accomplice, Gooding. The state focused on him in voir dire, misadvised the jury panel as to the standard to apply to his upcoming testimony, focused on his testimony almost to the exclusion of all else in the opening statement, made him the first and key witness in the trial, and returned to Gooding in closing. But for Gooding's uncorroborated testimony, Tyson could not have been convicted. Therefore, under the unique facts of this case, it was fundamental error for the court to not give a *Tillery* instruction.

II. The Court Lacked Jurisdiction to Conduct Tyson's Criminal Jury Trial Proceeding at an Annex Courthouse at a Location Outside the County Seat.

The Court proceeding in this case took place at a courthouse annex in Yulee, Florida. The law is well established that a criminal court proceeding may only take place in a courthouse that is located in the county seat of the county. Yulee is not the county seat of Nassau County, Fernandina Beach is the county seat.

> (k) County seat. In every county there shall be a county seat at which shall be located the principal offices and permanent records of all county officers. The county seat may not be moved except as provided by general law. Branch offices for the conduct of county business may be established elsewhere in the county by resolution of the governing body of the county in the manner prescribed by law. No instrument shall be deemed recorded until filed at the county seat, or a branch office designated by the governing body of the county for the recording of instruments, according to law. Florida Constitution, Art. 8, § 1

Florida Statutes, § 138.09, Canvass of votes of second election; establishing county seat, provides:

> The county commissioners shall, within 5 days after the election provided for in § 138.07 is held, meet and publicly canvass the same; and the place

receiving the majority of all the votes cast shall be the county seat for the next 10 years. The county commissioners shall erect a courthouse as soon as possible and provide suitable offices for all the county officers who are required by law to keep their offices at the courthouse at the place so selected as the county seat.

We recognize that Florida Statutes, § 138.12, Commissioners may expand county seat, provides:

The board of county commissioners of any county may expand the geographical area of the county seat of its county beyond the corporate limits of the municipality named as the county seat by adopting a resolution to that effect at any regular or special meeting of the board. Such a resolution may be adopted only after the board has held not less than two public hearings on the proposal at intervals of not less than 10 or more than 20 days and after notice of the proposal and such meetings has been published in a newspaper of general circulation in the county. However, nothing herein shall be deemed to extend the boundaries of the municipality in which the county seat was previously located or annex to such municipality the territory added to the county seat.

What may seem pertinent to Nassau County's situation is:

> In the event there is not suitable available space in the courthouse due to construction or reconstruction, destruction or other good reasons, for the holding of any court or courts now provided to be held in the county courthouse, or for the meeting of the grand jury of the county, the county commission, with the approval of the court, may designate some other place or places located in the county seat for the holding of court or courts or for the meeting of the grand jury. Florida Statutes, § 125.221.

But Florida Statutes, § 125.222, Auxiliary county offices, court proceedings, prohibits the use of an annex courthouse outside the county seat for *criminal trial proceedings:*

> All proceedings, *except trial by jury*, had in any of the several counties of this state in connection with any civil, equity or criminal action may be conducted in auxiliary county offices where such offices have been established and are maintained under authorization of law, provided adequate space and facilities are available therein and provided that the Official Records books be kept and maintained in the county offices at the county seat. [emphasis supplied]

This provision has been interpreted by the Florida Attorney General to mean that it is not proper for the judge of a criminal court of record to sit even on non-jury matters at a location other than the county seat. 1967 Op.Atty.Gen. 067-43, July 13, 1967.

Based on the above authorities, the Florida Constitution, as executed by the Florida Legislature in the relevant enabling legislation, has prohibited annex court proceedings outside the county seat in any criminal trial proceeding. *See Mack v. Carter*, 183 So. 478 (Fla. 1938).[5]

This is a fundamental error in Tyson's case, requiring that his judgment and conviction be vacated as having been entered in violation of Florida's fundamental law.

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[5] *Mack* holds:

From this, it follows that as to the removal of County records and as to the removal of the County seat for the trial of certain cases, the act is clearly violative of the Constitution though as to neither case can it be said to wholly violate it. We do not think the legislature is permitted to do this. Such a procedure makes for a disorderly administration of justice, it would create confusion and uncertainty and is contrary to the complete orderly system set up in the Constitution for the administration of justice.

But it is contended that the act makes for convenience and the dispatch of litigation. That may be true but the orderly dispatch of litigation does not always respond to convenience. It would be convenient for Congress to meet in several places and many State Houses would be more convenient if located in different places but the law does not so provide. If the thing here sought to be accomplished can be done in the manner attempted, then there is no end to which the purpose of a county seat may be flustered and every community in the County may be made the County seat for some purpose. If such things are to be done, they should be brought about as the fundamental law provides.

For these reasons, we think the act is bad and that the judgment below should be reversed.

Mack v. Carter, 133 Fla. 313, 316, 183 So. 478, 479 (Fla. 1938).

III. The Court Erred in Denying Tyson's Motion for Judgment of Acquittal on Count Two, Possession of Cocaine With Intent to Distribute, Because No Legally Sufficient Evidence Was Introduced to Prove Beyond a Reasonable Doubt Any Intent to Distribute Cocaine.

The original information in this case did not charge possession of *cocaine* with intent to distribute, but only charge possession of *heroin* with intent to distribute. The information was amended to add the cocaine distribution count. [RIII-14; RIII-55] Both the original and superseding information charged the misdemeanor possession of marijuana.

Although the *information* was amended to account for cocaine, the state's presentation of the evidence at trial omitted any reference to cocaine whatsoever, with the exception of the introduction of the FDLE laboratory report which shows the presence of a small quantity of cocaine as well as the heroin and marijuana. Not a single witness made any reference to cocaine in the course of the trial, including both police officers who testified concerning the search and seizure of the drugs. Neither officer testified that any cocaine was found. Nor did Gooding testify that there was any intention to distribute cocaine.[6]

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[6] There was at least a mention of marijuana in the trial - that is the officer who did the search specifically mentioned that cocaine was found - but there was no evidence to link Tyson to the marijuana. Indeed, the marijuana was found in the headliner of the car above the passenger's seat, and the passenger was the person who had rented the car.

The United States Supreme Court has held that possession of a larger quantity of cocaine than was possessed in Tyson's case could not, as a matter of law, support an inference that the cocaine was possessed with the intent to distribute.

> We can obtain some guidance on the question from *Turner v. United States*, 1970, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610. That case involved the illegal importation of heroin and cocaine in violation of 21 U.S.C.A. §§ 174. This is not an importation case nor a heroin case. The analogous part of *Turner* is that having to do with the count charging the distribution of cocaine not in or from the original stamped package in violation of 26 U.S.C.A. §§ 4704(a). *There the conviction was reversed as to that count on two grounds: (1) an insufficient foundation (mere possession), for the statutory inference which made a prima facie case of distribution;* (2) an insufficient basis for the statutory inference of a purchase other than in or from the original stamped package. *Only the first ground is applicable here.*
>
> *The court concluded in Turner that the small amount of cocaine involved was insufficient to sustain the statutory inference of possession with intent to distribute rather than possession for personal use*. 396 U.S. at 422-423, 90 S.Ct. 642. The amount involved was a package weighing

14.68 grams containing a mixture of cocaine and sugar, 5% of which was cocaine. *Thus only .73 of one gram of cocaine was in issue.*

Turner, analyzed in *United States v. Mather*, 465 F.2d 1035, 1037 (5th Cir. 1972) (emphasis supplied).

In Tyson's case the FDLE lab report discloses the presence of only .49 grams of cocaine, substantially less than the Supreme Court in *Turner* held was legally insufficient to draw an inference of possession with intent to distribute.

The only evidentiary basis for the proof of possession with intent to distribute cocaine was the testimony of Det. Bowen, who said, "*the narcotics that were found on the driver's side of the car"* were not packaged "consistent with individual use." [RII-108] But, where the only proof of an intent to sell is circumstantial, it may support a conviction only if it excludes every reasonable hypothesis of innocence. *See Jackson v. State,* 818 So.2d 539, 541 (Fla. 2nd DCA 2002). In *Jackson,* the state's only evidence of intent to sell consisted of the quantity and packaging of the cocaine found in his possession. The quantity of drugs possessed may be circumstantial evidence of an intent to sell it, *but only if the quantity is inconsistent with personal use*. *See Jackson,* 818 So.2d at 541. The cocaine at issue in *Jackson* weighed five grams and was packaged in six ring baggies contained within a larger baggie. The court held that this quantity, even as packaged, was not so large as to imply an intent to sell without

other evidence.

In Tyson's case there is no evidence how the cocaine was packaged, just the unsupported testimony of Det. Bowen that "the narcotics" were not packaged consistent with personal use. It is not clear from this testimony if Det. Bowen was even referring to the cocaine, given that in his predicate testimony he refers only to finding heroin.

In any event, in light of the holding in *Turner* and *Jackson*, the lower court erred in denying Tyson's motion for judgment of acquittal, because the small quantity of cocaine identified in the lab report coupled with the lack of evidence presented at trial of any knowledge of the presence of the cocaine or intent to distribute it, entitled Tyson to a judgment of acquittal. There simply was no proof beyond a reasonable doubt, subject to the standard of proof requiring exclusion of every reasonable hypothesis of innocence, that Tyson either had constructive possession of either the marijuana or cocaine, or even if he were held to have constructive possession, that as to the cocaine, no proof beyond a reasonable doubt that he possessed it with the intent to distribute it as opposed to possessed it for personal use.

CONCLUSION

Appellant Michael Tyson requests this Honorable Court reverse and vacate his convictions and sentences and remand the case to the circuit court for further

proceedings consistent therewith.

If this Court accepts the argument presented in Issue I above, then the case should be remanded for new trial on all three counts.

If this Court accepts the argument presented in Issue III above, then counts two and three should be vacated and no further proceedings would be permitted because the failure to present legally sufficient evidence bars retrial on those counts.

If this Court accepts the argument presented in Issue II above, we would submit that Double Jeopardy would bar retrial on all three counts.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Tyson certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Trisha Meggs Pate, Esq., Office of the Attorney General, The Capitol, Tallahassee, Florida 32399, by United States Mail, First Class, postage prepaid, this April 2nd, 2004.

_____
William Mallory Kent