IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502015AP900056AXXXMB
L.T. NO.: 502015CT002891AXXXMB

GONZALO LOPEZ MAZARIEGOS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: FEB 0 5 2019

Appeal from the County Court in and for Palm Beach County,
Judge Leonard Hanser.

For Appellant: Nancy Jack, Esq.
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PER CURIAM.

Appellant Gonzalo Mazariegos ("Appellant") appeals his conviction and sentence for Driving under the Influence Causing or Contributing to Injury to Person or Property. We find the trial court abused its discretion in determining Appellant was not prejudiced by the State's discovery violation, and therefore reverse Appellant's conviction and remand this matter to the trial court for a new trial.

On November 10, 2015, Appellant's case proceeded to trial on the charge of Driving under

the Influence Causing or Contributing to Injury to Person or Property. During opening statements, defense counsel told the jury the evidence would show that Appellant's son, not Appellant, was the driver of the vehicle at the time of the incident in question. Defense counsel specifically informed the jurors they would hear the investigating officer testify that Appellant told him several times he was not driving. But when the State then called the investigating officer as its first witness, the officer testified that Appellant stated that he *was* driving the vehicle.

Defense counsel objected to the investigating officer's testimony and moved for a *Richardson*[1] hearing, claiming that the State had committed a discovery violation by failing to disclose Appellant's admission prior to trial. The trial court conducted a *Richardson* hearing, concluding the State had committed a discovery violation with regard to the investigating officer's testimony about Appellant's admission. The trial court further concluded the discovery violation was inadvertent, but substantial because the testimony directly went to proving an element of the crime. Nevertheless, the trial court found that the defense was not prejudiced and ruled the appropriate remedy was to instruct the jury to disregard the statement.

"Where a discovery violation is brought to the trial court's attention, the court must conduct an inquiry as to whether the violation: (1) was willful or inadvertent; (2) was substantial or trivial; and (3) had a prejudicial effect on the aggrieved party's trial preparation." *Richardson v. State*, 246 So. 2d 771, 774-75 (Fla. 1971). "A trial court's rulings regarding the three prongs of *Richardson* 'are reviewed for an abuse of discretion, but this discretion can be exercised only following a proper inquiry.'" *Goldsmith v. State*, 182 So. 3d 824, 827 (Fla. 4th DCA 2016) (citing *Brown v. State*, 165 So. 3d 726, 729 (Fla. 4th DCA 2015)).

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[1] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

When an appellant claims the trial court erred in its determination of an alleged discovery violation, the reviewing court must undertake a two-step inquiry. First, the reviewing court must determine whether a discovery violation has, indeed, taken place. *Curry v. State*, 1 So. 3d 394, 398 (Fla. 1st DCA 2009). If the reviewing court finds that a violation has taken place, the court must then determine whether any error in the trial court's determination of the issue was harmless. *Id.* at 399.

We agree with the lower tribunal's determination that the State committed a discovery violation by failing to disclose Appellant's admission prior to trial. Florida Rule of Criminal Procedure 3.220(b)(1) requires the State to disclose during discovery "any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements . . . ." (emphasis added). Here, the State failed to disclose Appellant's oral statement to the investigating officer admitting to driving the car. Such an admission clearly falls within the State's discovery obligations.

We disagree, however, with the lower court's determination that the State's discovery violation did not procedurally prejudice the defense. The standard for finding that a discovery violation was harmless is "extremely high." *Cox v. State*, 819 So. 2d 705, 712 (Fla. 2002) (quoting *Pomeranz v. State*, 703 So. 2d 465, 468 (Fla. 1997)). In determining whether a trial court's error in failing to conduct an adequate *Richardson* hearing was harmless, the appropriate inquiry is whether the State's discovery violation procedurally prejudiced the defense. The Florida Supreme Court described this analysis in *Scipio v. State*, 928 So. 2d 1138 (Fla. 2006):

> [W]hen reviewing a claim of error based upon a *Richardson* violation, the reviewing court's focus should be on procedural and not substantive prejudice . . .

> . "As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefitted the defendant. In making this determination, every conceivable course of action should be considered. . . . [I]f the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful."

928 So. 2d at 1147 (quoting *State v. Schopp*, 653 So. 2d 1016 (Fla. 1995)). Thus, in conducting this analysis, the court should analyze whether the defense's "trial preparation or strategy" would have been materially different had the defendant had the benefit of the missing discovery. *Scipio*, 928 So. 2d at 1147. When a reviewing court is left only with the ability to speculate as to what different trial preparation or strategy a defendant would have employed, harmless error has not been shown beyond a reasonable doubt. *Id.* at 1150.

During opening statements, defense counsel explicitly told the jury that the evidence would be consistent with the conclusion that Appellant's son was driving the vehicle, which was an affirmative and explicit announcement that Appellant's defense would be that he was not the driver of the vehicle. While it may be reasonable for Appellant to assume the State would argue otherwise in attempting to prove the elements of the crime charged, as the Fifth District Court of Appeal reasoned in *Price v. State*, "[a] failure to deny simply does not carry the same evidentiary weight as an outright admission." 627 So. 2d 64, 65 (Fla. 5th DCA 1993).

Although the trial court issued a curative instruction, we find, in this case, that instruction insufficient. The focus of the harmless error analysis is whether the defendant was procedurally prejudiced by the discovery violation. As the Florida Supreme Court held in *Schopp*, "[t]he question of 'prejudice' in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder but rather upon its impact on the defendant's ability to

prepare for trial." 653 So. 2d at 1019 (quoting *Smith v. State*, 500 So. 2d 125, 126 (Fla. 1986)). Had Appellant known the investigating officer would testify that Appellant admitted to driving the vehicle, there is a reasonable possibility that Appellant's defense theory or preparation would have been different. Therefore, we find the trial court abused its discretion when determining that Appellant was not procedurally prejudiced by the State's discovery violation, and that such error cannot be deemed harmless.

Accordingly, Appellant's conviction is **REVERSED**, and this matter is **REMANDED** to the trial court for a new trial.

FEUER, KELLEY, and CARACUZZO, JJ., concur.

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Opinion/Decision filed: FEB 0 5 2019

Appeal from County Court in and for
Palm Beach County, Florida;
Judge Leonard Hanser

Appealed: November 18, 2015

DATE OF PANEL: JULY 17, 2017

PANEL JUDGES: FEUER, KELLEY, CARACUZZO

AFFIRMED/REVERSED/OTHER: REVERSED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:	DISSENTING: With/Without Opinion	CONCURRING SPECIALLY: With/Without Opinion
DATE: 2/5/19 J.	J.	J.
DATE: 2/5/19 J.	J.	J.
DATE: 2/4/2019 J.	J.	J.