NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DAVID DIAZ, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D10-1744

Opinion filed February 8, 2013.

Appeal from the Circuit Court for DeSoto County; James S. Parker, Judge.

Howard L. Dimmig, II, Public Defender, and Keith W. Upson, Special Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Sonya Roebuck Horbelt, Assistant Attorney General, Tampa, for Appellee.

CRENSHAW, Judge.

David Diaz challenges his judgment and sentence for trafficking in cannabis twenty-five to two thousand pounds, possession of paraphernalia, possession of a firearm by a convicted felon, and obstructing an officer without violence arising from

Diaz's role in a grow house operation. On appeal he argues, among other issues, that the trial court erred in allowing a booking report into evidence over his objection. We affirm the judgment without further comment. However, we reverse for resentencing in accordance with this opinion.

Diaz argues that the trial court erred in sentencing him to thirty years' prison even though the Department of Corrections recommended a minimum mandatory sentence of three years' prison, with a suggested maximum of ten.[1] Specifically, he charges that the trial court considered improper factors in its sentencing determination, notably its determination that Diaz lied on the stand in stating that he did not live at the grow house, a fact contradicted by other evidence. The trial court stated that Diaz was "obviously telling a patent falsehood to the Court that's just beyond pale" and stated "especially after this morning, he gets up and tells me the same thing and obviously he was living there the whole time . . . . I think the aggravating factors outweigh any mitigating factor" (emphasis added).

We agree with Diaz that a trial court cannot base a sentence on the truthfulness of the defendant's testimony. See Smith v. State, 62 So. 3d 698, 700 (Fla. 2d DCA 2011) (citing Hannum v. State, 13 So. 3d 132, 136 (Fla. 2d DCA 2009)). We note also that "[t]here is no protected right to commit perjury." Brown v. State, 27 So. 3d 181, 185 (Fla. 2d DCA 2010) (Kelly, J., concurring). And a sentencing court can base its determinations on a wide range of information. Bracero v. State, 10 So. 3d 664, 665 (Fla. 2d DCA 2009). That leeway, however, does not allow " 'a trial court to consider a defendant's assertions of his innocence.' " Brown, 27 So. 3d at 183 (quoting Hannum,

[1]We note that the State requested a sentence of thirty years' prison in part based on Diaz's prior history as a drug trafficker.

13 So. 3d at 135). Here, the trial court's statements indicate that it improperly considered Diaz's truthfulness. Therefore, we remand for resentencing before a different judge.

Judgment affirmed, sentence vacated and remanded with directions.

LaROSE, J., Concurs.
CASANUEVA, J., Concurs with opinion.

CASANUEVA, Judge, Concurring.

I fully concur with the majority opinion but write separately to discuss two evidentiary issues that arose during the trial. While the admission of the testimonies was, in my view, error, the error in this instance was harmless.

The initial evidentiary issue concerned the following excerpt of Officer Robbins' testimony regarding inculpatory information received from a nontestifying witness:

> ROBBINS: So for officer safety reasons, we made contact with that gentleman.
>
> STATE: Well, that gentleman that you contacted, was [sic] his characteristics consistent with what the neighbor had told you?
>
> ROBBINS: That is correct.
>
> DEFENSE: Objection, Judge.
>
> COURT: Excuse me?
>
> DEFENSE: Calls for hearsay. Move to strike that.
>
> STATE: That's not hearsay.
>
> COURT: Okay, overruled.

Section 90.801(1)(c), Florida Statutes (2010), defines hearsay as "a statement, other than one made by the declarant while testifying at trial . . . offered in evidence to prove the truth of the matter asserted." Generally, hearsay evidence is inadmissible. § 90.802.

Here, the State introduced evidence from an unknown neighbor declarant regarding the physical description of the individual observed by the neighbor. Clearly, it was being offered for the truth of the matter; that is, that Mr. Diaz matched the physical description provided by the neighbor. As such, it was hearsay.

A similar situation was presented in Roman v. State, 937 So. 2d 235 (Fla. 3d DCA 2006), where the defendant was convicted of sexually battering a victim behind an Amoco station. The detective investigating the crime viewed the store's videotape which showed the victim and her assailant at the store conversing at the counter shortly before the battery. The detective spoke to a store employee who recognized the defendant on the tape as a former employee of the store. Based on the store employee's information and the fact the man in the videotape matched the description the victim had given him, the detective arrested the defendant. At the trial, the victim and detective testified but the store employee did not. When the detective testified that he was able to obtain the identity of the defendant after viewing the videotape and speaking to the store employee, a defense hearsay objection was overruled. Id. at 237. The Third District reasoned that " '[w]here . . . the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness

are not repeated.' " Id. (quoting Postell v. State, 398 So. 2d 851, 854 (Fla. 3d DCA 1981)).

Here, as in Roman, the officer's similar testimony about what a nontestifying witness told him constituted inadmissible hearsay, and the trial court erred in failing to sustain defense counsel's objection.

A second mistakenly overruled defense hearsay objection occurred at trial when the State was attempting to prove Mr. Diaz's involvement in the grow house operation. This time, the State sought to place before the jury Mr. Diaz's street address that was listed on his booking sheet as his home address. To admit this testimony, the State offered the custodian of the record but not the testimony of the deputy who prepared the booking sheet. The records custodian testified that she did not interview Mr. Diaz, another deputy had done so. Accordingly, she did not know if the address information had been provided by Mr. Diaz or from a different source.

By using the address on the booking sheet, the State was seeking to admit the address for the truth of the matter asserted, i.e., this address was, in fact, Mr. Diaz's home. The evidentiary situation is one often referred to as hearsay within hearsay or double hearsay. "Hearsay within hearsay is not excluded under the hearsay rule, 'provided each part of the combined statements conforms with an exception' to the rule." Love v. State, 971 So. 2d 280, 286 (Fla. 4th DCA 2008) (quoting § 90.805, Fla. Stat. (2006)).

To overcome a double hearsay objection, the State was first required to establish the booking report as a business record exception pursuant to section 90.803(6)(a).

> "In order to lay a foundation for the admission of a business record, it is necessary to call a witness who can show that each of the foundational requirements set out in the statute is present. It is not necessary to call the person who actually prepared the document."

Twilegar v. State, 42 So. 3d 177, 199 (Fla. 2010) (quoting Forester v. Norman Roger Jewell & Brooks Int'l, Inc., 610 So. 2d 1369, 1373 (Fla. 1st DCA 1992)). Here, the record reflects that the State met this evidentiary foundation. The records custodian testified that the booking sheet was made at or near the time the event was recorded, that it was kept in the ordinary course of the sheriff's regularly conducted business activity, that it was the regular practice of the sheriff's office to make a record of the booking process, and that the deputy who completed the booking report had knowledge of the process and made the booking report from information transmitted by appropriate services. See Yisrael v. State, 993 So. 2d 952 (Fla. 2008); Charles W. Ehrhardt, Florida Evidence § 803.6 (2012 ed.).

It is the second hearsay exception that the State failed to satisfy. Section 90.803(18) permits the introduction of a statement "that is offered against a party and is: (a) the party's own statement." The deputy who filled out the booking sheet and who allegedly received this address from Mr. Diaz himself would have been competent to provide the desired testimony under section 90.803(18) had the deputy been called. But this deputy did not testify and there was no other evidence establishing that it was Mr. Diaz who made the statement. In the absence of such testimony, the State failed to carry its burden of proving the second exception to the hearsay rule, and the trial court erred in admitting the challenged testimony.

However, despite these errors, the record demonstrates that the errors individually and collectively are harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).