IN THE SUPREME COURT OF FLORIDA

ROBERT EARL DUBOISE,

Appellant,

v.

STATE OF FLORIDA,

Appellee/
Cross-Appellant.

CASE NO. 67,082

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

CROSS-APPEAL

REPLY BRIEF OF APPELLEE/

CROSS-APPELLANT

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SUMMARY OF THE ARGUMENT

The failure to allege one ingredient of an offense does not necessarily render the charging document void; particularly when the charging document sets forth the specific Statute allegedly violated. The Indictment in the instant case, though imperfect, was not fatally defective; and the lack of prejudice to the defendant as well as the failure of the defendant to timely move to dismiss the Indictment requires reversal of the trial court's Order in Arrest of Judgment.

CROSS-APPEAL

ARGUMENT

ISSUE XII

WHETHER THE TRIAL COURT ERRED IN GRANTING DUBOISE'S MOTION IN ARREST OF JUDGMENT ON THE ATTEMPTED SEXUAL BATTERY VERDICT

The second count of the Indictment alleged that Duboise committed a sexual battery under §794.011(3), Fla. Stat. (1983). Specifically, the Indictment charged:

> The Grand Jurors of the County of Hillsborough, State of Florida, Charge that ROBERT EARL DUBOISE, between the 18th day of August, 1983, and the 19th day of August, 1983, in the County and State aforesaid, did unlawfully and feloniously commit sexual battery upon BARBARA GRAMS a person over the age of eleven (11) years, without the consent of the said BARBARA GRAMS, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 794.011(3).
>
> * * * * * * * * * * * * * * * * * * *
> INDICTMENT FOR SEXUAL BATTERY
> (Second Count)
> * * * * * * * * * * * * * * * * * * *
>
> (R 1966-1967)

It is undisputed that the defendant failed to timely challenge the indictment by Motion to Dismiss pursuant to Rule 3.190(b) Fla.R.Crim.P.; and a substantive defect in an indictment or information may be waived unless challenged timely by a Motion to Dismiss. Fla.R.Crim.P.3.190(b)(c).

In Brown v. State, 135 Fla. 30, 184 So. 518 (1983), the Supreme Court found no error in the trial court's refusal

to dismiss an indictment for first degree murder which failed to allege the venue of the crime. In Brown this court held:

> The test of the sufficiency of an indictment under the law of Florida is whether or not it is so vague, inconsistent, and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. 135 Fla. at 35, 184 So. at 519-20.

The language used by the court in Brown, was incorporated into Florida Rule of Criminial Procedure 3.140(o), Tucker v. State, 459 So.2d 306 (Fla. 1984). At this stage in the procedings, the reviewing courts must employ a lesser degree of scrutiny than would have been applied at a pre-trial Motion to Dismiss. State v. Fields, 390 So.2d 128 (Fla. 4th DCA 1980).

The failure to allege one ingredient of an offense does not necessarily render the charge void as wholly failing to state a crime, State v. Taylor, 283 So.2d 882 (Fla. 4th DCA 1973), particularly were the information charges the specific section of the statute under which the prosecution proceeds. Asmer v. State, 416 So.2d 485 (Fla. 4th DCA 1982). Haselden v. State, 386 So.2d 624 (Fla. 4th DCA 1980).

The defendant at bar has not contended that the indictment was so vague, indistinct or indefinite as to mislead or embarrass him in the preparation of his defense, or to expose him to a new prosecution for the same offense. The facts alleged in the indictment indicated a specific date and specific

victim, other details were provided in a bill of particulars (R 2048); and, as in Tucker supra, the evidence at trial was more than adequate to sustain a Blockburger defense to any possible future prosecution. See Blockburger v. United States, 284 U.S. 299 52 S.Ct. 180, 76 L.Ed. 306 (1932). The absence of a motion to dismiss at bar was readily explainable: the charge was understood and the defense was ready.

When an information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted words, it cannot be said that the imperfection of the information prejudiced the defendant in his defense. Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982). In view of the fact that the allegation was imperfect, but not fatally defective, the pleading error was waived pursuant to §3.190(c), Fla.R.Crim.P. State v. Fields, at 131. As noted by the court in Asmer, "a defendant may not thwart the ends of justice by sitting on a technical defect which has occasioned him no prejudice, holding it in reserve as a trap to spring on the State in the event the jury renders an adverse verdict." 416 So.2d at 487. Sub judice, the absence of a fundamental defect, the lack of prejudice to the defendant and the lack of a pre-trial objection compel the conclusion that the trial court erred in granting the Motion for Arrest of Judgment pursuant to Rule 3.610(a)(1), Fla.R.Crim.P.

CONCLUSION

Based upon the foregoing arguments and authorities, the trial courts order arresting judgment on the attempted sexual battery should be reversed.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Assistant Public Defender, Chief, Capital Appeals, Hall of Justice Building, 455 North Broadway Avenue, P.O. Box 1640, Bartow, Florida 33830 this 4th day of June, 1986.

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