IN THE SUPREME COURT OF FLORIDA

COREY LYNN COLBERT,

Petitioner,

v. CASE NO. 72,244

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

As to Issue I: Contrary to Colbert's contentions, the Court's instruction to the jury was consistent with what the trial judge had informed counsel she was going to do and contrary to defense counsel's contentions, counsel was allowed input on this instruction. Defense counsel was adamant that would do but to declare a mistrial and was informed quite readily by the trial court that it had no intention of granting a mistrial for the whole trial.

Not only was counsel consulted prior to the giving of the instruction, but the instruction itself was not incorrect. The trial court's word did not convey to the jury that they must arrive at a verdict. The trial court simply provided the jury with its possible options and told them that whatever they determined to do was fine. There was no presure from the trial court to reach a verdict; there was no mention of cost to the State or any other problems that would result from the granting of a mistrial on the one count.

As to Issue II: Mr. Colbert alleges that his statements made to the police were involuntary. To support this contention, Colbert sets forth numerous facts as revealed during the motion to suppress hearing and the trial that followed which he contends mandates a finding that the statements were involuntarily rendered. However, many of these facts were contradicted by the State's case. The trial court was presented with substantial, competent evidence to find that the statements were voluntarily made. Resolving any conflicts in the evidence is within the

domain of the trial judge.

After hearing all of the evidence, the trial court specifically found that the statement was voluntarily and intelligentlymade. The court noted that there was no evidence of deprivation of sleep or excessively long interrogation and that there was no right for a 17 year-old to have his mother present during interrogation. (R. 16) The court stated that the only evidence for failure of this defendant to understand his rights was his own testimony. There was no evidence that was produced from the school or other sources that he has a limited vocabulary or that he would not have understood those words. The court took judicial notice that contrary to common understanding, learning disabled children are not necessarily people who are retarded or slow learners. (R. 62)

The court specifically found, based on its own observations, that the defendant was not retarded, that he was in the normal range and that he understood what had occurred. (R. 63)

The trial court had all the facts before it and based on the totality of the circumstancesmade a specific finding that the confession was voluntarily and intelligentlymade. This is a matter that is within the trial court's discretion and Colbert has failed to show an abuse of that discretion.

As to Issue III: The victim's friend D[redacted] E[redacted] testified for the state. (R. 68) During defense cross-examination, was asked regarding conversations she had with Willie Watson (Steve). (R. 163) D[redacted] testified in response to defense counsel's questioning, that she stayed

outside the bathroom and talked with Willie Watson (Steve). (R. 163)

On re-direct D[redacted] testified that she heard Steve say to Colbert "Hey, man, I got your back up." (R. 169)

Colbert contends that this statement was inadmissible hearsay.

The only inescapable inference drawn from the testimony presented is that it was presented for the purpose of showing that the statement was made.

Further, even if it was error to admit this statement, the error was harmless.

As to Issue IV: Colbert contends that when the trial court decided to impose adult sanctions instead of juvenile sanctions, it considered four out of the six criteria listed in section 39.11(7)(c) and ignored section 4 and 5. This order in no way supports Colbert's contention that the trial court failed to consider the order two criteria. The law simply requires that the trial court enter a written order supporting its decision upon consideration of all the statutory criteria. State v. Rhoden, 448 So.2d 1013 (Fla. 1984). The trial court's order supports a finding that all of the criteria was considered and findings made accordingly.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING A DENIAL OF ITS REQUEST TO HAVE TESTIMONY RE-READ TO IT.

Dur ng the course of jury deliberations, a note was sent to the judge requesting to have the testimony of M[redacted] B[redacted] and [redacted] read back. Unfortunately, the court reporter that was present on the first day of trial when they testified was not the same court reporter present on the day of the request. (R.398) The judge informed the jury that they had several alternatives. The judge then asked the jury, without requesting any details, whether they had been able to reach a verdict on any of the counts and whether the verdict decided upon had anything to do with the testimony requested. The jury foreman stated that they have reached final verdicts and that this testimony requested had no bearing on those verdicts. The trial judge then stated, outside the presence of the jury, that she was inclined to have the jury return the verdicts on those counts that they had been able to reach a final verdict unaffected by the request to listen to the testimony and to declare a mistrial on the other count or counts. (R.400) The trial judge discussed her possible options with counsel. Defense counsel was adamant in his position that a mistrial should be declared for all the counts and that no other course of action would be proper. (R.396, 401, 402)

The jury was then brought back in and the trial court instructed them that she would take those verdicts which could be reached without the rendering of the testimony. For those

verdicts that could not be rendered without the testimony being re-read the trial judge informed the jury that she would declare a mistrial. (R.405)

Contrary to Colbert's contentions, this instruction was consistent with what the trial judge had informed counsel she was going to do and contrary to defense counsel's contentions, counsel was allowed input on this instruction. Defense counsel was adamant that nothing would do but to declare a mistrial and was informed quite readily by the trial court that it had no intention of granting a mistrial for the whole trial. The instruction is a matter that was within the trial court's discretion and after allowing defense counsel's input, the trial court correctly proceeded. Cf. Kelley v. State, 486 So.2d 578 (Fla. 1986); DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1365 (Fla. 1979).

Further, not only was counsel consulted prior to the giving of the instruction, but the instruction itself was not incorrect. The trial court's words did not convey to the jury that they must arrive at a verdict. The trial court simply provided the jury with its possible options and told them that whatever they determined to do was fine. There was no pressure from the trial court to reach a verdict; there was no mention of cost to the State or any other problems that would result from the granting of a mistrial on the one count. Cf. Portee v. State, 496 So.2d 173 (Fla. 3d DCA 1986). The instruction was a valid instruction given after counsel was consulted. Cf. Warren v. State, 498 So.2d 472 (Fla. 3d DCA 1986). No error was

committed.

After reviewing the facts and the law, the Second District concluded:

> It is clear from the record that the trial judge heard extensive arguments of counsel both before and after the jury's deliberation. We conclude the trial judge's final instruction to the jury allowing it the option to proceed without reading the requested testimony was the correct instruction. It was not prejudicial error for the trial judge to reach her final decision on that alternative after discussing the matter with the jury and without previously announcing that alternative to counsel. Counsel has not demonstrated how the trial judge's handling of the matter constituted error.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING MR. COLBERT'S MOTION TO SUPPRESS.

Mr. Colbert alleges that his statements made to the police were involuntary. To support this contention, Colbert sets forth numerous facts as revealed during the motion to suppress hearing and the trial that followed which he contends mandates a finding that the statements were involuntarily rendered. However, many of these facts were contradicted by the State's case. The trial court was presented with substantial, competent evidence to find that the statements were voluntarily made. Resolving any conflicts in the evidence is within the domain of the trial judge.

Detective Luther of the Lakeland Police Department testified that on the evening of August 28th, 1986, he was contacted by his Sergeant, who advised Luther that there had been a possible sexual battery and that the victim was at Lakeland Regional Medical Center. (R.11, 12) Luther then went to the Lakeland Police Department where he spoke to Corey Lynn Colbert who had been brought in by Sgt. Barlow. The interview was conducted by Sgt. Barlow and Detective Luther. Detective Luther testified that he read Mr. Colbert his Miranda rights. (R.13) Luther testified that after he read off the rights he asked Colbert "Do you understand that you do not have to talk to me?" and then he asked him "you also understand that you can stop talking to me any time you want to?" Mr. Colbert stated that he understood his rights and he signed a Miranda form stating that he understood

those rights. (R.14, 15) Detective Luther testified that Colbert seemed to understand everything he asked him, he did not promise anything to Colbert and Colbert clearly understood prior to Mirandizing him what Luther was going to question him about. (R.16) Luther did not use any force of any sort in getting Colbert to answer his questions. Colbert was then questioned about the sexual battery. (R.17)

Colbert was alert and awake when he was questioned and there was no indication of any kind of sleepiness. Luther felt like Colbert didn't think he had done anything wrong and he was more than willing to talk about what had happened. (R.19) Luther testified that he did not tell Corey that he was questioning him about charges for which he could be treated as an adult and that he did not tell Colbert's mother that she could not sit in on the interview. (R.20, 21) Detective Luther also testified that during the course of his questioning of Colbert, Colbert did not appear to have any problems understanding his questions. (R.26) His answers were given in a straight-forward manner as soon as they were asked. (R.27)

Mary Lynn Colbert, the defendant's mother, testified regarding her son's attendance of a special school. She stated that Colbert went to public school, but they put him in SLD (Slow Learning Disability) classes, from elementary through junior high school. (R.28) The trial court interupted this line of questioning to ask the witness about the special schools. The court stated that SLD does not mean someone is retarded or a slow learner, it means that they have a particular learning

disability. The court questioned Mrs. Colbert regarding the nature of the defendant's learning disability. She stated she did not know. Upon further questioning however, it appeared that his learning disability centered on the ability to read. (R.30) Mrs. Colbert also testified that Colbert read magazines and newspapers at home. She admitted that during the course of a normal conversation if she told him to pick up his room or asked him to run to the store to get a loaf of bread that he could understand her without a problem. (R.33)

Corey Lynn Colbert testified that the reason he was taking SLD classes is because he had a little problem with reading and English. Colbert stated that that was his only learning disability. (R.36) Colbert also testified that his mother told him prior to being interviewed by the officers not to say anything. When shown the Miranda rights waiver form, Corey stated that what was on the paper was his Miranda rights. (R.40) Colbert testified that Detective Luther did not threaten or coerce him. Colbert also stated that he told Detective Luther that he understood his rights. (R.41) Colbert understood that he had the right to stop questioning at any time and that if he didn't want to talk to the officers he didn't have to. He also knew that Luther and Barlow were both police officers. (R.42) Colbert then identified the judge, the guard and a state attorney by their occupations. (R.42, 43) Colbert testified that he didn't have any problem understanding the rules of the game of basketball and the instructions given by the coach. (R.43, 44) Colbert testified that he played junior varsity football while in

high school and that he had no problems understanding the plays as outlined by the coach. (R.47)

After hearing all of the evidence, the trial court specifically found that the statement was voluntarily and intelligently made. The court noted that there was no evidence of deprivation of sleep or excessively long interrogation and that there was no right for a 17 year-old to have his mother present during interrogation. (R.61) The court stated that the only evidence for failure of this defendant to understand his rights was his own testimony. There was no evidence that was produced from the school or other sources that he has a limited vocabulary or that he would not have understood those words. The court took judicial notice that contrary to common understanding, learning disabled children are not necessarily people who are retarded or slow learners. (R.62)

The court specifically found, based on its own observations, that the defendant was not retarded, that he was in the normal range and that he understood what had occurred. (R.63)

In response to the defense counsel's questioning, the court found that the defendant was not confused about the word attorney:

> THE COURT: He said to the officer that he understood it and he testified here today that he told the officer that. Now, I am choosing that version of his statement rather than his current version, having taken into account all the usual tools in determining credibility of witnesses.
>
> (R. 64, 65)

Colbert argues nevertheless that the trial court erred in

denying the motion to suppress based on the totality of the circumstances. Colbert contends that based upon his age (17), his limited intelligence, and the fact that his mother was not present during the interrogation supports a conclusion that the statement was not voluntarily and intelligently made. This position is supported in neither fact nor law.

Juvenile confessions have always been held to be admissible, though the courts have necessarily regarded them with closer scrutiny because of the age of the person involved. See T. B. v. State, 306 So.2d 183 (Fla. 2d DCA 1975). In State v. Francois, 197 So.2d 492 (Fla. 1967), our Supreme Court declined to adopt an exclusionary rule which would automatically exclude all confessions given by those who were still under the jurisdiction of the juvenile court. The United States Supreme Court has held that the admissibility of a juvenile confession depends upon the "totality of circumstances" under which it was made. Gallegos v. Colorado, 370 U.S. 49 (1962). The more immature the juvenile may be, the greater likelihood exists that his confession will be deemed inadmissible. See Doerr v. State, 383 So.2d 905 (Fla. 1980).

The trial court had all the facts before it and based on the totality of the circumstances made a specific finding that the confession was voluntarily and intelligently made. This is a matter that is within the trial court's discretion and Colbert has failed to show an abuse of that discretion.

Further, Colbert's reliance on J. E. S. v. State, 366 So.2d 538 (Fla. 1st DCA 1979), is misplaced. The First District in J.

E. S. determined that §393.03(3)(a), Florida Statutes (1977) requires that when a person determines that a child should be detained he must immediately notify the parents or the legal guardian. The court went on to hold that the purpose of the statute is not only to notify the parents or legal guardians, but also to provide a reasonable opportunity for them to confer with the juvenile. This decision was based on a prior First District Court of Appeal holding in Dowst v. State, 336 So.2d 375 (Fla. 1st DCA 1976). The holding in Dowst has been undermined by the view of the Supreme Court's later opinion in Doerr, supra, and the change in the statute in question. See In the Interest of E. J., 438 So.2d 500 (Fla. 1983).

The Court in Doerr held in response to a question certified by this Court, that §393.03(3)(a), Florida Statutes (1977) does not mandate that a confession obtained from a juvenile after he is taken into custody is rendered inadmissible if it was given prior to notification of his parents or legal guardians. Notification of the child's parents or legal guardians is required only after it is determined that the child will be detained or placed in shelter care. The Court found that the purpose of notification is simply to advise the child's parents or custodians that the child has been detained or placed in the shelter care. This section does not prohibit interrogation after the child is taken into custody but before a determination is made to release or detain. The Court also found that lack of notification of a child's parents is a factor which the court may consider in determining the voluntariness of a child's confession

but is not a statutory requisite to an interrogation. The Court specifically found that the language of §393.03(3)(a) does not support a position that the legislature intended that a juvenile should not be subjected to interrogation until a parent or legal custodian has had an opportunity to consult with the child. Id. at 907.

In the instant case, Colbert's mother was not only notified but she was allowed to consult with Colbert prior to the interrogation. The evidence was conflicting as to whether she had requested to be present, but there is nothing in the present statute to suggest that, when a parent requests to be present during interrogation, statements taken outside the parent's presence are "per se" involuntary. The right to request an attorney belonged to the defendant and he voluntarily waived that right.

The trial court correctly denied the motion to suppress.

ISSUE III

WHETHER THE TRIAL COURT ERRED INALLOWING THE STATE TO INTRODUCEHEARSAY STATEMENTS MADE BY WILLIE WATSON.

The victim's friend D[redacted] E[redacted] testified for the state. (R.68) During defense cross-examination, D[redacted] was asked regarding conversations she had with Willie Watson (Steve). (R.163) D[redacted] testified in response to defense counsel's questioning, that she stayed outside the bathroom and talked with Willie Watson (Steve). (R.163)

On re-direct D[redacted] testified that she heard Steve say to Colbert "Hey, man, I got your back up." (R.169)

Colbert contends that this statement was inadmissible hearsay. Colbert relies on Beatty v. State, 486 So.2d 59 (Fla. 4th DCA 1986), to support the contention that the testimony presented by the state was introduced in order to connect the defendant to the crime. Colbert further relies on Postell v. State, 398 So.2d 851 at 854 (Fla. 3d DCA 1981), "where . . . the inescapable inference from the testimony is that a non-testifying witness has furnished . . . evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right confrontation is defeated." (Brief of Appellee/Cross-Appellant at p. 20).

The only inescapable inference drawn from the testimony presented is that it was presented for the purpose of showing that the statement was made. The meaning of the statement is not evident and only serves to further illuminate what the parties were doing while Colbert was assaulting the child. The line of questioning was merely a continuance of that begun by the

defense.

Further, even if it was error to admit this statement, the error was harmless. D[redacted] testified that Steve said, "Hey, man, I got your back up." This statement is subject to numerous interpretations and in light of the overwhelming evidence, including the physical evidence and Colbert's confession, the admission of this statement was clearly harmless.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN SENTENCING MR. COLBERT AS AN ADULT.

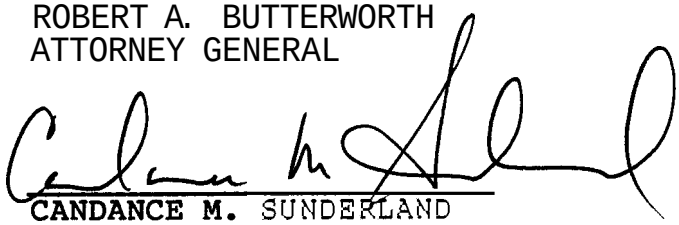
Colbert contends that when the trial court decided to impose adult sanctions instead of juvenile sanctions, it considered four out of the six criteria listed in section 39.11(7)(c) and ignored sections 4 and 5. To the contrary, the trial court's order specifically states that the court considered the pre-disposition report and the applicable criteria for determining the suitability or non-suitability of adult sanctions. The Court found that adult sanctions should be imposed for four out of the six criteria. (R.495) This order in no way supports Colbert's contention that the trial court failed to consider the other two criteria. The law simply requires that the trial court enter a written order supporting its decision upon consideration of all the statutory criteria. State v. Rhoden, 448 So.2d 1013 (Fla. 1984). The trial court's order supports a finding that all of the criteria was considered and findings made accordingly.

CONCLUSION

Respondent asks this Honorable Court to affirm Petitioner's judgment and sentence; and to affirm the decision of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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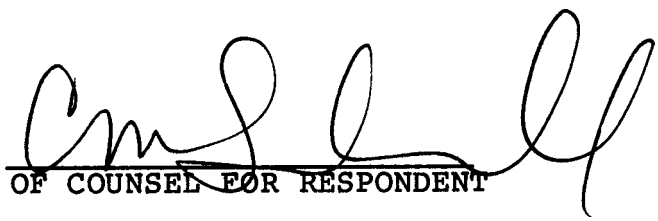
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. mail to Deborah K. Brueckheimer, Assistant Public Defender, **455** North Broadway, P.O. Box 1640, Bartow, Florida 33830 on this 9 day of August, 1988.



OF COUNSEL FOR RESPONDENT