IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,834

STATE OF FLORIDA,

Petitioner,

vs.

FRANCISCO HERNANDEZ,

Respondent.

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BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal; Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as the State.

In this brief, the symbol "R" will be used to denote the record on appeal, and the "AR" will be used to denote the Additional record on appeal. All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by Information as orally amended (AR 2-3), with lewd assault on J.M., a child under the age of sixteen, by pinning her against a wall and sucking her breasts, Count I; with lewd act in the presence of J.M., a child under the age of sixteen, by masturbating in her presence, Count II: and with lewd act in the presence of A.G., a child under the age of sixteen, by masturbating in her presence, Count III (R 514-515). On May 19, 1987, the Friday before trial, the State filed its Notice of Intent to Rely on Similar Fact Evidence; the Respondent objected, arguing that the State failed to give the required 10 days notice, and the trial court agreed, granting Respondent's motion to prohibit the testimony of Rebecca Stone, regarding a prior incident between Respondent and A.G. (R 552-553, 548, AR 17-18). A jury trial commenced on May 22, 1989.

A.G. testified that in 1987, she would go to the Four Arts Center after school; there, she met Respondent who was a gardner (R 38, 41-42, 43-44). She identified Respondent in court (43-44). On the day before the incident, she and J.M. were in the garden after school; they saw Respondent, who exposed himself and began to masturbate in their presence; they girls ran away (R 55-57). On the day of the incident, she and her friend, J.M. were in the garden; when they saw Respondent, they ran into the bushes to get away from him (R 58-60). They climbed on a wall and Respondent climbed up there with them (R 62-63). Respondent made sexual suggestions to them, then masturbated in front of them again (R 64-

64). They jumped down off the wall and Respondent jumped down also and grabbed them; although she got loose, he held on to J.M., pulled up her shirt, pinned her against the wall and sucked her breast (R 67-69). J.M. managed to knee Respondent in the chin, A.G. pushed him over and the girls ran across the street and told a teacher what had happened (R 69-70). A.G. admitted that in May, 1988, she falsely reported to the police that she and another girl had been abducted by four Latin men; they had gone to a party but did not get home on time, so they told this lie (R 72-73, 80-82).

J.M. testified that she went to the Society of Four Arts after school with A.G. (R 106-108). A.G. introduced her to Respondent; she identified him in court (R 109-110). She first met Respondent on the day before the incident (R 110). On this day, he gave them flowers and then he pulled down his pants and masturbated in front of them (R 116-118). The next day they went back to the garden; they were sitting on a wall and Respondent climbed up there with them (R 120, 123-125). Respondent made sexual suggestions to the girls, then again masturbated in front of them (R 128-129). She jumped off the wall, followed by A.G.; Respondent jumped off the wall with her, grabbed her arm, pinned her against the wall, pulled up her shirt, and sucked her breast (R 130-134, 143). She kneed him, A.G. pushed him and they ran across the street and told a teacher what happened (R 134-135).

Detective Chris Rigolo of the Palm Beach Police Department testified that she was involved in investigating this incident and assisted in interviewing the girls (R 158-160). They decided to

separate the girls to determine whether their stories were consistent; Detective Rigolo interviewed A.G. and then both girls together (R 161-164). Later she compared notes with the officer who initially took J.M.'s statement and found the girls' stories to be very consistent (R 164). Detective Rigolo also investigated the false abduction report made by A.G. approximately seven months after this incident (R 165-167). After the false report, she did not question the incidents with Respondent because the story told by the girls regarding the second incident was poorly developed, while the stories told by the girls after the incident in question were too consistent and too detailed to have been made up by the victims (R 168). On cross examination, Detective Rigolo testified that in separate conversations, each victim told her that as Respondent had J.M. pinned against the wall, she kneed him, A.G. pushed him and they ran away (R 169).

Sergeant Atkinson of the Palm Beach Police testified that his initial involvement in the case was to go to the garden and search for the suspect (R 180). Then he spoke with the victims; he took formal statements from the victims the next day (R 182, 186-190). Additionally he spoke with other witnesses (R 190-196). On the night of the incident, he also interviewed the Respondent; he read Respondent his rights in Spanish and Respondent answered he understood each right in English (R 196- 199). He told Respondent the allegations against him and, in English, Respondent told Sergeant Atkinson that he had had a conversation with these girls and had trouble with them in the past due to them being in the

gardens where they were not supposed to be (R 201). Atkinson was aware A.G. subsequently filed a false police report; he discussed the matter with Detective Rigolo and asked her to inform the State Attorney's office about it (R 203-204). After this incident, he continued to believe the victims' statements about Respondent because their statements were very detailed, very, very similar, had no inconsistencies, and neither statement had significant details which the other did not also include (R 208-210). Additionally, J.M. exhibited a number of symptoms exhibited by victims of sexual assault (R 205-206).

Julia Marie Holland, a kindergarten teacher at Palm Beach Public School testified that on October 21, A.G. and J.M., the victims, came running from the gardens in her direction; they asked her where a telephone was (R 236-240). She noticed that they were out of breath, very upset, kind of frantic and nervous (R 241). They told her that a man in the gardens had just tried to rape them (R 241-244). Initially, the girls did not ask her to call the police, but they were very scared and she felt they were telling the truth, so she felt the police should be called (R 245).

The State requested a Richardson hearing on the issue of whether it could present the testimony of Rebecca Stone, a friend of A.G.'s who saw Respondent fondle A.G. on a prior occasion (R 246-247). The State offered Ms. Stone's testimony to rebut the impeachment of A.G.'s credibility and to show Respondent's motive/modis operandi (R 247-253). Apparently after conducting a Richardson hearing (although the hearing is not part of the record on appeal) the

trial court ruled that the State could offer similar fact evidence through the testimony of Rebecca Stone (R 253-254). However, when the State could not immediately produce the witness, it was required to rest without presenting this witness (R 254-256). The Respondent's motion for judgment of acquittal was denied (R 256).

Respondent testified that he knew the girls from the school and that he had chased the older one out of the gardens on several occasions (R 262-263, 265, 275-276). He stated the victims accusations were a lie; he denied sucking J.M.'s breast, or exposing his sexual organs to any child, or unzipping his trouser's in front of any child or adult (R 264). He admitted seeing the victims in the garden on October 20 and October 21 and stated he had told them to leave the garden (R 264-265). He stated there were other people working in the garden on that day and that there were always people in the garden (R 266-268).

On cross-examination, Respondent denied knowing the victims' names prior to their testimony; he chased the older child from the gardens so many times that he could not say how often, but said she was never there alone (R 272-273). Although he cut flowers and gave them to many people, he denied giving any to the victims (R 276-277). He admitted having one conversation with A.G., but denied holding her hand, hugging her, fondling her breasts (R 277-280). He remembered seeing the victims on October 20, but did not know if he went into the bushes with them; he denied dropping his trousers that day or grabbing them (R 281). He kicked them out of the garden twice that day, the first time they left walking

normally; they were laughing and he thought they were talking like they had a secret (R 281-283). He did not see them return, but he saw them climbing the coconut tree later; he said he could not climb the wall without a ladder, but he didn't know if the victims did (R 283-284). In response to the question whether he again exposed himself to the victims on October 21, he stated "I am not sick." (R 284).

Respondent's wife testified that in 1987 her husband wore underwear with long legs to work; she testified that he did not own any red underwear, or bikini type underwear back then (R 287-288). She did not recall the clothes he wore to work that day; he was not in the habit of discussing his work with her and he did not discuss any problems he had at work that day (R 288-289). On cross-examination, she stated that he never mentioned the victims to her before this incident, or that he had had to throw them out of the garden (R 290-291). At first she denied her husband ever told her he gave people flowers, then after being shown her deposition testimony, she acknowleged that he told her he gave children flowers, but continued to deny he ever gave A.G. or J.M. flowers (R 290-293). She admitted talking with Respondent about the trial as it progressed (R 294).

Based on the Wife's testimony, the State moved the court for sanctions for the Respondent's conduct in violating the court's order not to talk to anyone regarding the trial testimony; specifically, the State asked the court to give a curative instruction to the jury, and to hold Respondent in contempt (R 298-

301).

Edward Rodriguez, a minister of the Love Tabernacle, where Respondent and his wife were members, testified that Respondent had a reputation for truthfulness and honesty in the community (R 308, 311). On cross-examination, he admitted he did not know Respondent's reputation for truth and veracity outside the church (R 315-316).

Evelyn Rand, a librarian at the library atached to the gardens, testified that she knew both victims (R 323). She testified that she knew A.G.'s reputation for truth at the library, and that was that A.G. did not always tell the truth (R 327-328). On cross-examination she stated that A.G.'s reputation was in part caused by the fact that she was troublesome (R 331). She recalled an incident in the spring where A.G. reported to her that Respondent had fondled her breast; Ms. Rand reported the incident (R 332-334).

Karl Larkin, building manager for the library and gardens, testified that he was familiar with the victims because they used to come to the gardens after school (R 352, 358-359). He stated the girls caused problems and had to be asked to leave the gardens (R 358-359). On the day in question, he saw the girls jumping through a hedge, they made some derogatory remarks to him and he asked them to leave (R 362). He testified that he never saw the girls with Respondent (R 363).

The Defense then rested (R 380).

On rebuttal, the State called Sergeant William Styfer of the Palm Beach Police Departmtne, who testified that he had received a

call from Mr. Larkin, who told Sgt. Styfer that he had the names of some witnesses regarding this case; however, he never told the sergeant that he kicked some children out of the gardens on October 21, or that the girls were a continual source of problems (R 384-385).

The State's second and final rebuttal witness was Rebecca Stone, who testified that she knew A.G. from school; Rebecca did her homework in the library and A.G. hung out in the garden (R 3911-393). She saw A.G. with the gardner, and she identified Respondent as the gardner in court (R 393-394). She and two other schoolmates were hiding in a bush; A.G. asked them to watch Respondent with her because she was not sure whether his conduct was "good" or "bad" (R 396-397). She saw Respondent hug A.G. and then try to fondle A.G.'s breast (R 398). Respondent saw the children in the bushes and got very angry; he told the others to leave but instructed A.G. to stay (R 398-399). The children went onto the library and A.G. told Ms. Rand what happened (R 399).

Both sides rested; Respondent renewed his motion for judgment of acquittal, which was denied (R 401-402). During instruction of the jury with respect to Count I/Lewd Assault on J.M., the trial court added to the Standard Jury Instruction, the following language: " knowingly committed a lewd or lacivious act in the presence of [J.M.] (R 457-458). After the jury was excused to retire, the prosecutor informed the court that the instruction given by the trial court on lewd assault contained language from the instruction on lewd act, which should not have been given (R 469-471). Counsel

for Respondent stated: "I don't want a curative instruction. I'd rather not have emphasis placed on it." (R 471). The trial court again asked Respondent's counsel if he wanted a curative instruction and he reiterated he did not (R 472). Later the jury came back asking to see the State's definition of lewd assault and battery (R 475-477). When the trial court answered the jury's question by reinstructing the jury with the standard instruction for lewd act rather than for lewd assault, neither the State not the defense objected or brought the matter to the trial court's attention (R 477-479).

The jury convicted Respondent of all three count's as charged in the information (R 481-483, 557). Respondent filed a motion for new trial; after a stipulation for substitution of counsel, a supplemental motion for new trial was filed (R 575, 576, 581-582). Said motion were heard by the trial court on August 3, 1989, and denied (R 496). Respondent was sentenced within the sentencing guidelines to a prison term of 3 1/2 years (R 497, 589-590).

On appeal, the Fourth District Court of Appeals reversed Respondent's convictions, holding:

a) that the trial court erred in allowing opinion testimony as to the victims' veracity, notwithstanding the Respondent's failure to object to this testimony;

b) that the trial court erred in allowing evidence of a prior act of misconduct by Respondent, even though the evidence was offered as impeachment;

c) that the trial court committed fundamental error in

incorrectly reinstructing the jury on lewd assault, regardless of Respondent's counsel's failure to object and prior express waiver of the misinstruction;

d) that the trial court erred in convicting Respondent of two counts of lewd act, where there was only one incident of Respondent masturbating in front of two children; and

e) that the cumulative errors deprived Respondent of a fair trial and warranted a new trial.

SUMMARY OF THE ARGUMENT

POINT I

The Fourth District Court of Appeal incorrectly reversed Respondent's two convictions for lewd assault, holding that as Respondent committed only one act of masturbation in the presence of two children, he could only be convicted for one count of lewd act. However the District Court's analysis incorrectly focuses on the Respondent, rather than the individual children the statute was enacted to protect. Further, as the jury instructions require the State to prove that Respondent knowingly committed the act in the presence of each victim, it is clear the that Respondent was properly convicted of two counts of lewd assault.

POINT II

The State submits the District Court incorrectly determined that the trial court's incorrect reinstruction to the jury constituted fundamental error and was thus reviewable without objection, where the Respondent expressly requested that the lower court not reinstruct the jury on the first occasion that the incorrect instruction was given to the jury.

ARGUMENT

POINT I

RESPONDENT WAS PROPERLY CONVICTED OF TWO COUNTS OF LEWD ACT.

Below, Respondent argued, and the Fourth District agreed, that as he committed only one act of masturbation in front of two victims at the same time, he could only be convicted of one count of lewd act. The State contends that such an interpretation of F.S. 800.04 is contrary to established case law as well as the purpose for which the statute was enacted.

In enacting F.S. 800.04 (1985), the Florida Legislature stated that one of the purposes of the legislation was to prohibit lewd and lacivious acts upon children. Ch. 84-86 Laws of Fla. (1984). Consequently, it is clear that the aim of the statute is the protection of children. Further F.S. 800.04 is written in the singular, that is, the statute prohibits conduct "upon any child" and states that the " victim's" conduct is not a defense to the crime. Thus, it is also clear that the statute was intended to protect individual children, not simply children as a group. To allow the Fourth and Fifth Districts' decisions to stand, is to focus on the defendant rather than the victims who are the very people the statute was enacted to protect.

An element of proof necessary to establish lewd act is that a defendant "knowingly" committed a lewd or lacivious act in the presence of the victim, Fla.Std.Jury.Instr.(Crim.) 122-122a, while lewd assault does not require such proof. Egal v. State, 469 So.2d 196 (Fla. 2nd DCA 1985), review denied 476 So.2d 673 (Fla. 1985);

Harris v. State, 418 So.2d 416 (Fal. 1st DCA 1982), review denied 426 So.2d 26 (Fla. 1983). Thus, with respect to lewd act, the State must establish that the defendant knowingly committed the lewd act in the presence of each victim. Thus, the Fourth District's opinion which focuses on the Respondent's act, rather than his knowledge of the presence of each child, is incorrect and must be reversed.

The State submits that this Court should follow the precedent set in Bergen v. State, 552 So.2d 262 (Fla. 2nd DCA 1989), where the defendant was convicted of five counts of lewd act for his act of masturbating in front of five children; McClain v. State, 383 So.2d 1146 (Fla. 4th DCA 1980), review denied 392 So.2d 1376 (Fla. 1980), where the defendant was properly convicted of two counts of aggravated assault for pointing a knife at two victims at the same time; and the express legislative intent of the statute, and reverse the Fourth District's opinion in this cause and reinstate Respondent's two convictions for lewd act. See also: Ponder v. State, 530 So.2d 1057 (Fla 1st DCA 1988),(where the defendant could have properly been convicted of two counts of armed robbery because he pointed his gun at two employees in his robbery of a restaurant).

POINT II

RESPONDENT WAIVED HIS OBJECTION TO THE TRIAL COURT'S JURY INSTRUCTION.

The Fourth District held that although Respondent waived any objection to the trial court's initial incorrect instruction, he did not waive his right to raise the trial court's incorrect reinstruction of the jury, despite the fact that Respondent failed to object and expressly waived reinstruction or curative instruction the first time the trial court read the instruction incorrectly. The State submits that allowing Respondent to raise the incorrect instruction as fundamental, reversible error, particlarly under these circumstances, is to allow a defendant to sabotage and build error into a trial.

At trial, the first time the judge instructed the jury, he inadvertently included an element of lewd act in the instruction on lewd assault (R 469-471). The State called this error to the trial court's attention, but Respondent's counsel stated: "I don't want a curative instruction. I'd rather not have emphasis placed on it." (R 471). The trial court again asked if Respondent wanted a curative and counsel stated he did not (R 472). Later, the jury came back asking for reinstruction on the State's definition of lewd assault and battery (R 475-477). The trial court responded to this request by reading to the jury the standard jury instruction for lewd act rather than lewd assault (R 477-479). At this time, however, neither the State nor the defense objected or called the matter to the trial court's attention. The District Court held that the trial court's failure to give a completed and accurate

instruction is fundamental error, reviewable in the absence of an objection. Hernandez v. State, 575 So.2d 1321, 1323 (Fla. 4th DCA 1991).

This Court has repeatedly held that the failure to object to the omission of jury instructions, or to incomplete instructions is not preserved for appeal unless an objection is made and the error is brought to the trial court's attention. Morris v. State, 557 So.2d 27 (Fla. 1990); Parker v. Dugger, 537 So.2d 969 (Fla. 1988); Roman v. State, 475 So.2d 1228 (Fla. 1985); Ray v. State, 403 So.2d 956 (Fla. 1981). In Ray, this Court held that if defense counsel took some affirmative act to induce the incorrect instruction, then the defendant's conviction would have been affirmed on the basis of waiver or invited error. The State submits that this is precisely what happened here. The first incorrect instruction was brought to the lower court's attention by the prosecutor, but Respondent's counsel adamantly and expressly waived a curative or reinstruction (R 469-472). A short while later, the trial court, again incorrectly instructed the jury, and again Respondent's counsel remained moot (R 477-479). Having already informed the trial court that he did not want to call the jury's attention to the erroneous instruction, how can we assume that Respondent would have done anything but reiterate his waiver?

Indeed, Respondent's conduct in remaining silent in the face of the incorrect instruction, yet claiming such error as fundamental on appeal, can only be viewed as inviting error and can not be allowed. Such a policy would do away with any responsibility on

the part of the defendant to prevent the trial court from committing error and encourages defendants to fail to allow the trial court an opportunity to cure the error. As a result, defendants will be able to invite error and then obtain a second trial[1] without having any responsibility for failing to take any action to prevent or lessen the trial court's error. Here, a simple reinstruction would have cured the problem, yet Respondent by expressly declining the trial court's offer to correct its error, has essentially made the second incorrect instruction worse. Had the trial court given a curative instruction as it desired after the initial misinstruction, the possibility that the second instruction would have a negative impact would not have been so great; had the trial court been allowed to correct the initial instruction, perhaps the jury would never have requested to be reinstructed.

The State submits that where, as here, a defendant has taken affirmative action to prevent a trial court from correcting an error, where he fails to object to, and instead acquiesces in the repeat of that error by the trial court, he should not be allowed to use the error which he has invited to obtain reversal of his conviction.

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[1] The advantages of a second trial to a defendant as a result of the events being less vivid in witnesses minds, the witnesses being less available, etc. are apparent.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court REVERSE the decision of the Fourth District below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Petitioner" has been furnished by U.S. Mail to: DOUGLAS DUNCAN, Esquire, Wagner, Nugent, Johhnson, Roth, Kupfer & Rossin P.A., P.O. Box 3466, West Palm Beach, FL 33402, this 27th day of September, 1991.

Of Counsel