047 3-31 D.A. 5-8-99

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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,308

GEORGE LEE MYLES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

****

BRIEF OF RESPONDENT

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INTRODUCTION

The Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the Petitioner, GEORGE LEE MYLES, was the defendant. All parties will be referred to as they stood in the lower court. The symbols "R" and "T" will be used respectively to refer to the index of the record on appeal and the transcript of the trial court proceedings.

STATEMENT OF THE CASE

Defendant was charged with capital sexual battery by an information filed on January 25, 1987. (R. 1-5A). On August 13, 1987, a six-count amended information was filed charging Defendant with the following: four (4) counts of capital sexual battery against his daughter, S.M., and two (2) counts of capital sexual battery against his son, J.M. (R. 11-16A). On April 22, 1987, Defendant requested that the trial court appoint another attorney to replace his assistant public defender, Larry Stein, and special assistant public defender Vincent McGhee was appointed to represent Defendant. (T. 1-10). Defendant filed a motion, on July 27, 1987 to act as co-counsel with his attorney of record, which was denied. (R. 56-7, T. 48-50). On September 21, 1987, special assistant public defender Arthur Carter was appointed to represent Defendant, thereby replacing special assistant public defender Vincent McGhee. (R. 23). Defendant filed a second motion, on November 13, 1987, to act as co-counsel

with his attorney and the trial court designated Defendant as "technically co-counsel". (R. 87-9). On December 3, 1987 and February 2, 1988, Defendant filed motions for dismissal of his counsel. (R. 90-2, 96). The motions were heard and denied on February 29, 1988. (T. 64-90).

A trial by jury commenced on February 29, 1988, before the Honorable Arthur I. Snyder. (T. 305). Following the testimony of several witnesses, Defendant made a motion for mistrial because one of the witnesses made an improper comment on Defendant's right to remain silent. The motion for mistrial was granted. (T. 550, 602).

The second trial began, before Judge Snyder, on March 2, 1988. (T. 630). Defendant was tried before a jury on March 2-4, 1988. (T. 630-1372). The trial court granted a judgment of acquittal as to Count I. (R. 136, T. 1280). The jury found Defendant guilty of Counts II through VI, as charged. (R. 131-5, T. 1373-4). Defendant was adjudicated guilty and sentenced to five concurrent life imprisonment sentences, with a twenty-five (25) year minimum mandatory for each count. (R. 137-44, T. 1376-8).

Defendant filed a belated appeal in the District Court of Appeal of Florida, Third District. The Third DCA affirmed the judgments and sentences. (R. 155-60). In rejecting Defendant's claim of error with respect to electronic communication under

§92.54(4), Florida Statutes (1987), the District Court stated the following:

> During the entire closed circuit direct examination testimony, appellant did not request to communicate with his lawyer. Further, appellant was given an opportunity to communicate with his lawyer before his lawyer cross examined the child victim.
>
> We find no error in appellant's third contention. The trial court neither violated the express language nor principles of Section 92.54(4), Florida Statutes (1989). The statute provides:
>
> > During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method.
>
> Contrary to appellant's suggestion, the statute does not mandate electronic communication. Rather, the statute suggests, by the use of the term "may," that there may be other appropriate means of attorney/client communication. See, e.g., Glendening v. State, 536 So.2d 212 (Fla. 1989), cert. denied, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). Here, rather than allowing communication through the statutorily suggested electronic means, the trial court used a more mundane method, writing.
> (R. 158-9); Myles v. State, 582 So.2d 71, 73 (Fla. 3d DCA 1991).

Notice of invocation of this Court's discretionary

jurisdiction was filed by Defendant on July 18, 1991. Following jurisdictional briefs from both parties, this Court entered its order accepting jurisdiction and setting the case for oral argument. jurisdiction accepted 591 So.2d 631 (1991).

STATEMENT OF THE FACTS

S.M. testified at trial in the office of the trial judge and in the presence of the trial judge, defense counsel, prosecutor, clerk, and court reporter. Her testimony was relayed to the jury and Defendant in the courtroom via a closed circuit television. (T. 853-55). As evidenced by the following discussion, the trial judge did not want Defendant to make improper comments in the presence of the jury, so instead of a microphone to speak with his attorney, Defendant was given paper to write any questions he wanted his attorney to ask, as well as a bailiff to relay messages or objections to his attorney while S.M. was testifying:

> THE COURT: We're in there. We're all in there. The only one that's here is Mr. Myles, and he's going to have a microphone on for emergency use only, and I can't imagine what the emergency would be.
>
> I mean, he can write down anything he wants on a pad of paper, and before you cross-examine the witness I'll have a break and you can come back in here and talk with him and discuss with him whatever you want.
>
> He can write out any questions that he wants you to ask his daughter, but I see no reason to have the microphone here. Rather than the microphone here, I would prefer that he tells the bailiff whatever he wants, and the bailiff can come in and tell me and then I can stop or delay the proceedings in there, depending upon what he says.

[DEFENSE COUNSEL]: I would leave--
In an abundance of caution, I would leave the microphone.
I'm not sure how--

THE COURT: The thing is I don't want--
In other words, if he communicates with you and says she's a liar, and he says it loud enough for the jury to hear it, I don't want that to happen.
Now, if he has no method to communicate to you in there, he can't possibly say it. If he says it, nobody is going to hear it except the jury, and at that time I'm going to put him in jail right away and take him out of the courtroom because if he says anything in front of [the] jury when you can't hear it, it's absolutely useless and he's only doing something to get it to the jury.
So, I would prefer not to have the microphone. If he wants to communicate with us in here--
The bailiff will be in here. He will tell the bailiff and the bailiff will immediately come in, and we'll either stop--stop the procedure, come back, and have the jury go back.
I'm afraid of the microphone. I can't see what he could possibly say in that microphone that is going to do anything.
Is he going to tell you to stop [the prosecutor] from examining the witness?
He's got something to communicate, he can write it down and tell you about it before you cross-examine. I can't imagine anything except that microphone might cause him to say something to you over it that the jury might hear.

[DEFENSE COUNSEL]: My main concern is I don't know how the Court's interpreted the portion of the statute that says he shall be able to communicate with his attorney.

THE COURT: I'm giving him the right to communicate with his attorney by telling the bailiff, and let him tell you immediately whatever he says.
I can't imagine that five seconds is going, or ten seconds is going to cause any problem. And, if it did it would be enough for a mistrial anyhow, if it was that serious of a matter.

> [DEFENSE COUNSEL]: All right, Judge.
>
> THE COURT: If we have any problems with it, the defendant can tell the bailiff, we can come back in here and see what the problem is and correct it.
>
> (T. 850-52).

As shown by the foregoing discussion, defense counsel did not object to the use of a bailiff and written notes, in lieu of a microphone, for Defendant to communicate during S.M.'s testimony. Furthermore, Defendant never requested an opportunity to communicate with his attorney at any point during the direct examination of S.M. Additionally, a break was taken between direct and cross-examination to allow Defendant to confer with his attorney and give his attorney questions to ask S.M. on cross-examination. (R. 102-4, T. 896-7).

S.M. testified that defendant, her father, "was hunching on her private part in front". (T. 869-71). She stated that "his wee-wee" touched her "front private part". (T. 873). This touching was both on the outside and inside of her "private part" and took place on the bed in her father's room. (T. 871-2, 874). S.M. testified that after Defendant finished with her, he took her younger brother, J.M., onto the bed and "hunched" J.M. "in the back part". (T. 875). S.M. stated that she observed Defendant putting his "wee-wee" in J.M.'s "bungie". (T. 876).

S.M. recalled that she was five years old the first time

that Defendant "did anything bad" to her and J.M. (T. 877). She testified that it happened to her again when she was six years old and when she was seven years old. (T. 880-2). S.M. observed it happen again to J.M. when she was six or seven years old. (T. 884). The younger brother, J.M., did not testify at trial.

Upon completion of the closed circuit television testimony, S.M. was taken into the courtroom to identify Defendant for the jury. S.M. identified the defendant, George Lee Myles, as her father. (T. 943-4).

In addition to the trial testimony of S.M., the prosecution introduced, under §90.803(23), Fla. Stat. (1987), hearsay statements made by S.M. to her school teacher, Constance Stone. (T. 240-57, 803-22). S.M. stated that her father treated her "like garbage" and had touched her private parts with "his thing". (T. 819-22).

The childrens' social worker testified that S.M. distanced herself from Defendant and that J.M. was unhappy and distressed when Defendant came to visit them at the Health and Rehabilitative Services (HRS) shelter where they were residing. (T. 957-9).

The prosecution also introduced physical evidence from the Rape Treatment Center where S.M. and J.M. were examined approximately six weeks after S.M. made her initial hearsay

statements. (T. 1067, 1089). A one-centimeter healed tear was observed in the area of J.M.'s anus. (T. 1069-71). An external laceration caused by some type of trauma was found on the outside of J.M.'s rectum. (T. 1074). Two well-healed tears were discovered in S.M.'s hymen, and her hymen was dilated. (T. 1095). S.M. told the examining physician that her father had touched her private parts and put his private part inside of hers on several occasions. (T. 1094).

Several witnesses testified for the defense at trial. (T. 1166-1221). These witnesses testified as to Defendant's reputation for truthfulness, and that they had heard no complaints about his conduct with children. (T. 1167, 1173, 1185, 1190, 1195). The witnesses also described their observations of inappropriate sexual behavior by S.M. (T. 1195-6, 1215).

Defendant testified on his own behalf at trial. (T. 1236-64). He denied committing any of the alleged sexual acts upon S.M. or J.M. (T. 1238). Defendant claimed that S.M. was going along with other people who told her to lie so that she could get out of the foster home where she was living. (T. 1242).

POINT ON APPEAL

WHETHER THE DEFENDANT WAS ALLOWED SUFFICIENT COMMUNICATION DURING THE CLOSED CIRCUIT TESTIMONY OF THE CHILD VICTIM, TRANSMITTED UNDER THE PROVISIONS OF SECTION 92.54(4), FLORIDA STATUTES (1987), SO AS NOT TO DEPRIVE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION?

SUMMARY OF ARGUMENT

Defendant was allowed sufficient communication with his attorney during the closed circuit television testimony of the child victim. Defendant was permitted to communicate, via writing or a bailiff, with his attorney while the child victim testified. Most importantly, Defendant did not object to the absence of electronic communication during the closed circuit television testimony. Furthermore, §92-54(4), Fla. Stat. (1987), states that electronic communication may be utilized, but does not mandate its use. While Defendant did not elect to communicate with his attorney during the direct examination, he did confer with his attorney prior to cross-examination and was not denied his right to counsel or right to confrontation. Finally, any error in the system of communication during the child victim's testimony did not affect the verdict and was harmless beyond a reasonable doubt.

ARGUMENT

THE DEFENDANT WAS ALLOWED SUFFICIENT COMMUNICATION DURING THE CLOSED CIRCUIT TESTIMONY OF THE CHILD VICTIM, TRANSMITTED UNDER THE PROVISIONS OF SECTION 92.54(4), FLORIDA STATUTES (1987), SO AS NOT TO DEPRIVE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION.

Defendant was allowed to communicate with his attorney throughout the closed circuit television testimony of the child victim. A bailiff was assigned to transmit communications from defendant to his attorney within seconds. Defendant had the means at all times of communicating with his attorney. While Defendant did not utilize the method of communication which was arranged, he was not deprived of his right to counsel. Moreover, defendant did consult extensively with his attorney prior to the cross-examination of the child victim. Most significantly, defense counsel did not object to the absence of electronic communication between Defendant and himself; rather, defense counsel stated, "All right Judge.". (T. 852).

Section 92.54(4), Florida Statutes (1987), provides as follows:

> (4) During the child's testimony by closed circuit television, the court may require the defendant to view the testimony from the courtroom. In such a case, the court shall

> permit the defendant to observe and hear the testimony of the child, but shall ensure that the child cannot hear or see the defendant. The judge and defendant and the persons in the room where the child is testifying may communicate by any appropriate electronic method.

The foregoing statute states that electronic communication **may** be employed, but does not mandate the use of electronic communication during closed circuit television testimony.

The use of the discretionary word "may" expresses an unequivocal legislative intent that electronic communication should be permissive, not mandatory. This Court recently addressed this issue of the statutory interpretation of the word "may" as permissive in Burdick v. State, 17 F.L.W. S88 (February 6, 1992), with the following:

> It follows that section 775.084(4)(b), which expressly uses the discretionary word "may," is also permissive as to life sentencing. We are not persuaded by any of the State's arguments that we should construe the word "may" to mean "shall" when in the context of the same subsection we previously held the word "shall" to mean "may."
>
> Burdick at 17 F.L.W. S89.

The interpretation of the "may" in §92.54(4) as mandatory would be inconsistent with the rules of statutory construction followed by this Court.

In a concurring opinion, in Coy v. Iowa, 487 U.S. 1012, 108

S.Ct. 2798, 101 L.Ed.2d 857 (1988), Justice O'Connor cited Section 92.54(4) as one of the state statutes which provided an exception to the right of physical confrontation. As noted by Justice O'Connor, where the case-specific findings of necessity were made by the trial court, "the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." Id. at 487 U.S. 1025, 101 L.Ed. 2d 869. Although Defendant did not choose to communicate with his attorney during the child victim's direct testimony, he did confer with his attorney prior to cross-examination and provided his attorney with several questions to ask S.M. (R. 102-4, T. 896-7). As in Glendening v. State, 536 So.2d 212 (Fla. 1988), cert. denied 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989), Defendant's right to engage in "full and effective cross-examination was not interfered with by his exclusion". Id. at 217.

In D.A.D. v. State, 566 So.2d 257 (Fla. 5th DCA 1990), there was no effort to comply with the requirements of §92.54. In D.A.D., the judge, defense counsel, prosecutor, and victim went into chambers and the victim's testimony was broadcast over a speaker into the courtroom where the defendant remained. D.A.D. was unable to communicate with his attorney during the entire testimony of the victim, thereby denying the defendant of his right to confrontation. That is not the situation here. Defendant could see S.M. as she testified, could hear the questions asked of her by the prosecutor, could hear her

responses to the questions, could observe her demeanor as she testified, could communicate within seconds with his attorney, and did convey information and questions to ask on cross-examination. The decision of the Third District below does not conflict with the decision of the Fifth District in D.A.D.

In Maryland v. Craig, 497 U.S. ____, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the United States Supreme Court analyzed the procedures employed during the closed circuit television testimony of a child victim. In Maryland v. Craig, the child victim, the prosecutor, and the defense counsel withdrew to another room where the child victim was questioned. The trial judge, jury, and defendant remained in the courtroom. The Supreme Court noted the following procedural protections which preserved the defendant's right to confront witnesses:

> We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: the child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies.
>
> 111 L.Ed.2d at 682.

Similar procedural safeguards were employed in this case to protect Defendant's constitutional rights. The victim testified, under oath, in the presence of the trial judge, prosecutor,

defense counsel, clerk, and court reporter. (T. 853-5). Both the Defendant and jury were able to observe the demeanor of the witness throughout direct examination and (after Defendant conferred with his attorney and provided questions), throughout cross-examination. The adversarial testing of the victim through cross-examination was thorough and did not deprive Defendant of either his right to confrontation or right to counsel.

Moreover, there is no reasonable possibility that any error caused by the communication system utilized during the closed-circuit testimony contributed to Defendant's convictions. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Throughout the entire direct testimony of S.M., Defendant made no attempt to communicate with his attorney, either in writing or via the assigned bailiff. Additionally, there was not a single objection during, or a motion for mistrial after, the direct testimony of S.M. (T. 855-96). Furthermore, Defendant conferred with his attorney before cross-examination and provided him with a list of written questions to ask S.M during cross-examination. (T. 896). The questions were marked as Court's Exhibit Number 1, (R. 102-4), and defense counsel stated that he would ask them at the very beginning of the examination, (T. 897), which he did. (T. 900-17). Finally, in addition to the direct testimony of S.M., the prosecution presented the testimony of S.M.'s teacher and the childrens' social worker, as well as physical evidence of sexual abuse from the Rape Treatment Center physician, thus , it

can be said beyond a reasonable doubt that the verdict was not affected by any error in the means of communication. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

CONCLUSION

Based upon the foregoing reasons and citations of authority the decision of the Third District Court should be affirmed.

Respectfully submitted,

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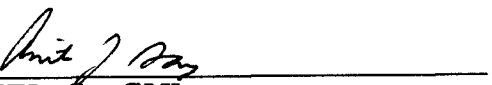
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **HOWARD K. BLUMBERG**, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 6th day of March, 1992.



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