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FILED
SID J. WHITE
JUL 26 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,308

GEORGE MYLES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

BENNETT H. BRUMMER
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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The pertinent facts relevant to a determination of whether discretionary review is warranted are set forth in the opinion of the district court as follows:

> Appellant, George Lee Myles, appeals his conviction and sentence for multiple counts of sexual battery. We affirm.
>
> Appellant contends that the trial court erred: . . . (3) by limiting appellant's access to his attorney during the closed circuit television testimony of the victim . . .
>
> At trial, the child victim testified through closed circuit television from the judge's chambers where the judge, prosecutor, defense attorney and court reporter were present. Meanwhile, appellant, bailiff, and the jury viewed the closed circuit testimony from the courtroom. The trial court advised appellant that, during the child's testimony, he could communicate with his attorney by writing his communication and having the bailiff deliver it to his lawyer. The following discussion took place:
>
> > 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.
>
> 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., Glendenning v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989). Here, rather than allowing communication through a statutorily suggested electronic means, the trial court used a more mundane method, writing.

(A. 1-5).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed July 18, 1991.

SUMMARY OF ARGUMENT

In the present case,the Third District Court of Appeal ruled that Section 92.54(4), Florida Statutes (1987) does not mandate electronic communication between the accused and his attorney during the closed circuit television testimony of a child witness. That ruling expressly and directly conflicts with the ruling by the Second District Court of Appeal in *D.A.D. v. State*, 566 So.2d 257 (Fla. 5th DCA 1990) that Section 92.54(4) requires that the accused and his attorney be permitted to communicate by any appropriate electronic method during the closed circuit testimony of a child witness. Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN *D.A.D. v. STATE*, 566 So.2d 257 (Fla. 5th DCA 1990).

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. *Neilsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960). In the present case, the Third District Court of Appeal announced a rule of law which conflicts with a rule previously announced by the Fifth District Court of Appeal in *D.A.D. v. State*, 566 So.2d 257 (Fla. 5th DCA 1990). As a result, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

Section 92.54, Florida Statutes (1987), which authorizes the taking of the testimony of child witnesses outside of the courtroom and shown by means of closed-circuit television, establishes the following requirement concerning communication between a defendant and his attorney:

> (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.

At the trial in this case, the alleged child victim testified through closed circuit television from the judge's chambers where the judge, prosecutor, defense attorney and court reporter were present. Meanwhile, defendant Myles, the bailiff, and the jury viewed the closed circuit testimony from the courtroom. Notwithstanding the fact that electronic means for communication between George Myles and his attorney had been set up prior to the closed-circuit television testimony of the child witness, the trial judge refused to allow Myles to utilize those means during the testimony. In upholding this ruling by the trial judge, the district court of appeal held that Section 92.54(4) "does not mandate electronic communication" between the accused and his attorney during the closed circuit television testimony of the child witness. (A. 5).

In *D.A.D. v. State, supra*, the defendant was convicted of attempted lewd assault on a child. At the request of the prosecutor, the alleged child victims were permitted to testify at trial outside the presence of the defendant. The judge, counsel and the witness went into chambers and the witness's testimony was broad-cast over a speaker into the courtroom where the defendant was required to remain.

On appeal, the conviction was reversed based upon the trial court's failure to comply with the requirements of Section 92.54, Florida Statutes (1987). One of the statutory violations

found by the district court was the failure to provide electronic means of communication between the defendant and the persons in the room where the child was testifying:

> Further, the judge failed to insure that he and the persons in the room where the child was testifying and the defendant could communicate by any appropriate electronic method as required by Section 92.54(4), Florida Statutes (1987).

D.A.D. v. State, supra, 566 So.2d at 258.

The ruling in the case at bar by the Third District Court of Appeal that Section 92.54(4) does not mandate electronic communication between the accused and his attorney during the closed circuit television testimony of a child witness expressly and directly conflicts with the ruling by the Second District Court of Appeal in *D.A.D.* that Section 92.54(4) requires that the accused and his attorney be permitted to communicate by any appropriate electronic method during the closed circuit testimony of a child witness. Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 24th day of July, 1991.

_____
HOWARD K. BLUMBERG
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO.

GEORGE MYLES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

_____/

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

GEORGE MYLES, **

Appellant, **

vs. ** CASE NO. 88-961

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed June 18, 1991.

An Appeal from the Circuit Court for Dade County, Arthur Rothenberg, and Arthur Snyder, Judges.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Anita J. Gay, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and JORGENSON, and GERSTEN, JJ.

ON MOTION FOR REHEARING AND/OR CLARIFICATION

GERSTEN, Judge.

On appellant's motion for rehearing and/or clarification, we withdraw the opinion filed April 9, 1991, and substitute the following opinion in its stead. Appellant, George Lee Myles, appeals his conviction and sentence for multiple counts of sexual battery. We affirm.

Appellant contends that the trial court erred: (1) by denying appellant's request to represent himself; (2) by admitting hearsay statements of a child victim, without the requisite findings of reliability; (3) by limiting appellant's access to his attorney during the closed circuit television testimony of the victim; and (4) by allowing one witness to comment on the credibility of another witness.

PRETRIAL HEARINGS

Prior to trial, the court considered various motions by appellant: to dismiss three successive lawyers appointed to represent appellant; to allow appellant to represent himself; or, in the alternative, to allow appellant to act as co-counsel. The judge determining that appellant was not capable of representing himself, made appellant co-counsel with his attorney.

After granting a mistrial, the court revisited the issue of appellant representing himself, and saliently inquired of appellant:

The Court: You think you could get along without a lawyer?

Appellant: Not by myself, no, I couldn't.

Appellant's first issue presents no error. Even if a defendant requests to represent himself, the right of self-representation may be waived through subsequent conduct indicating that he is vacillating on the issue, or has abandoned his request altogether. Brown v. Wainright, 665 F.2d 607 (5th Cir. 1982); Johnson v. State, 427 So.2d 1103 (Fla. 3d DCA 1983).

The trial court also heard testimony on the State's notice to rely on statements made by a child victim pursuant to Section 90.803(23), Florida Statutes (1989). This statute allows a child victim's hearsay statement of sexual abuse. However, the court

must find that the time, contend, and circumstances of the statement provide sufficient safeguards of reliability. Perez v. State, 536 So.2d 206 (Fla. 1988), cert. denied, ____ U.S. ____, 109 S.Ct. 3253, 106 L.Ed.2d 599 (1989).

In order to arrive at a finding of reliability, the court should take into account: the mental and physical age and maturity of the child; the nature and duration of the abuse; the relationship of the child to the offender; and the reliability of the child and the child's assertion. Perez v. State, 536 So.2d at 206.

Here, the court heard testimony from Miss Stone, the victim's teacher, who detailed the nature and circumstances surrounding the victim's statements. Based upon the teacher's testimony, the court found:

> The Court: Court finds that as to Miss Stone, the circumstances surrounding it, the age, the nature and duration of abuse and reliability of Miss Stone is accurate. There was no basis for her not to be accurate. Court is going to allow the testimony of Miss Stone as hearsay.

Again, we find no error. Simply stated, the State met the statutory requirement of notice, and the trial court met the statutory requirement by making findings of reliability.

Additionally, no contemporaneous objection was made regarding the trial court's findings. Accordingly, "we need not decide whether the trial court's findings contained the specificity required." Sanders v. State, 568 So.2d 1014 (Fla. 3d DCA 1990).

TRIAL

At trial, the child victim testified through closed circuit television from the judge's chambers where the judge, prosecutor, defense attorney and court reporter were present. Meanwhile, appellant, bailiff, and the jury viewed the closed circuit testimony from the courtroom. The trial court advised appellant that, during the child's testimony, he could communicate with his attorney by writing his communication and having the bailiff deliver it to his lawyer. The following discussion took place:

> 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.
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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:

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> 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.

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We turn to appellant's last alleged error. The prosecutor endeavored to have the victim's social worker comment on the victim's veracity. After several objections to questions on the victim's veracity, the prosecutor finally obtained the following statement:

Prosecutor:	Are you familiar with [the victim] ever telling you any lies?
Answer:	No, I am not.

No objection was made after this question and answer, and therefore, the issue was not preserved for review. See Castor v. State, 365 So.2d 701 (Fla. 1978).

In addition to the failure to preserve the issue, we find that any error which resulted from the question and answer was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The goal of a trial court is to conduct a fair and impartial trial. To accomplish that goal, the trial court does not need omniscient vision, but rather, a reasonable application of the law. Here, the trial court did apply the law in a reasonable fashion, and, therefore, we find no error.

Affirmed.