W00A 047

IN THE SUPREME COURT OF FLORIDA

RICHARD EARL WALKER, :

Petitioner, :

vs. : Case No. 78,759

STATE OF FLORIDA, :

Respondent. :

_____ :

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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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ISSUE I

WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANT OF KIDNAPPING?

The State's case-in-chief failed to establish prima facie cases of kidnapping under this court's three-pronged Faison[1] test. In its answer brief, the State erroneously contends granting a judgment of acquittal is a "discretionary matter" for the trial court.[2] To the contrary, Florida Rule of Criminal Procedure 3.380(a) states:

> If, at the close of the evidence for the State or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant, shall, enter a judgment of acquittal. (emphasis added)

Granting a motion for judgment of acquittal is not discretionary when the State fails to establish a prima facie case. In the Interest of T.M.M., 560 So.2d 805, 807 (Fla. 4th DCA 1990); Taylor v. State, 446 So.2d 213 (Fla. 4th DCA 1984) ("When the State fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt, the case should not be submitted to the jury and a judgment of acquittal should be granted.").

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[1] Faison v. State, 426 So.2d 963 (Fla. 1983).

[2] "It is a discretionary matter for the trial court to render a judgment of acquittal." (answer brief page 12).

The State also erroneously contends this court should consider Mr. Walker's own defense testimony to determine whether the State established prima facie cases of kidnapping. However, in State v. Pennington, 534 So.2d 393 (Fla. 1988), this court expressly prohibited the State from relying upon a defendant's evidence to supply the missing essential elements of a prima facie case. A defendant does not waive a motion for judgment of acquittal made at the close of the State's case-in-chief by introducing evidence in his own defense. Florida Rule of Criminal Procedure 3.380(b); Pennington, 534 So.2d at 395-396; Killingsworth v. State, 584 So.2d 647, 648 (Fla. 1st DCA 1991).

At the close of the State's case-in-chief, Mr. Walker made a timely motion for judgment of acquittal specifically arguing the State failed to establish prima facie cases of kidnapping under the three-pronged Faison test. (R 78-89) At the close of all the evidence, Mr. Walker properly renewed his same motion for judgments of acquittal on the kidnapping charges. (R 119)

Therefore, the State may not rely upon Mr. Walker's defense testimony to supply the missing essential elements of kidnapping. See, Pennington. The District Court of Appeal's majority opinion erroneously considers Mr. Walker's defense testimony to supply the missing essential elements for prima facie cases of kidnapping.[3] However, under Pennington, this court may not consider Mr. Walker's

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[3] "Appellant admitted that he made this demand in order to enable him to escape.
In light of that admission, we believe it became a factual question, which the jury decided against appellant..." (emphasis added) Walker v. State, 585 So.2d 1107 (Fla. 2d DCA 1991).

testimony when determining whether the state established four prima facie cases of kidnapping.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to William I. Munsey, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 14 day of April, 1992.

Respectfully submitted,

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