W00A

87

THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER 79,162

THIRD DISTRICT COURT OF APPEAL CASE NUMBER 91-191

RAFAEL JOSE PUERTAS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee,

APPELLANT'S REPLY BRIEF

The following is an appeal from the opinion given by the Third District Court of Appeal on the 24th day of December, 1991.

MIGUEL SAN PEDRO, ESQUIRE
Law Offices of Miguel San Pedro, P.A.
Attorney For Appellant,
Four Ambassadors
Tower III, Suite 1246
825 South Bayshore Drive
Miami, Florida 33131
(305) 373-8211

CASE NUMBER 79,162

TABLE OF CONTENTS AND CITATIONS

CASE NUMBER 79,162

TABLE OF AUTHORITIES

Authorities — Pages

CASES

STATUTES

CASE NUMBER 79,162

STATEMENT OF THE ISSUES

1. The trial Court erred by:

   (i) denying defense counsel's continuing Motion In Limine to exclude witnesses hearsay testimony at trial with reference to Y.P.'s out of Court statements, which testimony constituted unfair and prejudicial bolstering of the child's in-Court testimony;

   (ii) allowing the State Attorney to introduce a video taped interview and also allow the child to testify as to the allegation contained therein, thereby unfairly bolstering the child/victim's credibility.

2. The trial Court erred in denying defense counsel's Motion For Judgement of Acquittal as there is insufficient evidence to convict the appellant of Count II and III of the Information; Sexual Battery by penetrating the vagina of the child/victim, Y.P., with the use of his fingers and/or hand.

CASE NUMBER 79,162

REPLY ARGUMENTS AND CITATIONS OF AUTHORITIES

ISSUE NUMBER 1

The trial Court erred by:

(i) denying defense counsel's continuing Motion In Limine to exclude witnesses hearsay testimony at trial with reference to Y.P.'s out-of-court statements, which testimony constituted unfair and prejudicial bolstering of the child's in Court testimony;

(ii) allowing the State to introduce a video taped interview and also allow the child to testify as to the allegation contained therein, thereby **unfairly bolstering** the child/victim's credibility.

In response to the respondent's brief, initially, it is undisputable from the record that the undersigned counsel clearly raises an objection to the prejudicial nature of evidence presented at the trial of this matter on October 16th, 1990, to wit:

> "I am anticipating, your Honor, that with this questions Ms. Weintraub seeks to enhance the credibility of the child and I would ask in a Motion in Limine to protect the record to request that the child's testimony or credibility not be bolstered unless it has been thoroughly attacked. At this point it has not occurred." (T. Vol. Oct. 16, 1990, P. 37).

Therefore, the appellee's contention that "the issue on appeal involves only the propriety of a vel non of the order" is in error.

In addition, it is unknown why the appellee, in its answer, attempts to limit the appellant's position solely to whether the hearsay statements were admissible or not, as the appellant's first issue is whether the hearsay statements **constituted unfair and prejudicial bolstering** not admissability as hearsay. The appellant does not question whether the statements were admissible or not, pursuant to Fla. Stat. §90.803 (23). The appellant questions whether the repetition of the hearsay was prejudicial and only intended to bolster the child's credibility. This court recently decided the dame issue in State v. Pardo, 17 F.L.W. S194, the prior consistent statements of a child prosecutrix cannot be excluded as hearsay, but are subject to analysis under section §90.403. Therein this court stated, "Thus the defendant can move for exclusion of the evidence under section §90.403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence."

In the instant case, at pretrial hearing before the Honorable Arthur Rothenberg and on October 16th, 1990, when the undersigned counsel made the above mentioned objection, the court failed to consider the possible danger of the introduction of the prior consistent statements through numerous witnesses. Therefore, the court failed to make a finding that the testimony to be presented subsequently would not pose the danger of unfair prejudice, confuse

of the issues, mislead the jury, or just be the needless presentation of cumulative evidence, even though the undersigned counsel raised an objection to same. Judge Carney even sustained the objection as "repeating," and later reversed his ruling when the prosecution commented that this had been heard by Judge Rothenberg at the pre-trial hearing. (Oct. 17, 1990, T. Page 40, Line 7 through 17).

The undersigned concurs with the appellee conclusion on page 12 of the answer brief, that there is no appreciable distinction between the instant case and Pardo, other than that in this case the evidence was admitted at trial and in Pardo the testimony was not admitted. In addition, the trial court determined that all the witnesses' testimony met the criteria of subsection §90.803 (23), but the court never applied the prejudice test in §90.403, when counsel raised the above objection. The trial court limited its consideration of the defendant's objection solely to the scope of §90.803 (23) and did not consider the prejudicial nature of the cumulative testimony.

This honorable Court must reverse the verdict rendered at the trial court, pursuant to this court's decision in State v. Pardo, 17 F.L.W. S194; _____ So.2d_____, (Fla. 1992).

CASE NUMBER 79,162

ISSUE NUMBER II

The trial Court erred in denying Defense Counsel's Motion For Judgement of Acquittal as there is insufficient evidence to convict the appellant of Count II and III in the Information, of Sexual Battery by penetrating the vagina of the child/victim, Y.P., with the use of his fingers and/or hand.

The State claims the erroneous position that the child's representation that the defendant touched her inside her "pipi" or "totico" is sufficient evidence to survive a defense Motion For Judgement of Acquittal. Florida Statute §794.011 (1)(h), has been interpreted as requiring penetration by a finger or other object when the charge does not direct itself to any oral, anal, or vaginal union with the penis. State v. Allen, 519 So. 2d 1076 (Fla. 1st DCA 1988), Furlow v. State, 529 So. 2d 804 (Fla. App. 1st Dist. 1988), Firkey v. State, 557 So. 2d 582 (Fla. App. 4 Dist. 1989). Wallis v. State, 548 So. 2d 808 (Fla. App. 5 Dist. 1989).

In Furlow v. State, 529 So. 2d 804 (Fla. 1st DCA 1988), the Court. citing the definition of "sexual battery" under section 744.011 (1)(h), Florida Statutes, opined:

> Under the above definition, mere "union with" the victim's vagina is insufficient because an object other than the defendant's [sexual] organ was used. See State v. Allen, 519 So. 2d 1076 (Fla. 1st DCA

> 1988). The State was therefore required to prove that the defendant penetrated the victim's vagina with his finger. Id. at 805.

The State to support the child's claim used the testimony of Dr. Valerie Rao, a state expert witness in the field of forensic medicine. Through this witness the prosecutor presented at trial the presence of healed tears, approximately three centimeter wide, in the child's hymen, which was otherwise intact. At no point and time were said tears ever attributed to any act of the defendant, nor could the origin of the tears be determined with any medical certainty. The Jury was left to guess that the defendant was the one who inflicted this injury upon the child. During cross examination, Dr. Rao admitted, at page 167, line 20 through 24, of the trial transcript, that there was no evidence of penetration by the penis and there was no evidence of **any** penetration whatsoever.

Also supporting our contention is the decision of Wallis v. State, where the Court stated:

> As distinguished from the "union" of the defendant's sexual organ with the victim's vagina "by" the defendant's hand, finger, or any other object the mere "union" of the defendant's hand or finger " with" the victim's vagina does not violate this statute....

In light of the foregoing, it is evident that the State's position is erroneous, as the prosecution must prove that penetration took place and that the defendant was the one that did

it without any inconclusive inferences. Clearly the state failed to meets its burden of proof in showing the defendant violated F.S. §794.011, by penetrating the vagina of the child with the use of his sexual organ or any other object. The trial Court also failed to recognize the State's failure, and therefore, improperly and without due consideration denied the defendant's Motion For Judgment of Acquittal at the close of the State's case. The defense motion was renewed at the close of the defendant's case, and also in the defendant's Motion For New Trial as to Count two and three of the Information.

CONCLUSION

It view of the foregoing arguments and authorities listed herein, the appellant requests this Court to grant the defendant a new trial and reverse the lower Court's decision denying defendant's Motion For Judgment of Acquittal as to Count II and III of the Information.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY**, that a true and correct copy of the foregoing reply brief was furnished the Clerk of the Court, State of Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399, Office of the Attorney General, Joan L. Greenberg,

Esquire, P.O. Box 013241, Miami, Florida 33101, by United States Mail this 19th day of May, 1992.

Respectfully submitted,

MIGUEL SAN PEDRO, ESQUIRE
Attorney For Appellant
Four Ambassadors
Tower III, Suite 1246
825 South Bayshore Drive
Miami, Florida 33131
(305) 373-8211