ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,415

STATE OF FLORIDA,

Petitioner,

v.

ROMEO CIFUENTES,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI REVIEW

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PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Romeo Cifuentes was the Defendant below and will be referred to as "Respondent." The State will be referred to as "Petitioner." References to the record will be preceded by "R." References to the supplemental record will be preceded by "SR."

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts in its initial brief.

JURISDICTIONAL STATEMENT

Petitioner disagrees that cases that have been denied certiorari review in the United States Supreme Court are necessarily unaffected by this Court's decision. See Morales v. State, 580 So. 2d 788 (Fla. 3d DCA 1991)(declining to enforce mandate where district court opinion was superseded by intervening decision of Florida Supreme Court).

Petitioner respectfully asks that this Court decide this issue as soon as possible given the very large number of cases affected by this claim.

SUMMARY OF THE ARGUMENT

I & II

Taken alone, or properly considered with the complete, approved, standard instructions given at the end of trial, the unobjected to preliminary comments on reasonable doubt were an accurate statement of the law. The reasonable doubt standard does not require absolute or one hundred percent certainty. Absolute or one hundred percent certainty is an impossibility. The trial judge's comments were not error, fundamental or otherwise.

ARGUMENT

ISSUE I (RESTATED)

THE TRIAL COURT'S UNOBJECTED TO PRELIMINARY COMMENTS ON REASONABLE DOUBT, MADE BEFORE THE JURY WAS SELECTED OR SWORN, WERE NOT ERROR.

Respondent suggests that the trial court's giving of the standard, approved instruction at the end of trial was meaningless (Respondent's brief p. 7-8). Respondent's suggestion is simply without basis in logic or the law. In Higginbotham v. State, 19 So. 2d 829, 830 (Fla. 1944), this Court held:

> It is a recognized rule that a single instruction cannot be considered alone, but must be considered in light of ***all*** other instructions bearing upon the subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail (emphasis supplied).

In his initial comments, the trial judge incorporated by reference the complete, approved instruction on reasonable doubt (SR2 21-24). The complete, approved instructions on reasonable doubt were given immediately before the jury began deliberations. It is difficult to comprehend a more appropriate time for the jury to hear such an instruction. Interestingly, Respondent concedes that the trial judge's supposedly improper comments were remediable by a proper curative instruction. Petitioner does not

agree that the trial judge's comments were improper. Still, it is difficult to imagine a better "curative" instruction than the complete, standard, approved instruction on reasonable doubt given at the end of this case and incorporated by reference into the trial judge's comments.

Petitioner relies on its initial brief for further argument on this issue.

ISSUE II (RESTATED)

THE TRIAL JUDGE'S UNOBJECTED TO PRELIMINARY COMMENTS ON REASONABLE DOUBT, MADE BEFORE THE JURY WAS SELECTED OR SWORN, WERE NOT FUNDAMENTAL ERROR.

Respondent suggests that it improperly reduces the level of proof required, to state that a reasonable doubt is a doubt to which a reason can be attached (answer brief p. 13). Respondent's contention is incorrect. See Victor v. Nebraska, 511 U.S. ___, 114 S. Ct. 1329, 127 L. Ed. 2d 583, 597 (1994)(a reasonable doubt at a minimum, is one based upon reason). The standard jury instructions also make it clear that a reasonable doubt is not a possible, speculative, imaginary, or forced doubt (R 558-59).

Respondent's claim that the trial judge's comment violated judicial neutrality, is ridiculous (answer brief p. 15). The comment was a correct statement of the law. The fact that a correct instruction or statement benefits one party does not make it a violation of judicial neutrality.

Respondent claims that the trial court's statement that nothing is 100 percent certain, destroyed his defense (answer brief p. 17). This claim is without merit. The comment was a correct statement of the law.

In Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. Nov. 7, 1995), the Fourth District distinguished Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991) because in that case the Court also gave extensive and proper jury instructions on reasonable doubt and presumption of innocence. Petitioner argued in in the Fourth District and in its initial brief in this Court that the Fourth District's distinction was illusory. In this case and in Jones, the trial judge gave the complete, approved, standard instructions on reasonable doubt and presumption of innocence. See McInnis v. State, 671 So. 2d 803, 804 (Fla. 4th DCA 1996)(acknowledging that the standard instructions were given in Jones).

The Third District has recently confirmed the correctness of Petitioner's position. In Doctor v. State, Case no. 95-2395 (August 14, 1996), prior to the commencement of voir dire, the trial court gave extemporaneous instructions on reasonable doubt to the venire. The Defendant claimed that the extemporaneous instruction minimized the reasonable doubt standard and constituted fundamental error. As in this case, the Defendant did not raise any error as to the formal jury instructions at the close of evidence. The Third District affirmed, holding:

We adhere to our decision in Freeman v.

> State, 576 So. 2d 415 (Fla. 3d DCA 1991), and hold that 'the giving of the instruction does not rise to the level of fundamental error . . . ." Freeman, 576 So. 2d at 416.
>
> We decline Doctor's invitation to follow Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), rev. denied, 663 So. 2d 632 (Fla. 1995), as we find it antithetical to our holding in Freeman.

Petitioner also notes the "special concurrence" in Doctor specifically and completely agreed with State's position that 1) the trial judge's comments not erroneous, 2) if erroneous, were not harmfully so in light of the complete instructions given at the end of trial, and 3) if harmfully erroneous, were not fundamentally so since they could have easily been corrected upon objection and in no way affected the validity of the trial. Slip op. at pp. 3-4.

The "special concurrence" in Doctor was signed by a majority of the sitting members of the Court. Accordingly, it is law of the case. See Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980). This Court should approve the Third District's "special concurrence" and disapprove Jones.

CONCLUSION

The number of cases affected by the Fourth District's decision in Jones is huge and continues to grow. The decision is without support in the law. The trial judge's comments were not erroneous. This Court should reverse this case and disapprove the decision in Jones as soon as possible.

Respectfully submitted,

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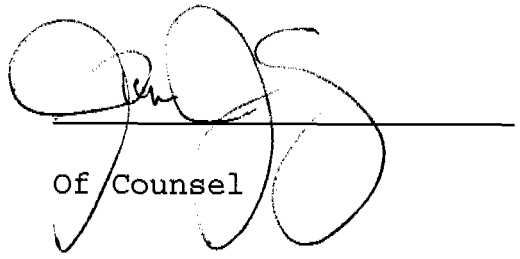
Certificate of Service

I CERTIFY that a true copy has been furnished by courier to Allen DeWeese, 9th Floor Governmental Center, 310 North Olive Ave., W. Palm Beach, FL 33401, this 20 day of August 1996.



Of Counsel

95-191653-F

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1996

DONNIE HUGH DOCTOR, **

Appellant, **

vs. ** CASE NO. 95-2395

THE STATE OF FLORIDA, ** LOWER TRIBUNAL NO. 94-8554

Appellee. **

Opinion filed August 14, 1996.

An Appeal from the Circuit Court for Dade County, Leonard E. Glick, Judge.

Samek & Besser and Lawrence Besser, for appellant.

Robert A. Butterworth, Attorney General, and Fleur J. Lobree, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and LEVY and SHEVIN, JJ.

SHEVIN, Judge.

Donnie Hugh Doctor appeals convictions for armed robbery, aggravated battery, and possession of a firearm. We affirm.

During Doctor's trial, prior to the commencement of voir dire, the trial court gave extemporaneous instructions on reasonable doubt to the jury venire. Defense counsel did not object.

Doctor argues on appeal that the extemporaneous instruction minimized the reasonable doubt standard and rises to the level of fundamental error. Doctor does not raise any error as to the formal jury instructions at the close of the evidence.

We adhere to our decision in Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991), and hold that "the giving of the instruction does not otherwise rise to the level of fundamental error . . . ." Freeman, 576 So. 2d at 416.

We decline Doctor's invitation to follow Jones v. State, 656 So. 2d 489 (Fla. 4th DCA), review denied, 663 So. 2d 632 (Fla. 1995), as we find it antithetical to our holding in Freeman. Therefore, we affirm Doctor's convictions.

Affirmed.

LEVY, J., concurs.

Doctor v. State
Case no. 95-2395

SCHWARTZ, Chief Judge (specially concurring).

In my opinion, the remarks to the jury in this case, in our previous cases of Freeman v. State, 576 So. 2d 415 (Fla. 3d DCA 1991) and Perez v. State, 639 So. 2d 200 (Fla. 3d DCA 1994), and in the line of Fourth District decisions which began with Jones v. State, 656 So. 2d 489 (Fla. 4th DCA 1995), review denied, 663 So. 2d 632 (Fla. 1995), cert. denied, 116 S.Ct. 1451 (1996),[1] were

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not erroneous, Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); Jones, 656 So. 2d at 491 ("At bar, the trial judge's instructions were accurate as

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[1] Accord Reyes v. State, 674 So. 2d 921 (Fla. 4th DCA 1996); Variance v. State, ___ So. 2d ___ (Fla. 4th DCA Case no. 94-3019, opinion filed, January 3, 1996) [21 FLW D79], review granted (Fla. Case no. 87,916, July 19, 1996); Cifuentes v. State, 674 So. 2d 743 (Fla. 4th DCA 1996); Poole v. State, 674 So. 2d 746 (Fla. 4th DCA 1996); McInnis v. State, 671 So. 2d 803 (Fla. 4th DCA 1996); Pierce v. State, 671 So. 2d 186 (Fla. 4th DCA 1996), review granted (Fla. Case no. 87,862, July 1, 1996); Bove v. State, 670 So. 2d 1066 (Fla. 4th DCA 1996), cause dismissed, ___ So. 2d ___ (Fla. Case no. 88,168, June 6, 1996); Wilson v. State, 668 So. 2d 998 (Fla. 4th DCA 1995), review granted, 672 So. 2d 543 (Fla. 1996); Frazier v. State, 664 So. 2d 985 (Fla. 4th DCA 1995), review denied, 666 So. 2d 145 (Fla. 1995), cert. denied, 116 S.Ct. 1679 (1996); Rayfield v. State, 664 So. 2d 6 (Fla. 4th DCA 1995), review denied, 664 So. 2d 249 (Fla. 1995), cert. denied, 116 S.Ct. 1421 (1996); Jones v. State, 662 So. 2d 365 (Fla. 4th DCA 1995), review denied, 664 So. 2d 249 (Fla. 1995), cert. denied, 116 S.Ct. 1421 (1996).

far as they went."); and

2.

if erroneous, were not harmfully so in the light of the complete, and completely accurate instructions repeatedly given the jury on the burden of proof issue, particularly at the most critical time immediately before its deliberations. Esty v. State, 642 So. 2d 1074 (Fla. 1994), cert. denied, 115 S.Ct. 1380 (1995); Higginbotham v. State, 155 Fla. 274, 276-77, 19 So. 2d 829, 830 (1944)("[A] single instruction cannot be considered alone but must be considered in light of all other instructions bearing upon the same subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail."); and

3.

if harmfully erroneous, were not fundamentally so since they could easily have been "corrected" upon objection and in no way affected "the validity of the trial itself." See State v. Delva, 575 So. 2d 643, 644 (Fla. 1991); Castor v. State, 365 So. 2d 701 (Fla. 1978); Brown v. State, 124 So. 2d 481 (Fla. 1960).

Cardozo has described the process which I believe may have led to the Fourth District's contrary decisions:

Judges march at times to pitiless conclusions under the

> prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.

Benjamin Cardozo, The Growth of the Law, in Selected Writings of Benjamin Nathan Cardozo 214 (Margaret E. Hall ed. 1947). I concur without reservation in this Court's continued refusal to do the same.

LEVY, Judge, concurs.