IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,954

DONNIE DOCTOR,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 Northwest 14th Street
Miami, Florida 33125
(305) 545-1961

ROSA C. FIGAROLA
Assistant Public Defender
Florida **Bar** No. 358401

Counsel for Petitioner

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,954

DONNIE HUGH DOCTOR,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Appellee.

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

INTRODUCTION

This a petition for discretionary review after the Third District Court of Appeal expressed conflict with the Fourth District Court of Appeal decision in ***Jones** v. **State,*** 656 ***So.*** 2d 489 (Fla. 4th DCA), *rev, denied, 663 So.* 2d 632 (Fla. 1995). References to the transcript of proceedings are designated "T" and references to the record are designated" R" ,

STATEMENT OF THE CASE

The Third District Court of Appeal issued the following order in the instant case:

> Donnie Hugh Doctor appeals convictions for armed robbery, aggravated batter, 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 instructions 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),** rev. denied, 663 So. 2d 632 (Fla. 1995), **as** we find **it** antithetical to our holding in Freeman. Therefore, we affirm Doctor's convictions.

Doctor v. State, 677 So. **2d** 301 (Fla. 3d DCA **1996).**

Petitioner filed a timely notice to invoke this Court's discretionary jurisdiction to review conflicts among the district courts of appeal. This Court has accepted jurisdiction and dispensed with oral argument.

STATEMENT OF THE FACTS

Donnie Doctor was convicted of armed robbery, aggravated battery, and possession of **a** firearm. His defense at trial was misidentification. The prosecution established that Bereket Sibhatu was working at a convenience store at approximately 9:30 p.m. on December 27, 1993, when two men walked into the store. (T. 257-260). One man walked towards the left side of the register by the surveillance camera (T. 262) and one man placed a drink on the counter. (T. 261, 290). Sibhatu described the man who placed the drink on the counter as 5'6" tall, weighing approximately 155 pounds, light skinned, clean shaven and wearing a baseball cap. (T. **261,** 290).

The man at the counter pulled a gun and instructed Sibhatu not to move. (T. 263). The other man walked behind the counter and put a gun to Sibhatu's head. (T. 264). Sibhatu was not able to see the second man's face. (T. 264). Sibhatu gave the men the money from the cash register at which point the second man demanded the money from the safe. (T. 264-265). Sibhatu did not have the key to the safe. (T. 265).

The second man instructed Sibhatu to open the room where the surveillance equipment was kept. (T. 267-268). Sibhatu responded he did not have the key and the man hit Sibhatu with his firearm. (T. 267-268). The second man then fired two shots at the door containing the surveillance equipment in an attempt to open the door. (T. 268). The door did not open and the two men fled the store. Sibhatu called the police. (T. 269).

A latent fingerprint belonging to Donnie Doctor was lifted from the front counter area. (T. 318, 366). The fingerprint examiner was unable to establish when the latent was left on the counter. (T. 366). A photographic display containing Donnie's photograph was prepared and shown to Sibhatu. (T. 318). Sibhatu did not identify Donnie Doctor as either of the men who robbed him. (T. 318, 270). A second photographic display containing a photograph of Donnie was shown to Sibhatu several weeks later. (T. 322, 271). During the second photographic lineup, Sibhatu identified Donnie as the man standing in front of the counter. (T. 271, 322).

Sibhatu did not identify Donnie as the man who robbed him during the trial.[1] Sibhatu's account of the robbery was also called into question by police testimony that there were no casings or other evidence of gunshots being fired in the store. (T. 316).

At the conclusion of the prosecution's case, the defense presented evidence on Donnie's behalf. David Neal, an employee of the City of North Miami for twenty years testified that he had known Donnie his entire life. (T. 372-376). Mr. Neal disputed Sibhatu's identification of Donnie as his assailant by testifying that Donnie was 5'11' tall and weighed approximately 200 pounds, (T. 286, 372). Sibhatu had described his assailant as 5'6" to 5'7" tall and weighing 155 pounds. (T. 286). Sibhatu had also testified that his assailant had no facial hair. (T. 286). Mr. Neal testified that at the time of the incident, Donnie had a moustache and beard. (T. 375).

Mr. Neal **also** testified that Donnie could not have committed the robbery because Donnie was with him when the robbery was committed. Mr. Neal stated he remembered the day because it was the Monday after Christmas and he had taken his daughter to the doctor. (T. **381).** At approximately 4:00 p.m. a friend of Mr. Neal's and Donnie began helping Neal with yard work while Neal barbecued left over food from the Christmas meals. (T. 383). Several friends and family members came over the Neal house to visit. (T. 383-384). Donnie finished racking Neal's house at approximately 6:00 or 7:00 p.m. (T. 385). He went home but came back to spend time with Neal's daughter. (T. 385). At approximately 9:30 or 10:00 p.m., Mr. Neal

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[1]He was also unable to identify Donnie as the man who robbed him during a pretrial motion to suppress hearing. (T. 23).

told Donnie it was time to leave. (T. 385). Neal saw Donnie visiting the front neighbors and then went to bed. (T. 385).

The defense also presented the testimony of Jean Morisset to explain the presence of Donnie's fingerprint in the store. Mr. Morisset testified that Donnie accompanied him to Play world to buy a present one day before the incident. (T. 401-403). On the way to Play world, Morisset and Donnie had stopped at the convenience store to buy cigarettes. (T. 404). The cigarettes were located in the front counter area, the same area where Donnie's latent prints were lifted. (T. 404).

SUMMARY OF THE ARGUMENT

Petitioner asserts that the Third District of Appeal incorrectly concluded that the trial judge's extemporaneous instructions on reasonable doubt were not fundamental error in the instant case. The prosection's case was not overwhelming and the trial judge's remarks, which served to minimize the importance of reasonable doubt and could have been interpreted as shifting the burden to the defendant to prove reasonable doubt, could have affected the jury's deliberations and weighing of the evidence.

ARGUMENT

THE TRIAL COURT ERRED IN HOLDING THAT THE TRIAL COURT'S EXTEMPORANEOUS INSTRUCTION TO THE JURY PANEL REGARDING THE DEFINITION OF REASONABLE DOUBT WAS NOT FUNDAMENTAL ERROR IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

Petitioner asserts that the following extemporaneous instructions from the trial judge violated his constitutional rights to a fair and impartial jury:

> In order to overcome the presumption of innocence that stays with this defendant through this trial and establish guilt it's not enough to furnish evidence tending to prove guilt or prove a mere probability of guilt.
>
> I think he's guilty is not good enough. You must be convinced beyond and to the exclusion of every reasonable doubt. That's the standard of law that we apply to criminal cases.
>
> **Unlike Perry Mason, for those of you who grew up with Perry Mason, there is no such concept as beyond a shadow of a doubt. That's something writers made up because it sounds good.**
>
> The Government has to prove their case beyond and to the exclusion of a reasonable doubt. **It's not beyond all doubt whatsoever. There's nothing in life that is beyond all doubt. It's not to a hundred percent mathematical certainty. Cause that's an impossible burden.** It's beyond an to the exclusion of a reasonable doubt. And what that means, what the law says a reasonable doubt is will be explained to you at the end of the case.
>
> It's not what I think it is or what you think it is, it's what the law says it is. It's part of the law that you will have to use whether or not you agree with it or not.
>
> The term close now enough for Government work doesn't apply in criminal cases. The State has to meet that burden

> in order for you as a juror to find the defendant guilty.
>
> If they fall below that burden than you cannot find the defendant guilty by law. **But you can't require the State to go over that burden necessarily.**
>
> **You can't say well you have to prove this case to me beyond all doubt whatsoever or I'm never going back with a guilty verdict. That' not the standard that applies here.**

(T. 95-96).

In ***Wilson v. State,*** 22 Fla. L. Weekly S2 (Fla. December 26, 1996), this Court held that instructions similar to the ones made by the trial judge in the instant case, were "ambiguous to the extent that it might have been construed as either minimizing the importance of reasonable doubt or shifting the burden to the defendant that reasonable doubt existed." ***Id.*** at S3. This court ultimately concluded that error had not resulted because the trial judge had given the standard jury instructions at the close of the case and instructed the jury that it was required to follow the standard jury instructions. *Id.* at S3; ***See also*** *State v. Variance,* 22 Fla. Law **Weekly** S35a (Fla. December 26, 1996). The facts of this particular case bring it outside the rationale of ***Wilson.***

The sole issue in this case was whether Donnie Doctor's identification as the assailant had been established beyond a reasonable doubt. The prosecution's case was not overwhelming. Mr. Sibhatu had failed to identify Donnie as his assailant during two *court* proceedings and had failed to identify Donnie from the first photographic line up. Sibhatu's account of the robbery was also called into question by police testimony which refuted Sibhatu's claim that one of the assailant fired two

shots while in the store. Additionally, Sibhatu's description of his assailant **as** 5'6 to 5'7 inches tall conflicted with Donnie's height which Mr. Neal testified was 5'11" tall.

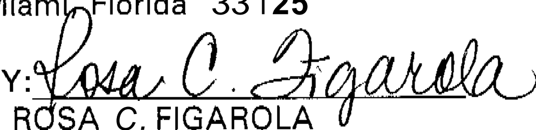
Moreover, the defense presented credible and uncontested evidence explaining the presence of Donnie's fingerprint at the store. The defense also presented credible testimony that Donnie could not have committed the robbery because Donnie was at the Neal residence when the robbery was committed. Under these set of circumstances, **it** is impossible to determine whether the jury could have considered the trial judge's extemporaneous instructions when weighing the evidence and making its determination of Donnie's guilt. Accordingly, the extemporaneous instructions vitiated the trial's integrity and must be considered fundamental error.

CONCLUSION

Based on the foregoing facts, authorities and arguments, appellant respectfully requests this Court to quash the decision **of** the Third District Court of Appeal and remand Mr. Doctor's **case** with instructions that he be granted **a** new trial.

Respectfully submitted,

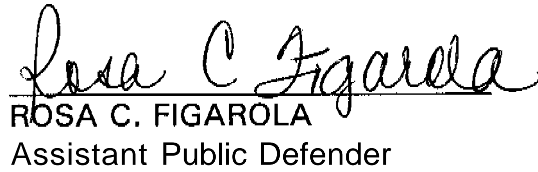
BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125



BY: ______________
ROSA C. FIGAROLA
Assistant Public Defender
Florida Bar No. 358401

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 12th day of May, 1997.



ROSA C. FIGAROLA
Assistant Public Defender