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IN THE SUPREME COURT OF FLORIDA

KEVIN WALTER PENDER, et al.,

Petitioners,

V. CASE NO. 89,619

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS

The State submits the following additions/corrections to Pender's Statement of the Case and Facts:[1]

T. P. testified at trial that her father, Clarence, and her uncle, Kevin, had sex with her on several occasions when she was in the fourth grade. (T. 42,56). She explained that her father pulled down his pants and she took off her clothes; she was then told to lay down on the bed, and Clarence put his penis inside her and moved up and down on top of her. (T. 50-52). Clarence told T. not to tell anybody. (T. 52).

T. also testified that while at her grandparent's house Kevin had sex with her in his room. She explained that Kevin put his private part in hers, got on top of her, and moved up and down. (T. 57-58).

As part of the investigation of these incidents, T. was examined by Dr. Penelope Tokarski, a pediatrician who works for the Child Protection Team. (T. 247).[2] Tokarski performed a general

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[1]In this brief, the symbol "R1" will be used to designate the record on appeal for Kevin Pender. "R2" will designate the record for Clarence Pender. "T" will designate the transcript contained in Kevin's record on appeal.

[2]For the Court's convenience, a copy of Tokarski's testimony and the proceedings relating to it (T. 246-84) is included in the Respondent's Appendix.

physical exam as well as a genital exam. (T. 252-53). In performing the latter exam, Tokarski used a colposcope, a binocular-like instrument which magnifies the area to be examined and allows for the detection of small abnormalities. (T. 253).

Tokarski found on T. a whitish scar which extended from just outside her hymen to her outer genital lips. (T. 255). A yellowish cyst was also present in that area. (T. 255). Tokarski drew a diagram for the jury which compared a "normal" genital area with T.'s. (T. 256-57).

Tokarski concluded that the injury was caused by blunt trauma to the outer genitals. (T. 260). Although Tokarski could tell that the injury was more than five days old, she could not determine its origin. (T. 261). Tokarski admitted on cross-examination that the injury could have been caused by masturbation or by falling on a blunt object. (T. 276-77).

Tokarski also found a discharge at the opening of T.'s vagina. (T. 255). This discharge was tested, and Tokarski determined that T. had chlamydia, a sexually transmitted disease. (T. 262-65). Tokarski concluded that T. had been exposed to sexual activity. (T. 268).

Both Clarence and Kevin testified at trial, and both denied T.'s accusations. (T. 423, 448). They also stated that they

almost never saw T. and did not spend time alone with her. (T. 424-26, 446-47). The defendants' father, mother, and sister corroborated this testimony, as did Clarence's oldest son, who lived with his grandparents. (T. 313-18, 359-60, 373-76). Both Clarence and Kevin tested negative for chlamydia when examined at the jail nearly a year after T. reported the abuse.[3] (T. 411-12).

Upon learning of the alleged discovery violation in this case, the trial court conducted a lengthy bench conference. The court explored the circumstances surrounding the alleged violation and the possible prejudice to the defense. The court determined that no prejudice had been demonstrated at that time, but if the photograph ultimately proved to be exculpatory this would form a valid basis for a new trial. (T. 270-76). Neither defendant alleged any exculpatory value in their motions for a new trial. (R1. 121-22; R2. 94-95).

After remand by this Court, the district court found that the State's failure to produce the photograph was harmless beyond a reasonable doubt, as the record reflected the photograph couldn't

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[3]A person who had chlamydia would test negative in a culture test once he or she had been treated with an antibiotic. (T. 266-27).

have been helpful to the defense even if produced before trial. Pender v. State, 682 So. 2d 1161 (Fla. 5th DCA 1996).

SUMMARY OF ARGUMENT

The defendants' convictions and sentences should be upheld by this Court. Even assuming the Richardson hearing conducted in this case was deficient in some way, any error was harmless. First, the record reflects that there was no discovery violation by the State. Moreover, even if there was a violation it is clear that the defendants were in no way prejudiced in their trial preparation or strategy by the failure to provide the photograph.

ARGUMENT

THE DISTRICT COURT PROPERLY FOUND THAT ANY DEFICIENCY IN THE RICHARDSON HEARING WAS HARMLESS ERROR.

On direct appeal, the district court found that the trial court committed per *se* reversible error in failing to conduct a sufficient inquiry into the defendants' claim that the State failed to produce a photograph. Pender v. State, 647 So. 2d 957, 958 (Fla. 5th DCA 1994). This Court subsequently determined that such error could be harmless in some circumstances and remanded for a determination by the district court as to whether this was such a case. State v. Pender, 661 So. 2d 304 (Fla. 1995).

After remand, the district court concluded the error was in fact harmless, as the record reflected that the defendants were clearly not prejudiced in their pretrial preparation. Pender, 682 So. 2d at 1162. This determination should be approved by this Court. The district court properly applied the harmless error test to the facts of this case.

In Richardson v. State, 246 So. 2d 771, 774 (Fla. 1971), this Court held that a violation of a rule of procedure, such as a discovery rule, does not require a new trial 'unless the record discloses that non-compliance with the rule resulted in prejudice

or harm to the defendant." The Court then stated that the trial court has the discretion to determine the appropriate sanction for a rule violation, but noted that such discretion may be properly exercised only after the court has 'made an adequate inquiry into all the surrounding circumstances," including whether the violation was inadvertent or wilful, trivial or substantial, and whether the violation impeded the defendant's ability to prepare for trial. Id. at 775.

In this case, the alleged discovery violation involved a photograph. Dr. Tokarski, a Child Protection Team pediatrician, conducted a physical examination of the victim, T. P. Tokarski testified that in conducting her examination she used a colposcope, a binocular-like instrument which magnifies the area to be examined and allows for the detection of small abnormalities. (T. 253).

Tokarski stated that T. had a whitish scar and a cyst in her genital area. (T. 255). She then drew a diagram of this injury, comparing the appearance of T 's genital area with the appearance of a "normal" area. (T. 256-57). The defendants objected to this diagram, stating that "the best evidence would be the photographs, which we don't have." (T. 256). This objection was overruled.

Tokarski testified that T 's scarring was caused by blunt trauma to her outer genitals. (T. 260). Although Tokarski could tell that the injury was more than five days old, she could not determine its origin. (T. 261). Tokarski admitted that the injury could have been caused by masturbation or by falling on a blunt object. (T. 276-77).

On cross-examination, Tokarski stated that the colposcope has the ability to take a photograph, and she did in fact take a photograph in this case. (T. 269). Tokarski discussed the photograph with the prosecutor, but she did not give it to him. (T. 270).

After eliciting this information, defense counsel requested a bench conference, which request was granted. (T. 270). At that time, counsel argued that the State had committed a discovery violation in failing to provide the defendants with the colposcope photograph. The trial court then conducted an inquiry into the circumstances surrounding the alleged nondisclosure of the photograph and the possible prejudice to the defense. (T. 270-76).

This bench conference, while never explicitly labeled a Richardson hearing, effectively illuminated the factors deemed relevant to such an inquiry. Most importantly, the inquiry

revealed that in fact no discovery violation had taken place and there was no prejudice to the defense.[4]

It is obvious from the record that the defendants were fully aware of the existence of the photograph before trial. In fact, defense counsel stated that before trial he had prepared a subpoena duces tecum specifically *requesting the* ***photograph.*** (T. *270,* 272). Whether this subpoena was actually served is not clear from the record. It is clear, however, that the defense never sought to force Dr. Tokarski to comply with the subpoena, nor did they ever even bring the issue to the court's attention before trial. (T. 274).

It is also apparent from the record that the State fully complied with its discovery obligations. Under the rules of criminal procedure, the prosecutor has the obligation to disclose to the defendant certain specific information, including:

-- the names and addresses of persons with information relevant to the offense;

-- statements of any of the above persons;

-- statements of the defendant or co-defendants;

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[4]The trial court even made a specific finding that there had been no discovery violation on the part of the State (T. 273), although it noted that the State could avoid such problems by just giving the defendant a complete list of every single thing it has. (T. 274-75).

-- tangible objects which were obtained from the defendant;

-- reports or statements of experts, including the results of examinations and of scientific tests; and

-- any tangible papers or objects which the prosecutor intends to use at trial.

Fla. R. Crim. P. 3.220(b)(1).

The record in the present case reveals that the prosecutor fully complied with this discovery obligation. (R1. **27-28;** R2. 14-16). The defense was informed that the State had physical evidence and reports of experts; Dr. Tokarski was disclosed as a State witness over seven months before trial, and she was deposed by the defendants nearly four months before trial. (R1. 27, 74; **R2. 15).**[5]

The disclosure discussed above fully satisfied the State's discovery obligation. Under the rules the photograph at issue did not have to be provided to the defense, since the prosecutor never intended to use it at trial.

As courts have stated on numerous occasions, the rules of discovery are not meant to relieve defense counsel from doing its own preparation. The defendants were aware of the photograph in this case, and they could have acquired it had they chosen to do

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[5]While the transcript of the deposition reveals no mention of the photograph, this was because the defendants chose not to ask about it, not because there was any deception on the doctor's part.

so. There was no discovery violation, and accordingly no relief is warranted. Cf. Banks v. State, 590 So. 2d 465, 467 (Fla. 1st DCA 1991) (no discovery violation where defendant could have made further inquiry to determine extent of statement), rev, denied, 599 So. 2d 654 (Fla. 1992); Johnson v. State, 545 So. 2d 411, 412 (Fla. 3d DCA) (no discovery violation where rules did not require disclosure), rev. denied, 551 So. 2d 461 (Fla. 1989).

At most, then, the defense raised at trial a potential Brady claim -- if the photograph would have shown something defense experts could have capitalized on or would have shown that Dr. Tokarski's conclusions were erroneous, then the State had an obligation to provide the photograph as potential exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1963).

However, given the lack of any evidence that the photograph was in any way exculpatory,[6] as well as the defendants' actual knowledge of its existence and its ability to acquire the

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[6]The trial court specifically stated that Dr. Tokarski could continue to be examined as to the photograph and whether her description and diagram of what she saw were different from the photograph. The court also noted that if it turned out the photograph had some benefit this issue would form a basis for a motion for new trial, (T. 272-76).

Nevertheless, counsel did not even attempt to demonstrate that Tokarski's testimony was in any way inconsistent with the photograph, nor did counsel allege any exculpatory value in their motions for a new trial. (T. 276-84; R1. 121-22; R2. 94-95).

photograph through the exercise of due diligence (that is, through enforcing its subpoena of Dr. Tokarski), this claim must also fail. See Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993); Williams v. State, 662 So. 2d 437, 438 (Fla. 5th DCA 1995) (rejecting Brady claim where defense acquired same evidence from different source).

Finally, even if there was a discovery violation in this case, and even if the trial court's inquiry into this alleged violation was in some manner deficient, a new trial is still not warranted, as the district court properly found that any error was harmless. In addressing this issue, the appellate court must determine whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense -- that is, whether the defendant's trial preparation or strategy would have been materially different had the violation not occurred. State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995). The record in the present case reveals that this harmless error test was met.

It is clear that any discovery violation by the State was inadvertent and trivial. The State's explanation for its failure to provide the photograph revealed that there was no intention to hide anything. The prosecutor assumed the defense would acquire the photograph through its subpoena duces tecum and had nothing to do with Dr. Tokarski's alleged failure to comply with the subpoena.

Further, the State never sought to introduce the photograph because the jury would not understand it anyway.

More importantly, the record reveals that the defense was in no way prejudiced by the failure to provide the photograph, as the record clearly reflects that the defendants' trial preparation and strategy were not affected by the photograph's absence.' First, because the State never attempted to introduce the photograph into evidence, the defendants cannot claim they were in any way unprepared for or surprised by the evidence at trial. In fact, Tokarski never even mentioned the photograph until defense counsel asked her about it.

Counsel's vague statement that without having the photograph he was not able to consult with experts as to that part of the defense does not establish prejudice. The record reflects that the defendants were well aware of Tokarski's findings, as they deposed her months before trial, and they were well aware of the existence

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'Contrary to the defendants' argument, the trial. court did not find that it lacked the ability to make a determination as to prejudice. Rather, viewing the comments in context, the court found that the defense had not demonstrated any prejudice at that point in time, as there was no demonstration that the photograph showed anything different from what the doctor had drawn and described. If the defendants could show that the photograph was somehow impeaching of that testimony (a showing the defendants did not even attempt), then the court's finding would change. (T. 273-76).

of the photograph before trial, yet counsel chose not to enforce compliance with the subpoena. They obviously did not believe they needed the photograph in order to effectively plan their case.[8]

Tokarski was extensively and effectively cross-examined as to her findings, and she affirmatively admitted that the injury she saw could have been caused by something other than sexual battery, such as masturbation or falling on a blunt object. Counsel were clearly fully prepared for the doctor's testimony.

More importantly, the defendants basically conceded that T. had been in sexual contact with someone -- after all, she had chlamydia when she was 9 years old.[9] The only real question in this case was who that someone was. Dr. Tokarski's testimony shed little light on this issue, and in fact her testimony was used in the defendants' favor, since they both tested negative for chlamydia.

There is no reasonable possibility that the failure to provide the colposcope photograph procedurally prejudiced the defense in its trial preparation or strategy. To remand for a new trial would

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[8]In fact, even after the photograph was discussed at trial, counsel never demanded that it be produced, nor did they ever ask for additional time to investigate the issue further. (T. 270-76).

[9]Accordingly, even if the photograph showed no scarring whatsoever, sexual abuse was still clearly established.

elevate form over substance -- which is exactly what the Schopp harmless error rule was designed to eliminate.

While the defendants rely on the statement in Schopp that a finding of harmlessness will be the exception, rather than the rule, "exception" does not mean "never." If harmless error will ever be found, it will be found in cases such as this.

The trial court's inquiry provides at least a fairly complete explanation of what happened in discovery. The defendants unquestionably knew about the "undisclosed" evidence. This evidence was not introduced at trial, and it related to a tangential part of the testimony of a witness who added little to the real question in this case -- who abused T.

This case is clearly distinguishable from other cases wherein discovery violations were found to be harmful. See McArthur v. State, 671 So. 2d 867 (Fla. 4th DCA 1996) (discovery violation not harmless where undisclosed physical evidence would totally undermine defense of consent); Tarrant v. State, 668 So. 2d 223, 224-26 (Fla. 4th DCA 1996) (discovery violation not harmless where State failed to disclose tape-recorded admissions by defendant to police officer); T.P. v. State, 656 So. 2d 951 (Fla. 1st DCA 1995) (discovery violation not harmless where State failed to disclose defendant's confession); Sears v. State, 656 So. 2d 595 (Fla. 1st

DCA 1995) (discovery violation not harmless where State failed to disclose statements of defendant to victim); Mason v. State, 654 So. 2d 1225, 1226-27 (Fla. 2d DCA 1995) (discovery violation not harmless where State failed to disclose statements of defendant to witness). This case is, indeed, the exception.

The rules of discovery were "designed to furnish a defendant with information which would bona fide assist him in the defense of the charge against him. [They were] never intended to furnish a defendant with a procedural device to escape justice." Richardson, 246 So. 2d at 774. The defendants' convictions and sentences should be affirmed in this case, as any Richardson error was harmless. Cf. Bateman v. State, 566 So. 2d 358, 359 (Fla. 4th DCA 1990) (affirming conviction where State failed to disclose photograph; defendant knew about photograph, it was never used at trial, and there was no indication that content was exculpatory); Huffman v. State, 472 So. 2d 469, 472 (Fla. 1st DCA 1985) (affirming conviction where State failed to disclose photograph; defendant was aware of existence of photograph, person who had photograph was available for deposition, and there was no intent to use photograph at trial until necessitated by defense case), rev. denied, 482 So. 2d 348 (Fla. 1986).

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court approve the decision of the district court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief on the Merits has been furnished to Noel A. Pelella, Assistant Public Defender, by delivery to the Public Defender's Basket at the Fifth District Court of Appeal, this 12th day of May, 1997.

Kristen L. Davenport
Counsel for Respondent

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KEVIN WALTER PENDER, et al.,

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STATE OF FLORIDA,

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RESPONDENT'S APPENDIX

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