IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

Vs. CASE NO. 90,493

JOHN WEBER,

Respondent

RESPONDENT'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent has the following corrections to the State's version of the facts.

Polygraph operator Smith was not so certain as the State implies at page 4 of its brief, that he told Respondent he could stop the test at any time. He testified that he believed he told Respondent that.

Respondent did not contradict himself as to whether he would be charged if he confessed (pp. 13-14 of State's brief). His entire answer at T274 is that they never discussed charges because they told him he wouldn't be charged.

Patricia Cummins made it sound on direct examination as though Respondent admitted doing things to R.S. (T957-958). On cross-examination she conceded that he never said he had abused R.S. or touched him or had sex with him. Nor did he say he had a sexual abuse problem. There was no explicit admission of any sort (T966-969).

POINTS INVOLVED

II. DID THE COURT ERR IN EXCLUDING PROFFERED TESTIMONY THAT THE ALLEGED VICTIM WAS MAD AT RESPONDENT FOR ATTEMPTING TO CURB HIS SEXUAL ACTIVITY WITH AN ELEVEN YEAR OLD GIRL?

III. DID THE COURT ERR IN EXCLUDING EVIDENCE THAT THE MOTHER OF THE ALLEGED VICTIM WAS IN DOUBT AS TO RESPONDENT'S GUILT SINCE THAT IS INCONSISTENT WITH HER LATER CLAIM THAT RESPONDENT CONFESSED TO HER?

IV. DID THE COURT ERR IN REFUSING TO ALLOW THE ALLEGED VICTIM TO BE REDEPOSED AFTER THE STATE AMENDED THE CHARGES TO INCLUDE NEW TIME PERIODS?

ARGUMENT POINT II

THE COURT ERRED IN EXCLUDING PROFFERED TESTIMONY THAT THE ALLEGED VICTIM WAS MAD AT RESPONDENT FOR ATTEMPTING TO CURB HIS SEXUAL ACTIVITY WITH AN ELEVEN YEAR OLD GIRL

Respondent pointed out in his initial brief why the cases cited by the State do not support exclusion of this additional motive for R.S. to lie. The defense was totally prevented from exploring the depth of the relationship with the eleven year old and that violated Delaware v. VanArsdall, 475 U.S. 673 at 679, 106 S.Ct. 1431 at 1435, 89 L.Ed.2d 674 (1986).

Respondent is pleased by the State's concession that R.S. was well-impeached in other regards, but that did not save the conviction in Lewis v. State, 591 So.2d 922 (Fla. 1991). It should not save this conviction either.

If the State is suggesting by its footnote 12 at page 24 and its argument in the second full paragraph on page 26 that the trial Judge rejected the proffer to protect Respondent's position, it is plainly mistaken. The Judge gave no such reason for rejecting the proffered evidence, and would have overstepped her position if she had. It is defense counsel's job to determine what evidence should be offered in defense of his client. The Judge should not second guess defense counsel during the trial.

As Respondent demonstrated in his initial brief, there were flaws in all of his alleged confessions. The fact that the jurors came back to ask for R.S.'s testimony and statements shows how critical his credibility was and that the error in its limitation was not harmless.

ARGUMENT POINT III

THE COURT ERRED IN EXCLUDING EVIDENCE THAT THE MOTHER OF THE ALLEGED VICTIM WAS IN DOUBT AS TO APPELLANT'S GUILT SINCE THAT IS INCONSISTENT WITH HER LATER CLAIM THAT APPELLANT CONFESSED TO HER

The State seems to want to answer a different point. It claims the defense had to ask the mother if she ever told any of her friends that Respondent did not confess to her. Because the defense did not ask her that, the State claims any proffered impeachment lacks a predicate. That is not responsive to Respondent's point. A witness can be impeached by what she doesn't say as well as what she does say, Raupp v. State, 678 So.2d 1358 at 1360 (Fla. 5DCA 1996).

Respondent demonstrated in his initial brief that impeachment on the basis of inconsistent conduct is valid impeachment. See e.g. Stewart v. State, 42 Fla. 591, 28 So. 815 (1900). When he attempted to raise that issue with the mother, the State's objection was sustained (T924-925). Thereafter, Respondent proffered the testimony which would have impeached her. He did all that was necessary to preserve this point.

The fact that an assistant attorney general can think of possible though implausible reasons why the mother might still have doubts days after hearing Respondent say he did it (see footnote 15, pages 31 and 32 of its brief), does not make the exclusion of this evidence any less erroneous. The explanation, if any, should have come from the witness, and the credibility of her explanation should have been submitted to the jury for its determination.

The vehemence of the Judge's ruling does not make it correct. Respondent was not asking the witness whether she believed her son. He was asking about her own credibility, and that was a proper line of inquiry.

What was said in Point II about the State's harmless error argument applies here as well. There was no evidence so compelling in the rest of the State's case that this Court can say the improper disallowance of impeachment is harmless beyond a reasonable doubt. It must be noted that the State's reference to other admissions allegedly made to the mother (p. 30 of its brief) were being heard by the defense for the first time at trial on a proffer. The defense objection was sustained (T874-884).

ARGUMENT POINT IV

THE COURT ERRED IN REFUSING TO ALLOW THE ALLEGED VICTIM TO BE REDEPOSED AFTER THE STATE AMENDED THE CHARGES TO INCLUDE NEW TIME PERIODS

As the State notes, Respondent wanted R.S. brought in for a third time for a deposition. However, the prior two times he came in were really just one deposition. The assistant public defender who began the deposition had to terminate with the State's consent because of a conflict of interest (SR74-75). Appointed counsel concluded the deposition (SR78-169).

Respondent had no notice at the time that the details of uncharged offenses R.S. described would become so critical. It was an abuse of discretion to allow the State to amend as it did and not allow the defense to prepare. There is no substitute for knowing the answer before defense counsel asks the question with the jury present.

CONCLUSION

The new trial awarded to Respondent should be approved regardless of what this Court does on point one, because he was not allowed proper impeachment of R.S. or his mother and because he was not allowed to redepose R.S. after the amended information changed the dates.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to CELIA TERENZIO, ESQUIRE and ETTIE FEISTMANN, ESQUIRE, Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, 3rd Floor, West Palm Beach, Florida, 33401-2299, by U.S. Mail, this 7th day of August, 1997.

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