IN THE SUPREME COURT OF FLORIDA

STANLEY RIDER,

Petitioner,

v. CASE NO. 95,060

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF **APPEAL**

RESPONDENT'S RRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CERTIFICATK OF FONT AND TYPE SIZE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF FACTS

The State submits the following additions/corrections to Rider's Statement of the Case and Facts:

The victim in this case, A[redacted] K[redacted], was 12 years old at the time the incident took place, and 13 years old at the time of trial. (T. 29, 31).

A[redacted] testified that on April 19, 1997, Stanley Rider was staying at her house in New Smyrna Beach. (T. 30-31). At around 5:30 that morning, Rider came into her bedroom. Although she had been sleeping, she woke up when she heard the door, and she opened her eyes enough to identify Rider as the person who entered. A[redacted] was certain it was Rider who came in the room, as she could tell it was him from his face as well as the shape of his body. (T. 35-37).

A testified that Rider laid on her bed and began touching her in her vaginal area. She told him to stop, but he didn't. (T. 37-38). Rider took off his pants and underwear, then removed A's shorts. He laid on top of her and put his penis inside her vagina. The incident lasted quite a while, and Rider eventually got up and left. (T. 38-39).

After Rider left, A[redacted] got up to leave the room. Rider then came back in the room and told A[redacted] to get back down on the bed. A[redacted] cried out for help, but Rider told her to be quiet. (T. 39-42). A[redacted] was afraid that Rider might hurt her. (T. 41-42).

Rider rolled A[redacted] onto her stomach and put his penis inside her anus. A[redacted] testified that it hurt when he did this. (T. 41). He eventually stopped and asked A[redacted] if she hated him. A[redacted] replied that she did, and he got up and left the room, taking his clothes. (T. 42-43). A[redacted] put her clothes back on and went to sleep, scared and tired. (T. 43).

A[redacted] was 4'11 and weighed 102 pounds. (T. 63). Rider was 6' and weighed 180 pounds. (T. 157). A[redacted]'s bed was against the wall, and Rider laid on the outside of the bed -- A[redacted] would have had to crawl over him to get away. (T. 68).

A[redacted] didn't tell anyone about the incident the next morning because she was scared. (T. 44). After spending the day with Bruce,[1] another friend who was staying with them, she eventually confided in him, and the incident was reported to the police. (T. 45-46).

A[redacted] was taken to the hospital and an examination was performed on her that evening. The doctor testified that there was redness and irritation present in the area of A[redacted]'s thighs, buttocks, and vulva; she also discovered dried semen secretions there. (T. 82).

The doctor found a bloody and tender tear in A[redacted]'s hymen. (T. 82). No tearing was present in her anus, but the doctor did find dried semen secretions in that area. (T. 83).

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[1] Bruce was back up north by the time of trial, and Andrew Nichols was unable to get in touch with him. (T. 122).

The doctor testified that the laceration in A[redacted]s vagina was of recent origin -- within the last 24 hours. (T. 83-84).

Rider admitted to police that he had slept in A[redacted]s bed the night of the crime, but he claimed that nothing sexual took place. (T. 133-38). Rider asserted that he slept with A[redacted]that night because Andrew Nichols, the owner of the house, told him to. (T. 133).

Nichols denied Rider's claim, testifying that he never told Rider to *go* sleep with A[redacted]and that in fact Rider was instructed to sleep on the couch. (T. 118-19). A[redacted]s mother confirmed this testimony. (T. 92, 94-95).

Nichols had a little dog when the incident took place, but she was friendly and loved everyone. (T. 110-11). She would only bark if she didn't know someone or if something odd happened. (T. 123). Both Nichols and A[redacted]s mother were heavy sleepers, and they slept with their bedroom door closed. (T. 95, 111, 119).

Rider was convicted of two counts of lewd and lascivious assault on a child. (T. 234; R. 89).

On appeal, the district court rejected Rider's claims of insufficient evidence and error in witness sequestration; the court also found that his challenge to one of his probation conditions was not properly preserved for appeal. Rider v. State, 724 So. 2d 617 (Fla. 5th DCA 1998).

SUMMARY OF ARGUMENT

ISSUE I: Rider failed to argue below the grounds now being raised on appeal, and accordingly any issue regarding the trial court's ruling on his motion for judgment of acquittal has been waived. In any event, there was substantial competent evidence to support the verdicts, and the trial court propesly denied Rider's motion.

ISSUE 11: Any due process issue regarding the trial court's denial of Rider's request that the victim's mother be excluded from the courtroom has been waived by the failure to specify this argument below. In any event, the record shows that the trial court did not abuce its discretion in allowing the mother to be present in the courtroom and in allowing the State to determine its own order of presentation of witnesses. At worst any error was harmless.

ISSUE 111: Any error regarding the trial court's imposition of the statutorily required special condition of probation has been waived by Rider's failure to object below. In any event, the condition imposed is not unconstitutionally vague, applying a common sense reading to the terms used, nor is it unconstitutionally overbroad, given its limiting language.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED RIDER'S MOTION FOR JUDGMENT OF ACQUILTAL.

As his first point on appeal, Rider contends that the trial court erred in denying his motion for judgment of acquittal. First of all, this Court need not consider this claim, as there is no asserted conflict between the district court's resolution of this issue and any other case.[2]

Should this Court exercise its discretion to consider this claim, the State submits that it should be rejected, as Rider's argument was not properly preserved for appeal and is refuted by the record.

A motion for judgment of acquittal "must fully set forth the grounds on which it is based." Fla. R. Crim. P. 3.380(b). Here, Rider's motion set forth no grounds -- he merely stated as follows:

> I do not believe the evidence has been substantiated to support either charge, Most specifically the second charge which deals with anal penetration. The evidence involved in that is negligible at best and I do not feel there's enough evidence in either case to allow this to go forward to the jury.

(T. 149, 165).

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[2] As Rider admits in his preliminary statement (Petitioner's Brief at p. vii), the only issue on which jurisdiction was sought in this Court was Issue III, involving the probation condition.

Rider now arguec that the trial judge erred by denying the motion for a judgment of acquittal because there was insufficient evidence of the identity of the defendant as the perpetrator -- merely the self-contradictory testimony of the child-victim.

It is respectfully submitted that the trial court cannot be faulted for committing error on the JOA motion on the legal argument now being raised for the first time on appeal. No argument was made below regarding the allegedly self-contradictory testimony of the child-victim nor the child's identification of Rider as the perpetrator.

A bare bones motion for judgment of acquittal, such as the motion in the present case, does not allow a defendant to raise on appeal every possible insufficiency in the evidence. Rider's specific attacks on the sufficiency of the State's case were not properly preserved below and should therefore be rejected. See, e.g., Archer v. State, 613 So. 2d 446, 447-48 (Fla. 1993); Hardwick v. State, 630 So. 2d 1212, 1213 (Fla. 5th DCA 1994). Showers v. State, 570 So. 2d 377, 378 (Fla. 1st DCA 1990).[3]

Moreover, even if this claim had been properly preserved, it should still be rejected as without merit.

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[3] Of course, where there is a lack of *any* prima facie proof to support the charges, an appellate court may reverse a conviction under the principle of fundamental error. See, e.g., O'Connor v. State., 590 So. 2d 1018, 1019 (Fla. 5th DCA 1991). This is clearly not the case here, as there was ample evidence to support the charges.

A motion for judgment of acquittal admits not only the facts in evidence, but every reasonable inference from the evidence favorable to the State. See, e.g., Proko v. State, 566 So. 2d 918, 920 (Fla. 5th DCA 1990). The credibility and probative force of conflicting testimony may not be determined on a motion for judgment of acquittal, and such a motion may only be granted where there is *no* view of the evidence which can sustain a conviction. Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974); Hardwick, 630 So. 2d at 1213.

Here, the State clearly produced sufficient evidence to support the jury's verdicts, and Rider's argument to the contrary should be rejected.

The child-victim specifically identified Rider as the person who came into her room that morning, and she testified in detail as to how he placed his penis in her vagina and then her anus. (T. 30, 35-43). In addition, there was corroborating physical evidence establishing that the sexual abuse took place -- the victim's hymen was recently torn, and there were semen secretions present in her vaginal and anal area. (T. 82-84).

While Rider attacks the victim's credibility, points out inconsistencies in the witness' testimony, and argues that the victim would have cried out for help or the dog would have barked had the incident really happened, these are arguments which are properly made to a *jury*, not to an appellate court.

Viewing the evidence in the light most favorable to the State, the trial court properly submitted this case to the jury and the jury properly resolved these evidentiary conflicts in favor of the State, finding Rider guilty as charged. Rider's first argument on appeal should therefore be rejected by this Court.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE VICTIM'S MOTHER TO BE PRESENT IN THE COURTROOM.

Rider next contends that the trial court erred in denying his request that the victim's mother either be excluded from the courtroom or required to testify first in the State's case. Again, this Court need not consider this claim, as there is no asserted conflict between the district court's resolution of this issue and any other case.

Should this Court exercise its discretion to consider this claim, the State submits that it should be rejected, as Rider's argument was not properly preserved for appeal and is refuted by the record.

In order for an argument to be adequately preserved for appeal, the legal basis for the argument at the trial court level must be the same as the legal basis for the claim of error at the appellate level. Terry v. State, 668 So. 2d 954, 961 (Fla. 1996); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Here, Rider objected to the mother's presence in the courtroom and requested that the court order her to testify first. (T. 16-20, 75-77). However, he never claimed below that the denial of his request violated his due process rights under the state and federal

constitutions, as he claims now. Accordingly, this specific argument has been waived.

Even to the extent this claim was properly preserved below, it should still be rejected as without merit.

As Rider admits, the rule of witness sequestration is certainly not absolute. te, 609 So. 2d 600, 606 (Fla. 1992). Further, there is no dispute that the mother of the victim had a constitutional and statutory right to be present during her child's testimony, as well as the rest of the trial. Art. I, § 16(b), Fla. Const.; §90.616(2)(d), Fla. Stat. (1997). There is also no dispute that this right must yield to the defendant's right to a fair trial. See Gore v. State, 599 So. 2d 978, 985-86 (Fla.), cert. denied, 506 U.S. 1003 (1992).

This Court has plainly stated that the trial court has the discretion to resolve any conflict between the right of the victim to be present and the right of the defendant to avoid having a witness' testimony influenced by hearing the tectimony of others. Id. at 986. In making this determination, the trial court must consider whether the defendant will be prejudiced by the witness' exclusion from the rule of sequestration. Gore, 599 So. 2d at 986. Cf. Wright v. State, 473 **Co**. 2d 1277, 1280 (Fla. 1985) (explaining that prejudice results where a witness' testimony is affected to the extent that "it substantially differed from what it would have

been had the witness not heard the testimony"), cert. denied, 474 U.S. 1094 (1986).

Here, the trial court specifically considered the question of prejudice, and the defendant offered no reason to believe that he would in any way be prejudiced by the mother's presence during the testimony of other witnesses. (T. 20). The simple fact that the mother would be testifying after hearing other witnesses certainly does not establish prejudice, as this is true of *any* witness excluded from the sequestration rule. In the absence of any further argument as to prejudice, the trial court certainly acted within its discretion in allowing the mother to be present.

Additionally, the record in no way indicates any change in the mother's testimony as a result of her presence. In fact, she specifically *disagreed* with her daughter as to several aspects of her testimony -- whether she was drunk the night of the crime, whether she saw her daughter that morning, even the specifics of what the house looked like and whether they had a close relationship which would allow her daughter to willingly reveal such an incident. (T. 92, 96-97, 99-101, 106-08, , 111-12). If she was apt to change her testimony, she certainly would have done so to make her version of events more in line with her daughter's, not less *so.*

The State further notes that the mother was specifically told that she was not allowed to speak with anyone about their

testimony, and there is no indication she violated this instruction. (T. 112).

The record clearly reflects that the trial court acted within its discretion in allowing the mother to remain in the courtroom, where there was no prejudice to the defendant in excluding this witness from the sequectration rule. In light of the lack of any prejudice, then, there was no reason to force the State to rearrange its case and have the mother testify first. While this would be a reasonable solution in a case where the victim's presence was prejudicial, it is certainly not a required arrangement any time the victim wants to be present, and accordingly it was not required here. Rider has shown no abuse of discretion, and his second argument on appeal should be rejected.

Finally, even if the trial court should have excluded the mother from the courtroom, Rider has failed to satisfy his burden of showing that the trial court's ruling constituted harmful error. See §924.051(7), Fla. Stat. (1997). In light of the overwhelming evidence of Rider's quilt, as well as the lack of prejudice from the mother being in the courtroom, as discussed above, the trial court's ruling constituted at worst harmless error.

ISSUE III

ANY ISSUE REGARDING THE IMPOSITION OF THE STATUTORXLY REQUIRED SPECIAL CONDITION OF PROBATION HAC BEEN WAIVED BY RIDER'S FAILURE TO OBJECT BELOW.

Rider finally contends that the trial court erred in imposing a statutorily required special condition of probation. As Rider admits, however, there was no contemporaneous objection when the trial court imposed this special condition of probation. (R. 10-11). Further, Rider never challenqed this condition through a 3.800(b) motion after sentencing.

Accordingly, this issue has been waived from appellate review. See Maddox v. State, 708 *So.* **2d** 617 (Fla. 5th DCA), rev. aranted, No. 92,805 (Fla. July 7, 1998). In Maddox, the district court ruled en *banc* that only sentencing errors which have been properly preserved can be raised on direct appeab. This includes any sentencing errors which previously may have been labeled "fundamental." The State contends that this is a correct interpretation of the recent changes to the appellate process encompassed in the Criminal Appeal Reform Act.

The scope of these changes has been addressed in detail in numerous briefs before this Court. For the sake of this Court's time, the State will not reiterate these arguments in detail here, but rather adopts its arquments as set forth in its brief in Maddox v. State, case # 92,805, presently pending before this Court.

In sum, the appellate system has become more and more clogged with sentencing errors which were either raised for the first time on direct appeal or were not even raised at all by appellate counsel but were simply apparent on the record. In an effort to combat this obvious waste of scare appellate resources, the legislature passed the Criminal Appeal Reform Act, codified in section 924.051, Florida Statutes, and this Court adopted Florida Rule of Criminal Procedure 3.800(b).

These changes were specifically designed to ensure that sentencing errors are dealt with initially in the proper forum for correction of such errors -- the trial court. Only if the trial court fails to correct such errors may they be dealt with by the courts of appeal -- the errors must first be properly preserved below.

The Reform Act has already led to multiple exceptions and interpretations -- exceptions which are so far-reaching as to effectively swallow the rule. Eliminating such exceptions in their entirety is the only effective means to ensure consistent application of the preservation requirement and to place the responsibility for sentencing back where it belongs -- in the trial courts. The State submits that this Court should adopt in its entirety the well-reasoned opinion of the district court in Maddox.

Even if this Court determines that there should be exceptions to the preservation requirement, the State submits that an exception would not be appropriate here.

Even before the Reform Act was enacted, the law was well-settled that the contemporaneous objection rule applies to probation conditions, unless such conditions are so egregious as to be the equivalent of fundamental error. Larson v. State, 572 So. 2d 1368, 1371 (Fla. 1991). Numerouc cases have held that the failure to preserve a vagueness challenge to a probation condition waives such a challenge on appeal. See. **e.a.**, Maxlow v. State, 636 So. 2d 548, 549 (Fla. 2d DCA 1994); Medina v. State, 604 So. 2d 30 (Fla. 2d DCA 1992).

The same rule should apply here. Rider's vagueness and overbreadth challenges to the probation condition were not properly preserved below, and accordingly the district court properly refused to consider these challenge when raised for the first time on appeal. The district court's decision should be approved by this Court, and Rider's third point on appeal rejected.

Finally, even if preservation of thic error is deemed unnecessary, Rider's claim should still be rejected, as it fails on the merits.

Rider complains about the standard probation condition prohibiting him from owning, viewing, or possessing "sexually stimulating" visual or auditory material. (R. 98); s

948.03(5)(a)(7), Fla. Stat. (1997). According to Rider, this provision is both vague and overbroad. See Johnson v. State, 701 So. 2d 367, 369 (Fla. 2d DCA 1997) (statutory conditions of probation may only be overturned if unconstitutional).

In determining the validity of a statute, courts are bound by the premise that all doubts must be resolved in favor of the statute's constitutionality. See, e.a., State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994). Moreover, if there is any way to construe the statute in a constitutional manner, it must be construed in such a way, as long as this is consistent with legislative intent and does not effectively rewrite the statute. Id.

A statute is unconstitutionally vague if it "'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" Bouters v. State, 659 So. 2d 235, 238 (Fla.) (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)), cert. denied, 516 U.S. 894 (1995). A court must find an allegedly vague statute to be constitutional "if the application of ordinary logic and common understanding would so permit." State v. Hoyt, 609 So. 2d 744, 747 (Fla. 1st DCA 1992).

A law is not required to "furnish detailed plans and specifications of the acts or conduct prohibited" in order to pass constitutional muster. McGuire v. State, 489 So. 2d 729, 732 (Fla.

1986). The relevant test is whether statutes give ordinary citizens fair notice of forbidden conduct, giving the statutory language its plain and ordinary meaning. State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997); Green v. State, 604 So. 2d 471, 473 (Fla. 1992). Accordingly, terms which "appeal to the norms of the community" are constitutional, even if the legislature could have chosen clearer or more precise language. L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997).

The overbreadth doctrine is to be used "'sparingly and only as a last resort.'" State v. T.B.D., *656 So.* 2d 479, **481** (Fla. 1995) **(guoting** Broadrick v. Oklahoma, **413 U.S. 601,** 613 (1973)), cert. denied, 516 U.S. 1145 (1996). Accordingly, a statute must be *substantially* overbroad in order to be declared invalid on this basis, and "'the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. ... In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections." Id. at 482 (quoting Citv Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800-01 **(1984)).**

Moreover, the application of the overbreadth doctrine becomes even more limited as the interest allegedly infringed upon "'moves from "pure speech" toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal

laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" Id. at 481 (quoting Broadrick, 413 U.S. at 615).

Applying these tests here, Rider asserts that the term "sexually stimulating" is too subjective to allow for proper enforcement and reaches protected and desirable conduct.

The State submits that the term "sexually stimulating" is commonly used and understood by the average citizen, and accordingly provides fair notice of forbidden conduct. The statute is clearly not vague, using ordinary logic and common sense.

The State also submits that the statute does not reach any protected and desirable conduct by a probationer, as Rider contends. In fact, courts in other states have specifically rejected vagueness and overbreadth challenges to statutes forbidding certain conduct on the basis of its "sexually ctimulating" effect. In doing so, they have uniformly praised this term as effectively and clearly limiting the scope of statutes so as to avoid the inhibition of freedom of expression and reach only conduct which may properly be prohibited. See People v. Batchelor, 800 P.2d 599, 603 (Colo. 1990); State v. Helgoth, 691 S.W. 2d 281, 283 (Mo. 1985); Commonwealth v. Savich, 716 A.2d 1251, 1256 (Pa. Super. Ct. 1998), appeal denied, 1999 WL 188088 (Pa. March 25, 1999); State v. Myers, 941 P.2d 1102, 1105 (Wash. 1997); State v. Bohannon, 814 P.2d 694, 697 (Wash. Ct. App. 1991).

Contrary to Rider's argument on appeal, he will not be in violation of this probation condition simply by living near "the world's most famous beach." Requiring this convicted sex offender to refrain from indulging in pornography and other sexually stimulating material is certainly reasonable and in no way unconstitutionally infringes on his conduct. Cf. Larson, 572 So. 2d at 1371 (noting that most orders of probation in some manner infringe on some rights, if for no other reason than because they restrict the probationer's liberty to some extent).

Thic standard probation condition is neither vague nor overbroad, and Rider's final argument should be rejected by this Court.

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 **Respondent's** Brief **on** the **Merits has been furnished by hand** delivery to Rosemarie Farrell, **Assistant** Public Defender, **112** Orange **Avenue, Suite A,** Daytona **Beach, Florida** 32114, this 1st **day** of **September, 1999.**

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