IN THE SUPREME COURT OF FLORIDA

STEVEN SEAGRAVE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-2228

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Steven Seagrave, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of two volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

In regards to Issue I, petitioner was convicted of one count of lewd, lascivious or indecent assault on a child under the age of sixteen pursuant to § 800.04, Fla. Stat. (1997). The trial court assessed forty points to petitioner’s scoresheet for sexual contact pursuant to § 921.0011(7), Fla. Stat. (1997). Petitioner appealed, and the First District Court of Appeal affirmed petitioner’s judgment and sentence; however, it certified the following question to the Florida Supreme Court as one of great public importance:

MAY FORTY POINTS BE ADDED TO A SENTENCING GUIDELINE SCORESHEET UNDER § 921.0011(7), FLA. STAT. (1997), BASED ON PETITIONER'S ACT OF FONDLING THE VICTIM'S BUTTOCKS, OR IS "SEXUAL CONTACT" LIMITED TO ACTS ENCOMPASSED WITHIN THE SEXUAL BATTERY STATUTE, AS WAS DECIDED IN REYES V. STATE, 709 SO.2D 111 (FLA. 5TH DCA 1998) RECEDED FROM IN KITTS V. STATE, 766 SO.2D 1067 (FLA. 5TH DCA 2000)(ON REH'G EN BANC)?

In regards to Issue II, the trial court admitted evidence that the child victim told numerous other persons of the petitioner's lewd and lascivious behavior toward her. The First District Court of Appeal held that this hearsay evidence was not admissible for the truth. However, the First District recognized that the same hearsay evidence was admitted by the mother of the victim without objection and from the child victim herself. Thus, the First District held that the admission of the hearsay evidence was harmless.

SUMMARY OF ARGUMENT

ISSUE I.

The petitioner contends that the trial court erred in assessing forty points for sexual contact by fondling the buttocks of the child victim. The State respectfully disagrees. Pursuant to Kitts v. State, 766 So. 2d 1067 (Fla. 5th DCA 2000), the touching and/or fondling of the female breast is sexual contact. Likewise, the touching and/or fondling of the buttocks is sexual contact. Thus, the trial court properly assessed the forty extra points for sexual contact.

ISSUE II.

This Court could, however it should not, address this issue regarding the admissibility of hearsay evidence. This issue is not a basis for discretionary review by the supreme court of Florida. Moreover, the correctness of the district court's holding is too obvious to require additional explanation.

ARGUMENT

ISSUE I

MAY FORTY POINTS BE ADDED TO A SENTENCING GUIDELINE SCORESHEET UNDER § 921.0011(7), FLA. STAT. (1997), BASED ON PETITIONER'S ACT OF FONDLING THE VICTIM'S BUTTOCKS, OR IS "SEXUAL CONTACT" LIMITED TO ACTS ENCOMPASSED WITHIN THE SEXUAL BATTERY STATUTE, AS WAS DECIDED IN REYES V. STATE, 709 SO.2D 111 (FLA. 5TH DCA 1998) RECEDED FROM IN KITTS V. STATE, 766 SO.2D 1067 (FLA. 5TH DCA 2000)(ON REH'G EN BANC)?

Introduction

The petitioner contends that the trial court erred in assessing forty points for sexual contact by fondling the buttocks of the child victim. The State respectfully disagrees. Pursuant to Kitts v. State, 766 So. 2d 1067 (Fla. 5th DCA 2000), the touching and/or fondling of the female breast is sexual contact. Likewise, the touching and/or fondling of the buttocks is sexual contact. Thus, the trial court properly assessed the forty extra points for sexual contact.

The trial court's ruling

Over petitioner's objection, the trial court assessed the additional 40 points on petitioner's scoresheet for sexual contact. (II 187).

Standard of Review & Burden of Persuasion

Appellate courts review a trial court's interpretation of a statute under the de novo standard of review. See United States v. Tait, 202 F.3d 1320 (11th Cir. 2000)("This court reviews de novo dismissals based on statutory interpretation); United States

v. Futrell, 209 F.3d 1286 (11th Cir. 2000)(federal Court of Appeals reviews questions of statutory interpretation de novo). The de novo question is whether the Florida legislature intended for trial courts to assess forty additional points for sexual contact on a defendant's scoresheet.

Preservation

Defense counsel objected to the assessment of the additional 40 points for sexual contact during the sentencing hearing. (II 179-187). Thus, this issue is preserved for appellate review.

Merits

This Court is currently considering this issue regarding the assessment of additional victim injury points for sexual contact on a defendant's scoresheet in the following cases: Spioch v. State, No. SC96836 (decision pending)[1]; State v. Milanes, No. SC001719 (jurisdictional briefs filed); Blackburn v. State, No. SC001681 (initial brief on the merits filed); Kitts v. State, No. SC001863 (awaiting brief scheduling; no jurisdictional briefs filed).

In Kitts v. State, 766 So. 2d 1067 (Fla. 5th DCA 2000), the Fifth District held that the kissing and fondling of the female breast was sexual contact within the meaning of § 921.0011(7)(b)2, Fla. Stat. (1997) even though there was nothing in case law or statute that specifically defined sexual contact.

[1]The Florida Supreme Court cancelled oral argument in the Spioch case when the Fifth District Court of Appeal receded from Spioch v. State, 742 So. 2d 817 (Fla. 5th DCA 1999) in Kitts v. State, 766 So. 2d 1067 (Fla. 5th DCA 2000).

Thus, the district court affirmed the trial court's assessment of the additional points for sexual contact.

The Fifth District reasoned that the Florida legislature, by implication, considered the female breast to be a sexual organ because relevant statutes include breasts as intimate parts of the human female body. For example, § 39.01(63)(d), Fla. Stat. (1997) defined sexual abuse of a child as follows:

> The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of either the child or the perpetrator.

Section 985.4045, Fla. Stat. (1997) defined sexual misconduct as "fondling the genital area, groin, inner thighs, buttocks, or breasts of a person." Likewise, these same statutes include the buttocks. The Fifth District also cited other jurisdictions' statutes and case law which recognized that inappropriate contact with the female breast, including the buttocks, is in violation of the law. In the case at bar, petitioner aggressively rubbed the victim's buttocks and made her touch his clothed penis. (II 68).

In Louis v. State, 764 So. 2d 930 (Fla. 4th DCA 2000), the Fourth District also affirmed the assessment of forty additional points on the defendant's scoresheet for sexual contact pursuant to § 921.0011(7), Fla. Stat. (1997) where one of the perpetrators touched the victim over her chest, through her shirt, on her stomach, and on her genital area. Louis, 764 So. 2d at 931; see also Altman v. State, 756 So. 2d 148 (Fla. 4th DCA 2000), rev. denied, 767 So. 2d 453 (Fla. 2000)(assessing victim injury points

for sexual contact where defendant rubbed his crotch against the child-victim's crotch and buttocks while both were clothed). Other districts have similarly defined sexual contact. See, e.g., Mackey v. State, 516 So. 2d 330 (Fla. 1st DCA 1987)(properly assessing additional points for sexual contact where defendant fondled a 13-year-old child by touching victim above crotch); Beasley v. State, 503 So. 2d 1347 (Fla. 5th DCA 1987)(properly assessing additional points for sexual contact where defendant opened victim's legs and started to pull down her bathing suit and shorts); Vural v. State, 717 So. 2d 65 (Fla. 3rd DCA 1998), rev. denied, 732 So. 2d 329 (Fla. 1999)(adding sexual contact points where defendant forced victim to masturbate his penis). Therefore, the intentional touching of the buttocks and contact with a clothed penis, just like contact with the female breast in Kitts and Louis, is sexual contact pursuant to § 921.0011(7), Fla. Stat. (1997).

Petitioner relies heavily upon Judge Peterson's dissent in Kitts v. State, 766 So. 2d 1067, 1069 (Fla. 5th DCA 2000) where his dissent expressly states that the Florida legislature has only defined the phrase "sexual contact" within the context of sexual battery where there is contact but not penetration for purposes of scoring victim injury points on a sentencing guidelines scoresheet. Id. Thus, Judge Peterson concluded that the additional victim injury points for sexual contact were improperly assessed in Kitts.

However, in his dissent, Judge Peterson failed to realize that by limiting the scoring of sexual contact points to instances of union, doing so would have the effect of precluding victim injury points for most violations of Section 800.04, Florida Statutes (1997), which prohibits the handling, fondling, or assaulting of any child under the age of sixteen in a lewd, lascivious, or indecent manner. Most of chapter 800 is devoted to prohibiting sex crimes which do not involve sexual battery and therefore most of the chapter describes acts which do not include the union of sexual organs. See, §§ 800.02, 800.03, 800.04(1), 800.04(2), 800.04(4), Fla. Stat. (1997). If the legislature had intended to restrict the assessment of sexual contact points to acts of sexual battery, it could easily have restricted the assessment of such points to violations of Section 800.04(3), Florida Statutes (1997), which prohibits an act defined as sexual battery under Section 794.011(1)(h) upon any child under the age of sixteen.

Moreover, the absence of a statutory definition does not support the petitioner's interpretation of the term "sexual contact." When words of common usage are used in a statute without a statutory definition, the words should be construed in their plain and ordinary sense. Sieniarecki v. State, 756 so. 2d 68 (Fla. 2000). If necessary, the plain and ordinary meaning may be ascertained by reference to a dictionary. Id. (quoting Green v. State, 604 So. 2d 471, 473 (Fla. 1992)). The word "sexual" means "of, characteristic of, or affecting sex, the sexes, the organs of sex and their functions, or sex instincts or drives."

Webster's New Universal Unabridged Dictionary 1664 (Deluxe 2d ed. 1983). "Contact" means "the act of touching or meeting" or "the state of being in touch or association (with)[.]" Id. at 393. Given its plain and ordinary meaning, the phrase "sexual contact" applies to Seagrave's act of aggressively rubbing the child victim's buttocks and his placing her hand on his clothed penis. Petitioner's interpretation of "sexual contact" as the union of the sexual organ of one person with the oral, anal, or vaginal opening of another is an unnatural and far too restrictive definition.

Accordingly, the phrase "sexual contact" encompasses more than the union or contact of the sexual organs. Florida case law has defined sexual contact more broadly, *supra*. Moreover, good, old-fashioned common sense and the plaining meaning of the words "sexual" and "contact" would lead any person of reasonable intelligence to believe that the rubbing of a child's buttocks in a sexual manner and placing that child's hand on one's penis is sexual contact. Thus, this Court should affirm the district court's decision below and uphold petitioner's judgment and sentence in this instant case.

ISSUE II

SHOULD THIS COURT ADDRESS AN ISSUE WHICH IS UNRELATED TO THE CERTIFIED QUESTION ON WHICH JURISDICTION IS BASED AND WHICH WAS FOUND TO BE HARMLESS IN ANY EVENT? (Restated)

Introduction

The petitioner contends that the trial court abused its discretion when it admitted the child victim's statements to Brenda Kimbrell pursuant to the first complaint exception of the hearsay rule. The State respectfully disagrees. First of all, this particular issue is totally unrelated to the question that the First District certified as one of great public importance and has nothing to do with this Court's exercise of discretionary jurisdiction. This Court has discretion to address this issue, Allstate Ins. Co. v. Rudnick, 761 So. 2d 289, 291 (Fla. 2000); Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982); however, it should decline to do so. See Sanchez v. Wimpey, 409 So. 2d 20, 21 (Fla. 1982); Gibbs v. State, 698 So. 2d 1206, 1210 (Fla. 1997). Secondly, the First District found the admission of the hearsay evidence to be harmless. Finally, in light of the state of Florida's pro-active stance regarding violence against women, this honorable Court should find that the hearsay evidence was properly admitted under the first complaint exception to the hearsay rule.

The trial court's ruling

The trial court overruled petitioner's objection to the witness's testimony. (II 39).

Standard of Review & Burden of Persuasion

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed on appeal absent a showing that the trial court abused its broad discretion in this area. Jent v. State, 408 So. 2d 1024, 1029 (Fla. 1981); Gray v. State, 640 So. 2d 186, 194 (Fla. 1st DCA 1994).

Preservation

Petitioner timely objected to the witness's testimony. (II 38-39). Thus, Petitioner properly preserved this issue for appellate review.

Merits

In Seagrave v. State, 768 So. 2d 1121 (Fla. 1st DCA 2000), the First District Court of Appeal affirmed petitioner's judgment and sentence; however, it certified the following question to the Florida Supreme Court as one of great public importance:

> MAY FORTY POINTS BE ADDED TO A SENTENCING GUIDELINE SCORESHEET UNDER § 921.0011(7), FLA. STAT. (1997), BASED ON PETITIONER'S ACT OF FONDLING THE VICTIM'S BUTTOCKS, OR IS "SEXUAL CONTACT" LIMITED TO ACTS ENCOMPASSED WITHIN THE SEXUAL BATTERY STATUTE, AS WAS DECIDED IN REYES V. STATE, 709 SO.2D 111 (FLA. 5TH DCA 1998) RECEDED FROM IN KITTS V. STATE, 766 SO.2D 1067 (FLA. 5TH DCA 2000)(ON REH'G EN BANC)?

However, petitioner's second issue is totally unrelated to this certified question and has nothing to do with this Court's exercise of discretionary jurisdiction. This Court has discretion to address this issue, Allstate Ins. Co. v. Rudnick, 761 So. 2d 289, 291 (Fla. 2000); Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982)("[O]nce we accept jurisdiction over a cause in

order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court."); however, it should decline to do so. See Sanchez v. Wimpey, 409 So. 2d 20, 21 (Fla. 1982); Gibbs v. State, 698 So. 2d 1206, 1210 (Fla. 1997)(refusing to address other issues which were unrelated to the certified question).

Nevertheless, if the child victim's statements to her aunt Brenda were improperly admitted, the error was harmless. In light of the child victim's testimony and the fact that she went to her Aunt Brenda's house after school on the day of the sexual assault when she normally went to petitioner's house after school, any error in admitting Aunt Brenda's testimony was harmless. Moreover, the victim testified to petitioner's lewd and lascivious behavior toward her, (II 65-70, 76-77), and her mother also testified to what her daughter told her about the incident. (II 58). Thus, if it was error to admit Aunt Brenda's testimony regarding what the victim told her, then the error was harmless beyond a reasonable doubt. See McDonald v. State, 578 So. 2d 371, 374 (Fla. 1st DCA 1991)(admitting police officer's testimony was harmless error in light of the other evidence against the defendant); State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

According to Florida case law, a witness may testify to the out-of-court statements made by the survivor of sexual assault to rebut any inference of consent which might be drawn from prolonged silence of the survivor pursuant to the "first

complaint" or "fresh complaint" exception to the hearsay rule in Florida. Monarca v. State, 412 So. 2d 443, 445 (Fla. 5th DCA 1982). The underlying rationale of the first complaint exception in other jurisdictions, such as Massachusetts, is that a sexual assault survivor can overcome the presumption of consent and not be penalized or further victimized by the judicial system if she delays in telling someone other than the assailant about the attack. See Massachusetts v. Licata, 591 N.E.2d 672, 673 (Mass. 1992)(disagreeing with the notion that a sexual assault victim would naturally come forward and tell others about an attack, particularly strangers, soon after being sexually assaulted); see also, Kathryn M. Stanchi, The Paradox of the Fresh Complaint Rule, 37 B.C.L. Rev. 441, 449-454 (1996).

The state of Florida has taken a pro-active stance regarding violence against women. For example, the executive branch of the Florida government has established a task force on domestic violence. Its purpose is to document "the extent of our awareness, and the responsiveness of our resources to battered women and their families." See Executive Office of the Governor, The Governor's Task Force on Domestic Violence, The First Report at v (January 31, 1994). In State v. Hickson, 630 So. 2d 172, 174 (Fla. 1994), the Florida Supreme Court assisted in dispelling the common myths regarding battered women by allowing the admission of battered spouse syndrome evidence. Just recently

the Supreme court dispersed with another myth[2] regarding domestic violence and held that a battered woman who is attacked in her home is not required to retreat and has "the lawful right to stand her ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to herself." Weiand v. State, 732 So 2d 1044, 1057 (Fla. 1999). Thus, the Florida judiciary, particularly this honorable Court, has taken an active role in combating violence against women by eliminating common false beliefs and myths that pervade society's notion of women and the violence that is perpetrated against them.

Because Florida has recognized that myths and falsehoods still exist regarding survivors and victims of sexual assault and domestic violence, this Honorable court should continue Florida's war concerning violence against women, follow the lead of the state of Massachusetts, and dispel with the myth that the sexual assault victim has an obligation to tell the first person she

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[2]The Florida Supreme court once held that a battered woman had a duty to retreat from her home if she was attacked by her husband where she and her husband had equal rights to the home. State v. Bobbitt, 415 So. 2d 724 (Fla. 1982), *overruled by* Weiand v. State, 732 So. 2d 1044 (Fla. 1999). More than likely, the underlying premise of this holding was the societal myth that survivors of domestic violence are free to leave the battering relationship at any time. However, this myth failed to recognize that the most dangerous time for a battered woman is when she leaves her batteror. Moreover, many survivors cannot leave due to financial or religious reasons, and many battered women have no other place to go and no family or friends to turn to for support. See Executive Office of the Governor, The Governor's Task Force on Domestic Violence, The Third Report at 163 (1997).

encounters, other than the assailant, about her attack such that her out-of-court statements are admissible in trial. See Pacifico v. State, 642 So. 2d 1178, 1186 (Fla. 1st DCA 1994). In viewing the totality of the circumstances, this Court should admit statements of the victim that are made to the first person(s) she tells of her attack within a reasonable time period regardless of whether it is her first opportunity to tell someone other than her assailant pursuant to the first exception of the hearsay rule. It is easy to understand why a sexual assault victim would be reluctant to discuss with someone whom she does not have a trusting relationship the uncomfortable, gory details of her sexual attack even if that person is her first opportunity to tell about the attack. See Massachusetts v. Licata, 591 N.E.2d 672, 657-658 (Mass. 1992).

In the case at bar, petitioner assaulted the twelve-year-old female victim by aggressively rubbing her buttocks with his hand, kissing her on the head, and attempting to take her hand and make her touch his clothed penis in the early morning hours of April 22, 1998. The child victim testified that when she was on the school bus later that day, she told her younger sister what petitioner did to her. (II 73). After they departed the bus, the child victim went directly to her Aunt Brenda's house instead of going to petitioner's house as she normally did after school. (II 72-73). When she arrived, she told her Aunt Brenda what happened between petitioner and her. (II 73). During trial,

Aunt Brenda testified to what the child victim told her. (II 40).

Even though the child victim did not tell the bus driver, her school teachers, or the guidance counselors regarding the sexual incident between petitioner and her (IB 10), the victim complained to the first person whom she trusted and could help her -- Aunt Brenda. A requirement to come forth at the first opportunity only reinforces the sexual myth that a sexual assault survivor would immediately tell of her attack to the first person she encounters. Upholding such a myth penalizes the child victim, a pre-adolescent girl, at a time when she should be commended for being courageous enough to report a crime that occurred only a few hours earlier within the same day. Thus, this honorable Court should affirm the trial court's ruling in admitting the child victim's statements to her aunt Brenda under the first complaint exception of the hearsay rule.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at Seagrave v. State, 768 So. 2d 1121 (Fla. 1st DCA 2000) should be approved, and the rulings entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jamie Spivey, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on January 4th, 2000.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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IN THE SUPREME COURT OF FLORIDA

STEVEN SEAGRAVE,
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APPENDIX

Seagrave v. State, 768 So. 2d 1121 (Fla. 1st DCA 2000)