IN THE SUPREME COURT OF FLORIDA

BRUCE W. GLOVER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC02-1064

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S MERIT BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is substantially accurate for the purpose of this appeal, with the following additions and emphasis:

The child victim identified Petitioner and explained that Petitioner lived in the same apartment complex. (R4 316-317) The child would go over to Petitioner's apartment and play video or computer games. (R4 317-319) The victim testified he complied when Petitioner told him to put his mouth on Petitioner's penis. Petitioner also placed his mouth on the child's penis. (R4 319-321) The victim explained that Petitioner's penis was inside the victim's mouth during the incident.

Petitioner also took the child shopping, bought him clothes and an earring, and rented video games. (R4 320, 322-323) The child stated that Petitioner wrote "suck it" and "fuck" on one piece of the newly purchased clothing: a pair of jeans. (R4 323-324) The sexual incidents occurred on a Monday, and the child told his mother three days later, on a Thursday, because he did not want it to happen any more. (R4 324-325) The child's legal guardian stated that she saw the "inscribed" jeans which also had a drawing of a penis on them and the child's name. (R4 377) She indicated that the child suffers from Attention Deficit Disorder, and that he is taking medication

(Adderall) for the condition. He also has “problems learning.” (R4 379-380)

The video taped statement of the child victim was played for the jury and it covered many more details than the victim’s direct testimony. (R5 443-514) A judgment of acquittal was entered as to the third count of attempted sexual battery upon a child. (R5 535, R2 260) The defense rested without presenting any evidence or testimony. (R5 535)

During deliberations the jury requested that the child’s video statement be replayed. Thereafter, they requested a readback of the child’s trial testimony. Both requests were granted. (R6 629-705, 709-764) Petitioner was found guilty of count one (Petitioner’s mouth in contact with the sexual organ of the child) and acquitted as to count two (oral contact with the sexual organ of Petitioner).

On direct appeal the district court issued an opinion affirming the convictions and finding that there was no dispute about the age of Petitioner or that the jury found Petitioner to be over the age of 18 at the time of the crime. Thus, any error in the jury instructions is harmless. This Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

POINT 1: The jury was properly instructed that it must find that Petitioner was over the age of 18. Even the verdict forms permitted the jury to find that Petitioner was less than 18 years of age; therefore Petitioner's age was pled in the information, proven by the evidence, and determined by the jury.

POINT 2: None of the comments amount to prosecutorial misconduct or improper argument. The State did not personally vouch for the veracity of a witness; there was no "Golden Rule" argument; and most of the alleged comments were not preserved for review.

POINT 3: The trial court conducted an extensive hearing on the child hearsay statements and made specific and detailed findings based upon the evidence adduced during said hearing. Inconsistency among various statements is not relevant to the issue of reliability or to the trustworthiness of each separate statement. The trial court did not abuse its discretion in admitting the two hearsay statements.

ARGUMENT

ISSUE 1

THE AGE OF PETITIONER WAS NOT AT ISSUE DURING THE TRIAL. THERE IS EVIDENCE TO SUPPORT A FINDING THAT PETITIONER IS OLDER THAN 18 YEARS OF AGE.

The State urges this Court to adopt the reasoning found in Jesus v. State, 565 So.2d 1361, 1363 (Fla. 4th DCA 1990) and Toussaint v. State, 755 So.2d 170, 172 (Fla. 4th DCA), review denied, 776 So.2d 277 (Fla. 2000). Sexual battery is defined in section 794.011(1)(h), Florida Statutes (2002) as oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by an object. According to that section, the offender's age is not an element of the crime of sexual battery. The offender's age does affect the punishment but it is clearly not an essential element of the crime.

The Fifth District has previously commented in *dicta* that it is error to fail to instruct the jury regarding the age of the defendant in capital sexual battery cases. See D'Ambrosio v. State, 736 So.2d 44 (Fla. 5th DCA 1999). However, in that case the Fifth District never ruled that age must be proven beyond a reasonable doubt. The court merely held that age must be "included within the instructions, along with proof." See D'Ambrosio, supra, 736 So.2d at 45. This is exactly what

transpired below. Nevertheless, Toussaint, supra, has more recently reaffirmed that "the offender's age is not an element of the crime of sexual battery." This Court declined to review Toussaint and there is no basis at this juncture to now conclude that age is an essential element of sexual battery.

In Baker v. State, 604 So.2d 1239 (Fla. 3d DCA 1992), a case cited by the decision below as conflicting with Jesus, supra, the verdict form contained no provision for a finding as to the defendant's age. Here, of course, the jury specifically found on the verdict form that Petitioner was over the age of 18. Thus, in reality, this case does not conflict with the *dicta* in D'Ambrosio or the holding in Baker, supra. This Court should therefore issue a ruling which corrects the finding that error occurred below.

However, even if this Court agrees that error occurred below it may affirm the ruling that said error is harmless. As this Court held in Goodwin v. State, 751 So.2d 537 (Fla. 1999), proper harmless error analysis is anything but a mere weighing of evidence. In the words of the court: "harmless error analysis requires appellate courts to first consider the nature of the error complained of and then the effect this error had on the triers of fact." 751 So.2d at 540; see also Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Goodwin added:

> "The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."

Goodwin, 751 So.2d at 541; see also Chapman, 386 U.S. at 24, 87 S.Ct. 824; State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). In the end the judiciary must be able to say beyond a reasonable doubt that the error did not affect the verdict. Goodwin, 751 So.2d at 541 ("If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful."). Daughtry v. State, 804 So.2d 426, 428 (Fla. 4th DCA 2001).

In this case the error could not have possibly affected the verdict. Petitioner never contested that he was over the age of 18 and, indeed, a jury panel can make an accurate determination of age in circumstances where a defendant is twice the age of 18. Petitioner related, during the booking process, that he was born in 1964. Under Florida Law, business records containing information transmitted by a person with knowledge, are admissible "***unless the sources of information or other circumstances show lack of trustworthiness***." Section 90.803(6), Florida Statutes (2000)(emphasis supplied). Petitioner has not questioned the source of the information or the trustworthiness

of the data.

In order to prove Petitioner's age, the State requested that the criminal report form filled out pursuant to section 923.01, Florida Statutes (1999) be admitted into evidence as a business record pursuant to §90.803(6), *supra*. (R5 423-425) Rather than redact all but the age and name of Petitioner on the form, it was eventually agreed that the officer could relay to the jury the date of birth given to him by Petitioner. (R5 432, 434) Therefore, evidence of age was properly proven.

In addition, the jury was properly instructed that it must find that Petitioner was over the age of 18. (R6 612-613) While the court did abbreviate the reference to Petitioner's age in count two, Petitioner was acquitted of said count. This, of course, precludes reversal and retrial as to count two. Even the verdict forms permitted the jury to find that Petitioner was less than 18 years of age; (R2 262-263) therefore Petitioner's age was pled in the information, (R2 219) proven by the evidence, and determined by a jury that was instructed on age as an element of the offense.

There is no doubt – reasonable or otherwise – that Petitioner was twice the age of 18. He therefore received a fair trial and the conviction should not be set aside based upon the wording of the age instruction. Age, unlike intent, is not subjective or ephemeral. In fact, if the offender's age did not

fit within the parameters of the crime, age would most assuredly be pled as an affirmative defense or raised in a motion to dismiss. In the future the legislature could certainly amend the statute to provide that age is an essential element of the crime, but the wording of the current jury instruction tracks the language of the statute and requires the jury to make a specific factual finding regarding the age of the defendant. In this case the factual finding is uncontroverted; the conviction should be upheld.

ISSUE 2

THERE WAS NO INSTANCE OF PROSECUTORIAL MISCONDUCT OR VOUCHING. MOTION FOR MISTRIAL PROPERLY DENIED.

Petitioner begins his challenge of the prosecutor's closing argument by quoting, out of context, the State's comment that the sexual incidents "really happened." But this comment was made in direct response to a defense allegation. The entire quote illustrates this fact:

> ...if this was rehearsed and scripted as [the defense] would have you believe, then why wasn't [the child victim] right on the line all the way down? Why wasn't every single point exact, all the way down the line?
>
> I'll tell you why, because this really happened. It happened two years ago. He was nine years old. And if you look at the video and then compare it with how he testified on the stand, he did a lot better today...
>
> Inconsistencies from telling to telling are one of the things you looked at. Inconsistencies on a relatively minor point.

(R5 588-289) Moreover, there was no objection to this proper inference based upon the evidence. And the prosecutor never expressed his "personal" belief to the jury. See Singletary v. State, 483 So.2d 8 (Fla. 2d DCA 1985). The claim that a crime "really happened" is nothing more than argument that a crime was committed. Similarly, at a later point, the prosecutor's

comments that “these things happened” and “that’s what he testified to” (R5 591) merely argue that the events occurred.

Next, Petitioner claims that the State violated the “Golden Rule.” However, there was no objection or motion for mistrial. See Irving v. State, 627 So.2d 92, 94 (Fla. 3d DCA 1993)(claim that the prosecutor made comments which violated the "golden rule" of prosecutorial argument was not preserved for appellate review by an objection or motion for mistrial). A “Golden Rule” argument is defined as that which forces “the jury to place themselves in the shoes of the victim.” McDonald v. State, 43 So.2d 501, 504 (Fla. 1999). Therefore, the prosecutor’s statement that “I can’t imagine how it was for him, to have to answer those questions [on the *witness stand*, not during the crime]” falls short of a “Golden Rule” violation. Discussing the fact that it is embarrassing to answer personal and private questions in front of six or twelve strangers is not a violation of the “Golden Rule.” Moreover, a single isolated improper Golden Rule argument may be deemed harmless. See Davis v. State, 604 So.2d 794 (Fla. 1992).

The child victim’s mental capacity and capability was legitimately questioned during the trial. As a result, the State did say, “I doubt seriously that [the victim] is capable of making something up like this.” (R5 594) There was an

immediate objection which was sustained. The court then reminded the jury that it was solely the province of the jury to determine credibility. Thus, the jury was at least twice charged with the tenet that it is the jury alone which decides the issue of credibility.

Finally, as to the comments made by the investigator on the video tape, the record is devoid of any objection at the time the tape was played. In fact, the record reflects that the tape was redacted and edited to conform to a previous order. (R5 410-411) The defense objection which was renewed at that time was based upon the child hearsay exception, not the comments of the investigator. Even if it was inappropriate to permit the jury hear the part of the tape where the investigator thanks the child for "being honest," it is clear that the jury did not believe the child was entirely honest, for it acquitted Petitioner on one sexual battery charge. These videotaped comments were gratuitous and, in light of the result, completely harmless.

Lastly, Petitioner attacks the prosecutor's customary and usual comment whenever the State is "sandwiched" between two defense closing arguments, such as: "I won't be able to talk with you again, so ask yourself how the State would respond to the defense argument." Nevertheless, up until now no court has ever found such an argument to be improper.

A ruling on a motion for mistrial is within the sound discretion of the trial court. Cole v. State, 701 So.2d 845, 853 (Fla. 1997). A motion should only be granted where it is necessary to insure a fair trial. Petitioner herein has already received a fair trial in this case. Statements were suppressed, interviews were edited, a judgment of acquittal was granted, and the jury acquitted on another count.

ISSUE 3

CHILD'S VIDEOTAPED STATEMENTS PROPERLY ADMITTED UNDER THE CHILD HEARSAY EXCEPTION.

Petitioner overlooks the fact that, pursuant to the child hearsay notice, a lengthy hearing was held during which the trial court reviewed the two statements that the State sought to admit. The transcript of the hearing, including argument of counsel, spans more than 90 pages.

The trial court's detailed order made specific findings regarding the time, content, and the circumstances of the statements. (R1 190-191) The video tape was played during the hearing, and the two witnesses testified. The thoroughness of the hearing and of the findings renders any question regarding the sufficiency of the child hearsay notice moot.

Furthermore, these hearsay statements were made only three or four days after the events; and the reference to the "suck my dick" statement is corroborated by the evidence found on the blue jeans. Other indicia of reliability are the purely spontaneous and shocking comment by the child regarding oral sex (R5 459) and the fact that the child is a "slow learner" attending special education classes and is therefore likely unsophisticated in the fabrication of such events. The child's level of sophistication would be plainly visible to the trial court judge but difficult to perceive in the antiseptic black

and white pages of the record.

Petitioner argues that the many minor inconsistencies in the child victim's statements renders the videotaped statement unreliable. However, if there were no divergence between the various statements, it would be impossible to impeach or question the child's testimony. It appears that the videotaped statement was much more detailed than the trial testimony; and the videotape was made within days of the crimes. Each of the statements, standing alone, support a conviction for at least one count of sexual battery. The fact that there are inconsistencies between them is a matter for the jury to resolve; the divergences are not sufficient to justify suppression of the statements. Obviously, the inconsistencies were great enough to result in an acquittal on one count.

This Court has specifically held that inconsistencies between statements do not preclude the admission of statements under the child hearsay exception. In Department of Health and Rehabilitative Services v. M.B., 701 So.2d 1155, 1157 (Fla. 1997) the Court held "that section 90.803(23), Florida Statutes (1995), permits the admission into evidence of certain out-of-court statements of a child crime victim without the necessity that those statements be consistent with the child's trial testimony." The Court further noted that the legislature knows how to impose a "consistency" requirement if desired,

because the legislature specifically addressed the issue of consistency between out-of-court statements and in-court testimony in the definition of non-hearsay found in section 90.801, Florida Statutes (1995).

Thus, the issue is plainly not consistency; and Petitioner's focus thereon is misplaced. In fact, the law requires that each statement be reviewed separately, and not in conjunction with other statements. It is clear that the trial court held an extensive hearing on this issue. The trial court then made a specific finding that the statements sought to be introduced were reliable, and this finding is not an abuse of discretion. See Sexton v. State, 697 So.2d 833 (Fla. 1977). The court's finding is clothed with a presumption of correctness. Caso v. State, 524 So.2d 422 (Fla. 1988).

CONCLUSION

Petitioner's conviction and sentence should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by basket delivery to Marvin Clegg, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114-4347, this _____ day of January, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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