IN THE SUPREME COURT OF FLORIDA

BRUCE W. GLOVER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO. SC02-1064
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 5D01-2462
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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POINT ONE

PETITIONER'S AGE WAS NOT PROVEN BY ADMISSIBLE EVIDENCE AND THE JURY WAS NOT INSTRUCTED CORRECTLY ON THIS AGE ISSUE. THEREFORE, PETITIONER SHOULD HAVE HIS CASE REMANDED FOR A NEW TRIAL.

The State urges this Court to follow the lead of one district[1] which, in effect, treats the proof for the age of defendants differently from the age of victims, with the latter as an element that must rightfully be proven beyond a reasonable doubt. This is specifically contrary to three other districts and contrary to general caselaw concerning an accused's constitutional rights. *See* Adams v. State, 28 Fla. L. Weekly D99 (Fla 1st DCA Dec 31, 2002), Baker v. State, 604 So.2d 1239 (Fla.

[1]Jesus v. State, 565 So.2d 1361 (Fla. 4th DCA 1990)

3d DCA 1992), D'Ambrosio v. State, 736 So.2d 44 (Fla. 5th DCA 1999). The second district, citing the district court opinion herein, has declined to rule on the issue, simply holding that where there's no dispute about the defendant's age then the defendant can waive some of the proof or charging requirements. Pena v. State, 829 So.2d 289, 292 (Fla. 2d DCA 2002).

In general, a defendant has the right to have *all* the elements of his charge proven by the state to the highest existing standard. While the state suggests that a jury 'finding' of some sort, as evidenced in the special verdict below, is all that is necessary for this particular element, this second-class status does not appear supported by existing law. (AB 4) D'Ambrosio, *supra*, does not create this lowered status, and in the remainder of the sentence partially quoted by the State, clearly refers to the defendant's age as "one of the elements to be proved to establish the crime..." *Id*. at 45. In speaking of one of the elements in a drug case, the Fifth District plainly stated "(l)ike *any* element of an offense, this element must be proved beyond a reasonable doubt." Hill v. State, 830 So.2d 876, 877 (Fla.5th DCA 2002) (*emphasis* added). There is no suggestion of a lower class for some elements with a lower standard of proof.

The recently issued Adams v. State, 28 Fla. L. Weekly D 99 (Fla. 1st DCA, Dec. 31, 2002) bolsters that view:

> Sexual battery committed by a person 18 years old or older is a capital felony punishable by life imprisonment with a 25-year mandatory minimum before possibility of parole. Sexual battery committed by a person under 18 years of age is a life felony punishable by life or a term of imprisonment not exceeding 40 years. A defendant's age at the time of committing a sexual battery is an *element* of the offense *which must be proven to the jury beyond a reasonable doubt*. (citations omitted)(*emphasis* added)

Throughout the standard jury instructions and cases involving specific victim or defendant ages, it is clear the ages must be proven beyond a reasonable doubt. *See* Young v. State, 753 So.2d 725, 727 (Fla. 1st DCA 2000)(Aggravated child abuse victim under 18); Dunlap v. State, 252 So.2d 292, 293 (Fla. 2d DCA 1971)(Lewd and lascivious under 14); McGahee v. State, 561 So.2d 333, 334 (Fla. 1st DCA 1990) (rape victim under 10); Florida Rules of Criminal Procedure , Standard Jury Instructions.

While the State argues it is merely *dicta* when the fifth district earlier deemed it to be error to fail to instruct a jury regarding the age of a defendant in capital sexual battery cases, this holding was reinforced in the district court's more recent opinion on appeal: (AB 4)

> This court held in (*D'Ambrosio, supra)* that the age of the defendant is an essential element of capital sexual battery. Indeed, it seems that if the age of the victim (under twelve) is an element of the offense (and this is recognized by the Standard Jury Instruction on sexual battery of a victim under twelve which was given by the court in the instant case),

> then the age of the defendant, set out in the same section of the statute creating the offense, should also be.

Glover v. State, 815 So.2d 698, 699 (Fla. 5th DCA 2002)(*emphasis added).*

The State also suggests the *offender's* age should not be viewed as an element but rather, as a punishment factor. (AB 4) This has not been the approach toward *victim's* ages, as the fifth district and others have noted. And, in holding that felony DUI is not a mere penalty enhancement over misdemeanor DUI, this Court has ruled that the three prior DUI convictions constituted an element "which must be proved beyond a reasonable doubt..." State v. Woodruff, 676 So.2d 975, 977 (Fla. 1996)

As to the age proof itself, the State would join the district court in substituting the government's judgment of Mr. Glover's age for that of a properly instructed jury's finding. (AB 6-7) The only proof of Petitioner's age was the objected-to hearsay from Mr. Glover's booking after he claimed his Miranda rights, and told police he was not willing to answer questions. (Vol. I, T 99-105) His other statements to the police were suppressed as the result of "unlawful interrogation". (Vol. II, R 201) The incriminating statement about his age in response to interrogation should have fallen under that same suppression order.

However, the proof of this age element was allowed in as an "admission against interest," amidst discussion of business record exceptions. (Vol. V, T 430)

The State now argues this hearsay should have been permitted in as 'business records.' (AB 6) After all, it does not make sense for the trial court to allow this hearsay in as an "admission against interest" thus suggesting Mr. Glover knew he was admitting an element of the offense to be proven, and confessing that point. This would hardly square with the suppression of earlier admissions by the same court. But in arguing that this element could be proven by hearsay from Mr. Glover through the business record exception, the State overlooks the very cases discussed in the trial court, where those courts did not intend to admit facts "designed to lead to incriminatory--incriminating response (*sic*), and do not require Miranda warnings." (Vol. V, T 429)

By extension of the State's broadening of the business records exemption, virtually any damaging statement that was recorded in a police report or booking document would be admissible as a business record, notwithstanding the Fifth and Sixth Amendments and the *Miranda* case.

The State next suggests, as did the district court, that Mr. Glover's age could be determined without the state needing to prove it--"(a)ge... is not subjective

or ephemeral." (AB 7) One could just tell by a glance at Mr. Glover that he was guilty of this particular age element. No Florida law was cited to support the suggestion that this element could be proven by 'looks,' and other jurisdictions have opposed this approach.

> Defendant argues that the People failed to prove that he was at least 21 years old, an essential element of sodomy... The People counter that defendant's age properly was established solely by the jury's observation of defendant. We cannot countenance this position. The People must affirmatively prove all elements of the charged crime. Reliance on the jury's observation of a defendant to establish the necessary element of age simply does not satisfy the People's obligation of proof. *Moreover, such reliance effectively prevents appellate consideration of the sufficiency of the evidence* since an appellate court usually does not have the opportunity to observe a defendant...

People v. Blodgett, 160 A.D. 2d 1105, 1106 (NY 1990). (*emphasis* added)

In State v. Vazquez, 3 Neb.C.A. 650, 1993 WL 153214 (Neb. App. 1993), the state introduced evidence of how long the defendant had been married, along with a prior conviction record showing his birthdate.

> When these items of evidence are considered together with appellant's appearance, there is sufficient evidence to prove that he was 19 years of age or older at the time of this offense. While a trier of fact may not ascertain the age of a defendant by merely observing him or her at trial, it is sufficient if there is some other evidence in conjunction with the appearance of the defendant from which his or her age may be fixed by the trier of fact.

There were no corroborating pieces of evidence in Mr. Glover's case, other than the self-incriminating hearsay that was subject to his suppression motion and hearsay objection. While the government here may believe it was harmless error to neglect legal proof of Petitioner's age, and later to improperly instruct the jury on this element, this would set a dangerous precedent on a matter as elusive and cosmetic as a person's apparent age--particularly where a capital felony can rest upon a difference of only one year.

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." This "bedrock, 'axiomatic and elementary' [constitutional] principle," prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. The prohibition protects the "fundamental value determination of our society," given voice in Justice Harlan's concurrence in *Winship*[2], that "it is far worse to convict an innocent man than to let a guilty man go free."

Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 85 L.Ed.2d 344 (U.S.,1985) (citations omitted)(*emphasis* added).

[2] In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

If the State were correct in considering one's apparent age[3] not to be a 'subjective' matter (AB 7), a world of businesses would vanish overnight. The government seeks to make it more palatable to substitute the judgment of a trial judge or appeals court for that of a jury after proper instruction. If it is proper to do this where the defendant is "twice the age of 18," would it be proper where the defendant is only 29 years old, or 23? If Florida is to begin a ride along this 'slippery slope,' then the precautions cited in the Nebraska and New York opinions above should be implemented--there must be some corroboration for simple 'looks.'

Petitioner's conviction should be reversed and a new trial ordered on Count One with directions; in the alternative, Petitioner requests that his cause be remanded for resentencing on the lesser offense of Sexual Battery by a Person Under the Age of Eighteen.

[3]Apparent age, because that is all the jurors would see if the illegal hearsay of Petitioner's age had remained subject to the trial court's own suppression order.

POINT TWO

PETITIONER SHOULD HAVE HIS CASE REMANDED FOR A NEW TRIAL BECAUSE THE OVERALL CUMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT AND IMPROPER VOUCHING, TAKEN TOGETHER WITH THE POLICE EMPHASIS ON THE COMPLAINANT'S TRUTHFULNESS, CREATED FUNDAMENTAL ERROR THAT DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL. HIS MOTION FOR MISTRIAL WAS IMPROPERLY DENIED.

Petitioner relies upon the facts and arguments previously set forth in his Initial Merit Brief as to the *cumulative* effect of the State's conduct below.

POINT THREE

PETITIONER'S CONVICTION RESTS ON INADMISSIBLE VIDEOTAPED CHILD HEARSAY STATEMENTS WHICH WERE PLAYED FOR THE JURY TWICE AND ADMITTEDLY FALSE HEARSAY STATEMENTS TO THIRD PARTIES. HIS CONVICTION SHOULD BE REVERSED.

The child abuse hearsay exception for statements of a child victim of sexual abuse is not a firmly rooted exception and is therefore hearsay admitted under this category is "presumptively unreliable. Perez v. State, 536 So.2d 206, 209 (Fla., 1988), Idaho v. Wright, 497 U.S. 805, 813, 110 S.Ct. 3139, 111 L. Ed. 2d 638 (1990)

Although the State argues that Petitioner 'overlooked' the fact that a hearing was held on the child hearsay admissibility, at least three pages of Mr. Glover's Initial Merit Brief were devoted to the testimony from that hearing, and it is the contradictory nature and unreliable character of the child's testimony at the hearing that led Petitioner to argue its untrustworthy nature made it inadmissible, and the resulting hearsay admissibility order itself did not comply with the requirements of Section 90.803(23), Florida Statutes. (IB 4-7; n. 7)

While the State terms the boy's 'shocking' testimony about oral sex as an "indicia of reliability," Petitioner submits it is more a testimony of the abysmal state of public television. (AB 13) AC said he was a big fan of the World Wrestling

Federation and its slogan was "suck it" which, the boy explained, meant "putting your mouth on your penis." (Vol. IV, T 331) The boy demonstrated the symbolic gesture used with that phrase. (Vol. IV, T 331-332) He had made this gesture to his friends while playing and he and Mr. Glover were both into wrestling and "(w)e'd play a lot, and I'd wrestle." (Vol. IV, T 334)

Therefore, by his own admission, this statement is no more an indicia of reliability behind serious accusations involving child abuse than it is an indicator of the child's television viewing. This is plain to an appellate court without needing to view the witness' demeanor, as are the previously-cited inconsistencies that suggest unreliability.

The State is correct that each of the boy's statements, standing alone, is enough to support a conviction for some sort of sexual battery--pick a version and different convictions can result. But this is far from reassuring. Instead, it supports the possibility that the jury coped with this unreliable testimony in the way *it* saw fit--a compromise verdict was reached. As the state says, "(o)bviously the inconsistencies were great enough to result in an acquittal on one count." (AB 14)

The fact remains that the boy's versions of what happened steadily increased in seriousness as time passed and after he watched his own videotaped statement before trial. (Vol. IV, T 329-330; Merit IB 38) Jurors should not have had to

decide what to do with the videotaped hearsay testimony--they had this tape played twice and then heard the boy's earlier hearsay to his mother, which he admitted was not truthful, and to the police. This was the *only* evidence of Mr. Glover committing sexual battery and being convicted of a capital crime.

Due to the trial court's failure to specify its findings are required by statute and caselaw, and the resulting violation of Petitioner's rights of due process and to confrontation of witnesses, the conviction herein must be reversed.

CONCLUSION

Based on the foregoing cases, argument and authorities, Petitioner respectfully requests this Honorable Court to reverse the conviction herein and remand for a new trial on Count One before a newly empaneled jury with directions to the trial court. In the alternative, Petitioner requests that his judgment and sentence herein be vacated and that his cause be remanded for resentencing on the lesser offense of Sexual Battery by a Person Under the Age of Eighteen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Charles Crist, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Bruce W. Glover, Inmate # E14299, K1105U, North Florida Reception Center - Main, P.O. Box 628, Lake Butler, Florida 32054, this 22nd day of January 2003.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

_____

MARVIN F. CLEGG
ASSISTANT PUBLIC DEFENDER