

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-258

LEON ADDERLY,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This cause is before the Court on petition for discretionary review. The parties will be referred to as they stood in the trial court. The trial court denied the State's motion in limine, which sought (pursuant to the rape shield law, Section 794.022, Florida Statutes) to exclude evidence of the alleged victim's prior sexual activity with her boyfriend. The District Court granted certiorari to quash the trial court's ruling. For purposes of this brief, the symbol "A." refers to the Appellant's Appendix, containing copies of the papers filed in the District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Leon Adderly is charged with sexual battery, in violation of Section 794.011(8), Florida Statutes. The information in this case, filed June 13, 2000 on the basis of allegations made by his step-daughter, S.D., alleges that in September, 1999, almost **nine months** prior to the filing of the information, Mr. Adderly had oral contact with the vagina of his stepdaughter, when she was approximately 15 years of age, and when he was in a position of familial or custodial authority. (A. 17, 62, 68).

Mr. Adderly's defense in this case is that the allegations against him are false, and were fabricated by S.D. to

divert attention from and minimize her mother's anger about, the fact that S.D. was having sexual intercourse with her boyfriend, Allen. S.D. told her mother about her sexual activities with Allen (see A. 77-80) immediately after telling her mother that she had been molested by Mr. Adderly, her mother's husband (see A. 77-80). By making the allegations against Mr. Adderly, S.D. was able to portray herself as a victim, rather than as a willing participant in sexual activity with her boyfriend that her mother would strongly disapprove. By accusing Mr. Adderly, she was able to focus attention on his alleged wrongdoing, and divert attention, including her mother's attention, from her own misconduct, which appeared to pale in comparison with the misconduct S.D. alleged against her step-father.

The State filed a motion in limine on September 17, 2001, seeking to preclude Mr. Adderly from introducing evidence as to S.D.'s sexual activities with her boyfriend. See A. 19-20.

At the September 19, 2001 hearing on the State's motion in limine, Judge Cecilia Altonoga quickly perceived that the evidence could not be excluded (see A. 34). The trial court found that the evidence of S.D.'s admitted sexual activities with her boyfriend was of sufficient probative value as to S.D.'s credibility and motive to fabricate that to exclude it,

in a case where S.D. and the defendant are the only witnesses and there is no physical evidence, would effectively deprive defendant of the right to confront the witness against him and present a defense. The trial court ruled that the evidence was necessary to the defense, and that excluding it would effectively deprive Mr. Adderly of the opportunity to confront his accuser and present his defense (A. 51). See *Lewis v. State*, 591 So. 2d 922, 925 (Fla. 1991).

Thus, the trial court commented:

THE COURT: And couldn't it also be the defense theory that . . . she was also doing this in part to minimize any adverse reaction from her parent to being a sexually active teenager?

In other words, saying look it's not so bad because your husband was trying to do this to me, too?

(A. 34).

THE COURT: The allegation, motivation to fabricate an accusation. That's the proffered evidence, the proffered evidence of this victim's allegation, motivation to fabricate would presumably consist of one trying to minimize any anger from her parent for being sexually active.

(A. 35).

THE COURT: After the accusation, by the way, mom I'm real sexually active and this pales in comparison to any egregious things that might have been taking place in my bedroom with your husband.

Did you see the motivation? I mean I see a certain amount - I see a certain amount of motivation just inherent in the timing of it, because your anger at your teenage daughter for being sexual sexually active without your knowledge is going to pale in comparison at your outrage at the perceived act that took place, that took place with your spouse.

(A. 40-41).

THE COURT: . . . She didn't see any other way of letting her mother know this [the sexual activity with her boyfriend] had been going on for months. So, what does she do? She devises this scheme to let the mother know, after she's made this accusation, because the information that she's sexually active will all of a sudden pale in comparison to the bomb shell that she gave her a few hours previously.

(A. 46-47).

THE COURT: But here, because of the victim's age and familial circumstances there is a motive to fabricate this accusation.

MR. SHAPIRO: Where is it?

THE COURT: The motive to fabricate consists of lessening the impact of the news involved, news involving her sexual activity.

(A. 52).

Moreover, S.D. also testified at her deposition that her mother's reaction to what S.D. told her was exactly what defendant Adderly claims was intended:

Q. Was she upset about that too or did she not know what to be upset about first?

A. She was not so much upset at me about the sex with Allen, but she was upset with Leon and all that. She was upset with Leon, not Allen.

(A. 79-80).

Defense counsel properly realized that Judge Altonaga had a complete understanding of the argument that the evidence indicated a motive to lie, and proceeded to argue other theories for the denial of the motion (A. 29-30).

The trial court denied the State's motion (A. 51), and entered a written order to that effect (A. 22).

The District Court ruled that there was "no legally sufficient reason to overcome the rape shield statute in this case" (A. 104) because the "claim of the defendant is contrary both to common sense and the facts of the case." (A. 103). The District Court granted certiorari to quash the trial court's ruling and exclude the evidence. The result of the District Court's ruling is effectively to preclude Mr. Adderly from disputing the truth of his stepdaughter's testimony against him in a case where they are the only witnesses and there is no physical evidence.

SUMMARY OF ARGUMENT

This case presents a classic credibility contest between defendant and S.D., his stepdaughter -- there are no other witnesses, and there is no physical evidence. The exclusion of evidence of S.D.'s admitted sexual relationship with her boyfriend, where defendant contends it gave S.D. a motive to lie and to make up a false allegation against the defendant, would effectively preclude defendant from challenging S.D.'s testimony and from contending that she had a reason to fabricate a false charge. The exclusion of that evidence would thus deprive defendant of his right to confront and cross-examine the only witness against him and to present a defense. The rape shield law is a rule of relevance, and cannot be applied in a criminal case to exclude relevant evidence essential to the presentation of a defense.

The District Court therefore erred in ruling that the trial court's refusal to exclude the evidence of S.D.'s sexual relationship with her boyfriend was a departure from the essential requirements of law, warranting the issuance of certiorari. The District Court's ruling should be reversed.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT THE TRIAL COURT WAS REQUIRED TO EXCLUDE EVIDENCE OF THE ALLEGED VICTIM'S SEXUAL ACTIVITY WITH HER BOY-FRIEND WHERE THE DEFENDANT CONTENDED THAT IT GAVE HER A MOTIVE TO LIE ABOUT THE ALLEGED SEXUAL BATTERY

Mr. Adderly's defense in this case is that the allegations against him were fabricated by S.D., his 15-year-old step-daughter, to divert her mother's attention and anger from the fact that S.D. was having sexual intercourse with her boyfriend. S.D. told her mother about her recent sexual activities with her boyfriend immediately after telling her mother that, almost nine months before, she had been sexually battered by her mother's husband. By making these allegations, S.D. was able to portray herself as a victim, rather than as a willing participant in sexual misconduct. By accusing defendant, she was able to focus attention on his alleged wrongdoing, and divert attention from her own misconduct. The District Court's ruling excluding this evidence under the rape shield statute (Section 794.022(2), Florida Statutes) precludes defendant from showing that S.D. had a motive to lie.

The right to confront witnesses includes the right to cross-examine, and the rape shield statute can not be applied in a criminal case to exclude evidence relevant to the veracity of testimony against the defendant. *Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (exclusion of evidence of sexual relationship allegedly motivating witness to lie violated the confrontation right); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) ("Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination") (citations omitted); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("[t]he right . . . to due process is, in essence, the right to a fair opportunity to defend").

In *Lewis v. State*, 591 So. 2d 922 (Fla. 1991), as in this case, the defendant was charged with lewd and lascivious assault upon his stepdaughter. "At trial, Lewis sought to develop as a defense theory that the victim, his stepdaughter, fabricated the charges against him in order to prevent her mother and Lewis from discovering . . . that she was sexually active with her boyfriend." *Lewis*, 591 So. 2d at 923.

"Lewis contended that the proffered testimony was relevant to his defense in that it would reveal to the jury the stepdaughter's motive to accuse him of sexual misconduct, and that it therefore must be admitted under his Sixth Amendment

right to full and fair cross-examination." *Lewis*, 591 So. 2d at 923 (citations omitted). Mr. Adderly's contention here is the same.

This Court held in *Lewis* that the evidence had to be admitted because excluding it would have "effectively deprived [Lewis] of the opportunity to confront his accuser and present his defense." *Lewis*, 591 So. 2d at 925, quoting the dissenting opinion below. The Court explained:

We recognize the public policy underlying [the] rule . . . that a victim of a sexual assault should not be subjected to having her sexual history brought up in open court, but **hold that where, as occurred in this case, application of this rule interferes with confrontation rights, or otherwise precludes a defendant from presenting a full and fair defense, the rule must give way to the defendant's constitutional rights.**

Lewis, 591 So. 2d at 925 (citations omitted, emphasis added).

Thus, the rape shield statute is "essentially an explicit statement of the rule of relevancy" (*Marr v. State*, 494 So. 2d 1139, 1142 (Fla. 1986)), and cannot be used to exclude relevant evidence needed to confront a prosecution witness and present a defense.¹ Here, as in *Lewis*, the evidence in ques-

¹ The State acknowledged the authority of *Lewis* below and agreed that the rape shield law "does give way" when defendant seeks to "prove a motive to fabricate on the part of the

tion is relevant to credibility, where credibility is the sole issue to be determined at trial. The principle in *Lewis* and here is that the defendant is entitled to confront and cross-examine his accuser, and defend by showing that she had a motive to lie.

Lewis has often been applied to vindicate confrontation rights. See *Hammond v. State*, 660 So. 2d 1152, 1157 (Fla. 2d DCA 1995) (error to exclude testimony concerning prior sexual knowledge of victims likely to be perceived as innocent, because in "classic credibility" contest, "the defendant's right to confront his accusers takes precedence over the rape shield law"); *Teemer v. State*, 615 So. 2d 234, 236 (Fla. 3d DCA 1993) (rape shield statute codifies rule of relevancy that victim's prior sexual history is irrelevant, but must yield to defendant's constitutional right to present "a full and fair defense"); *Dixon v. State*, 605 So. 2d 960, 962 (Fla. 2d DCA 1992) (the rape shield statute could not be applied to interfere with "confrontation rights" or to preclude a defendant from "presenting a full and fair defense"); *Castro v. State*, 591 So. 2d 1076 (Fla. 3d DCA 1991) (judge improperly excluded

[alleged] victim." A. 9.

evidence indicating 15-year old's alleged motive to fabricate accusations against her uncle).

The District Court ruled here that there was "no legally sufficient reason to overcome the rape shield statute in this case" (A. 104) because the "claim of the defendant is contrary both to common sense and the facts of the case." (A. 103). The result of the Court's ruling is effectively to preclude Mr. Adderly from disputing the truth of his stepdaughter's testimony against him in a case where they are the only witnesses and there is no physical evidence.

The "facts of the case" are in dispute, and are to be determined by a jury upon the evidence at trial. The only "facts" not in dispute are the fact that S.D. was having sex with her boyfriend, and the fact that she charged Mr. Adderly with a sexual battery, allegedly committed almost nine months prior to the filing of the information. The State contends that charge is true; defendant claims it is false.

The State contends that S.D. truthfully told her mother that her stepfather had assaulted her because her mother asked (nine months after the alleged sexual battery) why she didn't like him; Mr. Adderly claims that S.D. fabricated the accusa-

tion so that her mother would be angry at him, not at her.² The State claims that S.D. told her mother she had been having sex with her boyfriend only because that would be revealed after she made her accusation against Mr. Adderly; defendant contends that S.D. needed to tell her mother that she had been having sex with her boyfriend, and made a false accusation in order to divert her mother's anticipated wrath.

The District Court's opinion indicates that the defendant's claim is contrary to "common sense." (A. 103). But the Court cannot take judicial notice that 15-year old girls always act in accordance with "common sense." The State has swallowed whole S.D.'s claim that she told her mother about her sexual activity with Allen because she had to undergo a gynecological examination after making her accusation against Mr. Adderly. The District Court would preclude defendant from contesting that claim and arguing that she made a false accusation because she needed to tell her mother about her sexual activities with Allen (and the accusation would focus her mother's anger at defendant Adderly), or that she needed a gynecological examination for a reason she could not explain

² As noted, events transpired in precisely this fashion. S.D. testified at her deposition that her mother "was not so much upset at me about the sex with Allen, but she was upset with Leon and all that. She was upset with Leon, not Allen." A. 79-80.

truthfully, and therefore made a false accusation that would get her a medical consultation.³ And the State would apparently preclude defendant from seeking to argue that the accusation is false unless defendant can make a factual showing as to why S.D. needed to tell her mother about her sexual activities with Allen or needed a gynecological examination, and as to the mental process that led S.D. to make a false accusation.⁴

Defendant's right to a jury trial encompasses the right to have a jury determine whether there is a reasonable doubt that S.D.'s account is true. Jurors may think, and the prosecution will likely argue, that S.D. has no reason to lie about

³ See State's Petition at A. 10 ("The accusation . . . triggered the exam and then S.D. openly told her mother about her prior sexual activity with her boyfriend"); see also State's Petition at A. 4 (told her mother because she knew examination at "rape [treatment] center" would reveal that she was not a virgin). Whatever the purpose of an examination at the rape treatment center where S.D. claimed oral contact nine months before she reported it, it is apparent that such a gynecological examination would show little or nothing, other than the absence of pregnancy or sexually transmitted disease.

⁴ See State's Petition at A. 10 ("These facts completely destroy any contention that S.D. fabricated the accusation against Adderly to soften the blow about her mother finding out about the sexual activity with her boyfriend. If S.D. did not want her mother to find out about the sexual activity, she could just as easily said nothing [about] Adderly." **Apparently the State can not even contemplate the possibility that some else knew about Allen and threatened to tell S.D.'s mother.**

a matter such as this. The District Court's opinion, precluding defendant from showing that she does, deprives him of the right to have a jury determine whether there is a reasonable doubt.

Exploration of the mental process that may have led S.D. to make a false accusation is virtually impossible; making a false accusation of sexual battery is not likely ever to accord with "common sense." Nonetheless, a jury could rationally find a reasonable doubt about the veracity of S.D.'s accusation against Mr. Adderly without determining why S.D. wanted or needed to tell her mother that she was having sex with her boyfriend.

Possible reasons for S.D.'s disclosure of her sexual activity with her boyfriend are readily apparent. S.D. might have feared that her mother already knew about her sexual activities with Allen or that she might find out from someone else. S.D. might have feared that she was pregnant or had a sexually transmitted disease, that she could not further conceal the situation from her mother, and that she had no way to obtain or to explain why she needed a gynecological examination. By telling her mother about Allen, S.D. would diffuse her mother's anger, and by falsely accusing Mr. Adderly, S.D. would divert it towards him.

Defendant need not prove what circumstances led S.D. to confess her sexual activities to her mother in order to argue that S.D. had a motive to make a false accusation against defendant in order to divert her mother's attention. The District Court's order precluding defendant from proving the undisputed fact that S.D. was secretly having sex with her boyfriend, and arguing S.D.'s motive to lie, effectively precludes defendant from meaningfully disputing the testimony against him. The Court may not, under the guise of a ruling upon the admissibility of evidence, preclude defendant from seeking a jury determination as to the truth of the accusation against him.

The right of a defendant to confront the witness against him, to cross-examine, and to offer relevant evidence indicating that the witness had a motive to fabricate the charges made is fundamental, and rooted in the Sixth Amendment, as the above-cited cases hold. The State's claim that the charges are true does not entitle the State to relief that would effectively preclude the defendant from contesting them. A proceeding in which only one side gets to present its case is a sermon, not a trial.

A jury (not an appellate court) is needed to determine whether S.D. hid her hostility toward her step-father from her

mother for almost nine months, or invented it when she realized her mother was about to discover S.D.'s sexual activity with Allen.

II

THE DISTRICT COURT ERRED IN GRANTING CERTIORARI WHERE THERE WAS NO DE- PARTURE FROM THE ESSENTIAL REQUIRE- MENTS OF LAW

The District Court ruled that certiorari was proper to quash the trial court's refusal to exclude evidence of S.D.'s sexual activity with her boyfriend that gave her a motive to lie on the ground that there was "no legally sufficient reason to overcome the rape shield statute in this case" (A. 104) because the "claim of the defendant is contrary both to common sense and the facts of the case." (A. 103). The District Court thus rejected the trial court's finding, that the evidence in question has sufficient probative value as to S.D.'s credibility that excluding it would deny defendant his rights, and found the order below reflected a departure from the essential requirements of the law.

This ruling disregards rulings of this Court limiting the circumstances under which certiorari may be granted to quash a non-appealable ruling. See *Haines City Community Development v. Heggs*, 658 So. 2d 523 527-28 (Fla. 1995) ("an abuse of judicial power")(citation and internal quotation omitted); accord, *Combs v. State*, 436 So. 2d 93, 96 (Fla.

1983)("violation of a clearly established principle of law resulting in a miscarriage of justice"). In *State v. Pettis*, 520 So. 2d 250, 253-54 (Fla. 1988), the Court indicated that even an erroneous ruling did not necessarily rise to the level of a departure from the essential requirements of law, warranting certiorari; see also *Young, Stern & Tannenbaum, P.A. v. Smith*, 416 So. 2d 4, 5 (Fla. 3d DCA 1982) ("departure from the essential requirements of law"). The District Court's opinion did not articulate the basis upon which it found a departure from "the essential requirements of law" or "an abuse of judicial power." The result of the Court's ruling that the confrontation clause did not override the rape shield statute in this case is effectively to preclude Mr. Adderly from disputing his stepdaughter's testimony where they are the only witnesses and there is no physical evidence.

Plainly there was no departure here from the essential requirements of law. The trial court's ruling that the evidence was admissible was correct, not error. Indeed, there is no substantial argument that the trial court's ruling was wrong; the State claims only that the trial court saw too quickly that the State's claim was unfounded.

CONCLUSION

The order appealed from should be reversed, the trial court's ruling should be reinstated, and the matter should be remanded for trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copies of the foregoing, and the attached Appendix, were mailed to Frank J. Ingrassia, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 110 S.E. 6th Street, Fort Lauderdale, FL 33301 and the Honorable Cecilia Altonoga, Circuit Judge, Richard E. Gerstein Justice Building, 1351 Northwest 12th Street, Miami, Florida 33125, on October 11, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the type font in this brief is Courier New 12 point, except that the headings are set in Times New Roman 14 point.

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