

IN THE SUPREME COURT OF FLORIDA

RAFAEL ALEXANDER GUTIERREZ,

Petitioner,

v.

CASE NO. SC14-799

STATE OF FLORIDA,

Respondent.

_____ /

On Notice To Invoke Discretionary
Jurisdiction To Review A Decision Of The
Fifth District Court of Appeal

MR. GUTIERREZ'S INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

In this brief, the Petitioner, **RAFAEL ALEXANDER GUTIERREZ**, will be referred to as "Mr. Gutierrez". The Respondent, **STATE OF FLORIDA**, will be referred to as the "state".

The initial record on appeal in this case consists of two volumes. Citations will be by "1," for the first volume of court papers, and by "T," to the one volume of trial transcript, followed by the appropriate page reference therein. Two volumes of supplemental records have been filed. They will be referred to by "SR," followed by the appropriate page reference therein.

STATEMENT OF THE CASE AND OF THE FACTS

A. PROCEEDINGS BELOW

This petition seeks review of a decision by the Fifth District Court of Appeal in Gutierrez v. State, 133 So.3d 1125 (Fla. 5th DCA 2014), following an appeal from a final judgment and sentence entered in the Circuit Court, Ninth Judicial Circuit, Orange County, Florida ("trial court").

The state filed a one count criminal information which alleged that on January 27, 2010, in Orange or Seminole County, Mr. Gutierrez committed a sexual battery on N.A., a person over 12 years of age, in that his penis penetrated or had union with her sexual organ, in violation of §794.011(5), Florida Statutes (1/1-2). Consent was his defense.

After a two day jury trial, Mr. Gutierrez was convicted as charged and

adjudicated guilty (1/86, 91, 109; T/1, 135-37). He was sentenced to serve 7.9 years in state prison, with credit for time served (1/96-99, 107-08; SR1/9-10). He is currently serving this sentence.

Mr. Gutierrez filed a timely appeal to the Fifth District. One issue raised asserted that the trial court committed reversible error in giving a special jury instruction, emphasized by the state in closing arguments, that read: **The testimony of the victim need not be corroborated in a prosecution for sexual battery.** In a 2-1 decision that court affirmed the judgment and sentence¹. Gutierrez v. State, 133 So.3d 1125 (Fla. 5th DCA 2014). The Fifth District's majority discussed this Court's opinion rejecting a special jury instruction for a sexual battery victim in Marr v. State, 494 So.2d 1139 (Fla. 1986), but did not find it controlling. Id. at 1129-31. It found the case distinguishable from Brown v. State, 11 So.3d 428 (Fla. 2d DCA 2009), which reversed a conviction due to the use of the identical instruction. Id. at 1128-31. Instead it noted that courts from several other states had approved the use of similar instructions. Id. at 1130-31. It finally ruled that while this instruction may be used in certain cases, it was error to have used it in Mr. Gutierrez's. Id. at 1131. However, it then ruled that its use was harmless error, stating

Although there were no eyewitnesses, there was DNA evidence obtained from the vaginal swab that matched Gutierrez, as well as testimony from a sexual assault nurse and photographs of the victim's injuries that were consistent with the described attack.

¹ It remanded for correction of some scrivener's errors in the judgment. 133 So.3d at 1131-32.

Id. at 1131.

One judge dissented, arguing that as in Brown this instruction must be condemned as improper because it was likely to confuse and mislead the jury, it highlighted the testimony of one witness, and the state had not proven it to be harmless error. Id. at 1132-33.

Mr. Gutierrez filed a timely motion for rehearing, which the Fifth District denied on March 21, 2014. The mandate issued on April 9, 2014. Mr. Gutierrez filed a timely notice to invoke this Court's jurisdiction on April 21, 2014. This Court accepted jurisdiction by order dated September 9, 2014. This Court has jurisdiction pursuant to Article V, §3(b)(3), Florida Constitution.

B. FACTS

N.A., a 40 year old woman, testified that in January 2010 she worked at the Caliente Lounge in Orange County (T/18-20). She knew Mr. Gutierrez as a patron of the bar, and as a friend of the bar manager (T/20-21). She had no romantic relationship with Mr. Gutierrez, but talked with him and considered him a good person (T/20-21, 24). Typically N.A. worked at the bar from about 10:15 p.m. until 2:00 a.m. (T/22).

On the night of January 27, 2010, N.A. had about five or six beers at work (T/21-22). She had a conversation with Mr. Gutierrez, which included talk of a romantic relationship (T/23). Mr. Gutierrez also drank alcohol that night, which was unusual for him (T/31). N.A. left work at about 2:15 a.m., and attempted to drive herself home (T/25-26). She hit a curb in the parking lot (T/25-26). She initially said

she would just sleep it off there (T/25). Mr. Gutierrez, however, offered to drive her home (25-27). He drove her car, and was followed by a second bar patron, Mr. Gutierrez' friend whom N.A. knew, who drove Mr. Gutierrez' car (T/24, 27-28).

N.A. testified that they stopped at an apartment complex, where Mr. Gutierrez said they were going to see a friend (T/29-30). N.A. had fallen asleep on the ride there (T/34). N.A. saw Mr. Gutierrez's friend who had already arrived at the complex in Mr. Gutierrez's car (T/29-30). Mr. Gutierrez then said he wanted to talk with her (T/30). They talked for a bit. N.A. knew that he was in a relationship with the bar manager, and she called him a stupid idiot (T/31-32). Mr. Gutierrez said he was going to show her he was not a stupid idiot, and grabbed her hands (T/32). They struggled in the car (T/32). Mr. Gutierrez grabbed her breast, and tried to pull down her pants (T/33). Eventually he pulled both her and his pants partially down (T/34-35). He then had sexual intercourse with her, without a condom, and ejaculated (T/35-36). N.A. tried to get him to stop (T/36). He told her not to tell anyone (T/36-37).

N.A. testified she then slept for a while in her car, while Mr. Gutierrez slept in his own vehicle (T/41). She woke up around 6:00 a.m., got her keys from him, and he showed her how to leave (T/42-43). At home, she slept and then went to work (T/44). She obtained Mr. Gutierrez's name from the bar manager (T/44, 48). On the third day after the event, she told the bar manager, who did not believe N.A. (T/49). She then went to a hospital, which contacted the police (T/50).

N.A. was not ever sure where the attack took place (T/29, 51-52). She believed

it was within five to ten minutes of Lee Road (T/51-52). She reported it to the police in Seminole County (T/51).

A nurse with the Seminole County Health Department examined N.A. on January 29, 2010 (T/76-77). The nurse testified that the right breast area was red, the left breast, left thigh, hip joints, and entire vaginal area were tender, there were scratches on the navel and back, and there were bruises on the right thigh and left hand (T/80-81). Her urethral orifice was tender (T/82). Just below the entrance to the vagina there was an abrasion (T/83). She agreed that injuries can occur even during consensual sex, but were more likely to occur when it was not consensual (T/84). Vaginal swabs were taken for DNA comparison (T/85). The parties stipulated that DNA found on these swabs matched Mr. Gutierrez's DNA (T/91-92).

Mr. Gutierrez did not testify or present any witnesses (T/96).

Over the defense's objection (T/64-66), the trial court agreed to give a special instruction requested by the state (T/66). Taken directly from §794.022(1), Florida Statutes, it read:

The testimony of the victim need not be corroborated in a prosecution for sexual battery. (T/64).

The trial court initially stated that it was not inclined to give the instruction, but was persuaded to give it because the instruction was based on a Florida statute and the defense was arguing that N.A.'s testimony was not corroborated (T/64-67). That instruction was included in the oral and written final instructions to the jury as part of the instruction on weighing the evidence (1/80; T/125).

In its initial closing argument, the state argued this instruction in an effort to

head off the expected defense credibility attack, twice telling the jury there was no need for any evidence to corroborate the victim (T/104):

The second instruction that the Judge is going to give you that I would like to mention, is that in a prosecution for sexual battery, there is no need for corroborating evidence of the victim. Just like we talked in jury selection, and everyone agreed that you would follow the law. And that's the law. There is no need for corroboration. (T/104; emphasis added).

It then again asked the jury to follow the law (T/105). In its rebuttal closing argument, the state's argument was all about the credibility issues raised by the defense (T/116-21). Right at the end of that closing argument, the state reiterated:

Members of the jury, use your common sense, follow the law. The victim's testimony doesn't have to be corroborated in a case like this. And remember that beyond a reasonable doubt, you cannot speculate. (T/120; emphasis added).

SUMMARY OF THE ARGUMENT

THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS BY UPHOLDING A SEXUAL BATTERY CONVICTION WHERE TRIAL COURT APPROVED, AND STATE EMPHASIZED, SPECIAL VICTIM CREDIBILITY INSTRUCTION CONDEMNED BY COURTS

Contrary to legal precedent from this Court and the Second District that has strongly condemned jury instructions - such as the one used by the state in this case - that single out the credibility of the victim in a sexual battery case for consideration under special rules, the Fifth District erroneously affirmed Mr. Gutierrez's sexual battery conviction. This Court has jurisdiction pursuant to Article V, §3(b)(3), Florida Constitution, to review cases which directly and expressly conflict with opinions of this Court or other district courts of appeal on the same question of law. This Court must vacate the Fifth District's opinion because it a) expressly and directly conflicts with other Florida appellate decisions on the trial court's use of special credibility instructions for victims in sexual battery cases, and b) erroneously affirmed the conviction in a case where the state's repeated use of the condemned instruction was critical to obtaining the conviction, and thus the error could not be harmless.

ARGUMENT

THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS BY UPHOLDING A SEXUAL BATTERY CONVICTION WHERE TRIAL COURT APPROVED, AND STATE EMPHASIZED, SPECIAL VICTIM CREDIBILITY INSTRUCTION CONDEMNED BY COURTS

It has been clear since at least this Court's decision in Marr v. State, 494 So.2d 1139 (Fla. 1986), that the use of a special credibility instruction to weigh the credibility of an alleged victim in a sexual battery case is prohibited. The use of instruction requested by the state in Mr. Gutierrez's trial, already condemned and found to be reversible error by the Second District in Brown v. State, 11 So.3d 428 (Fla. 2d DCA 2009)², should have been held to be reversible error in Mr. Gutierrez's case. However, despite these cases, the Fifth District erroneously ruled that such an instruction may be used in some sexual battery cases and was not reversible error in Mr. Gutierrez's.

Marr was a prosecution for sexual battery. Id. at 1139. At trial the defense had requested an instruction that read: "In a case where no other person was an immediate witness to the alleged act, the testimony of the prosecutrix should be rigidly scrutinized." Id. at 1140. The trial court denied the instruction, instead giving the standard instruction on credibility of witnesses, similar to the credibility instruction

² Apparently neither the trial court nor either counsel was aware of the Brown decision. Had this been brought to the trial court's attention, it would have been required to follow it as binding precedent. Pardo v. State, 596 So.2d 665 (Fla. 1992).

that now exists. Id. A panel of the First District held the denial of the instruction to be reversible error, but the en banc court disagreed. Id. In affirming that decision, this Court unanimously held that the requested instruction should not be used in sexual battery cases. Id. The Court held that the instruction improperly singled out the testimony of a sexual battery victim, and “. . . should no longer play a role in Florida jurisprudence.” Id. at 1142. It went on to say:

. . . we can discern no unique reason why those accused of sexual battery should occupy a status different from those accused of any other crime where the ultimate factual issue at trial pivots on the word of the victim against the word of the accused.

Id. (footnote omitted). Instead, the standard credibility instruction was held to be adequate because it gave guidance to the jury without impermissibly commenting on the weight to be given to the evidence or the credibility of any witness. Id.

In the appeal to the Fifth District, Mr. Gutierrez - in his initial brief - argued Marr was controlling law on this issue. The state - in its answer brief - did not even cite, much less address or discuss Marr. In its decision, the Fifth District similarly gave Marr short shrift. While it did discuss the case, it failed to recognize that it was controlling Florida authority which condemned in the strongest terms the use of an instruction such as the one used against Mr. Gutierrez. Instead of recognizing this controlling authority, the Fifth District went on a search of other states to find contrary decisions. While a review of decisions in other courts may be relevant to an issue of first impression in this state, it was not relevant to the issue before the Fifth District. This search for opposing authority reveals the majority was searching for

a way to approve of the instruction at issue. In the end, it determined that such an instruction can be used in some cases, but was wrongly used in Mr. Gutierrez's. The Fifth District's ruling that this instruction can be used in a Florida criminal trial cannot survive this Court's Marr decision, which rejected such an instruction as one which "... should no longer play a role in Florida jurisprudence." Marr, 494 So.2d at 1142. The Fifth District's decision to the contrary must be soundly rejected.

The instruction offered by the state in Mr. Gutierrez's case is the flip side of Marr. It is, however, clearly improper for the same reasons. It improperly commented on the evidence and singled out the testimony of the sexual battery victim, and sought to apply a special rule of credibility to that testimony that does not exist. The statute on which the instruction is based, §794.022(1), Florida Statutes, sets forth a rule of evidence. It is not intended, however, to tell a jury how to weigh credibility in a sexual battery case. While it is true that as a matter of sufficiency of the evidence the testimony of a sexual battery victim need not be corroborated, Marr made clear that principle of law is not the subject of a proper jury instruction.

The Second District reviewed this issue at length in Brown v. State, 11 So.3d 428 (Fla. 2d DCA 2009). The instruction proposed by the state, and given over defense objection, was **identical** to the one used in Mr. Gutierrez's case. Id. at 430-31. The trial court in Brown gave the instruction for two reasons: that the defense put the question of corroboration at issue and the instruction was an accurate statement of the law. Those are the same two reasons the trial court articulated in Mr. Gutierrez's case! In reversing the defendant's sexual battery convictions and

remanding for a new trial, the Second District applied the rationale of Marr to this issue. It ruled that the instruction impermissibly singled out the testimony of one witness, was an impermissible comment on the evidence, and was likely to confuse and mislead the jury. Id. at 438-39. Because the testimony of the victims was not corroborated, and because the prosecutor used this improper instruction in closing argument to gain an advantage, the giving of the instruction was held to be harmful error. Id. at 439-40.

Despite the holdings of Marr and Brown, the Fifth District held that the instruction used in Mr. Gutierrez's case may be properly used in some sexual battery cases. For that conclusion it primarily relied on out of state cases, and did not properly apply this Court's clear and contrary mandate from Marr (as well as the Second District's decision in Brown) which rejected such an instruction as one which "... should no longer play a role in Florida jurisprudence." Marr, 494 So.2d at 1142.

The Fifth District's majority ruled that Brown was distinguishable because there was no corroborating physical evidence in that case, and there was corroborating evidence in Mr. Gutierrez's case. It thus held the use of the instruction to be harmless error. However, that conclusion is contrary to this Court's harmless error principles, as set forth in State v. DiGuilio, 491 So.2d 1129, 1138-39 (Fla. 1986).

In DiGuilio the Court stated that 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, there is

no reasonable possibility that the error contributed to the conviction.” Id. at 1135.

The Court explained that

Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. However, the Court cautioned that “[h]armless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.” Id. at 1139. Instead, the “focus is on the effect of the error on the trier-of-fact.” Id. The question is “whether there is a reasonable possibility that the error affected the verdict. Id. “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.” Id.

The Fifth District did not properly apply this test in Mr. Gutierrez’s case. It simply looked at two pieces of non-conclusive evidence from the state’s case. It did not look at the state’s use of the improper instruction in closing argument. It thus made no effort to examine how the impermissible instruction was actually used at trial, and no effort to examine how its use might possibly have affected the verdict. In contrast, the dissent made that type of analysis, and properly concluded that the error had to be harmful.

In reaching its harmless error conclusion, the Fifth District discussed only a) DNA evidence that linked Mr. Gutierrez to having sex with N.A., and b) the nurses testimony and photographs of N.A.’s injuries. However, the DNA evidence did not establish guilt, as the defense was one of consent, and there was no claim by the

defense that sexual contact did not occur. The nurse's testimony and photographs do not establish guilt either. The nurse testified that the injuries exhibited by N.A. can occur during consensual sex, so her testimony was not an indisputable benefit to the state. The defense even argued that this evidence supported Mr. Gutierrez's defense of consent (T/112-13). Additionally, the Fifth District's opinion overlooks the fact that Mr. Gutierrez did not simply argue that the physical evidence was inconsistent with N.A.'s testimony. He argued that her testimony as to how the act took place was not believable, that she only remembered certain parts of the evening, that she claimed she was raped and then immediately fell asleep, and her actions in delaying the reporting of the incident impacted her credibility (T/107-15). The instruction dealing with the lack of corroboration undercut all of those defense credibility arguments, as the dissent below recognized. Gutierrez, 133 So.3d at 1132-33.

The Fifth District's decision completely ignored cases which stress that how an improper instruction or improper evidence is used in closing argument is an important aspect of the harmless error test. See e.g., Rigterink v. State, 2 So.3d 221, 257-59 (Fla. 2009)(admission of improper evidence was not harmless when it was discussed in state's opening statement and emphasized in state's closing argument); State v. Hoggins, 718 So.2d 761, 772 (Fla. 1998)(where evidence against defendant was not clearly conclusive, improper closing argument that involved comment on defendant's right to remain silent was not harmless error). See also Marston v. State, 136 So.3d 563 (Fla. 2104)(harmless error test is not "overwhelming-evidence test;"

repeated improper comments on defendant's right to remain silent, in voir dire, were not harmless); Cooper v. State, 43 So.3d 42 (Fla. 2010)(harmless error test is not strength of evidence test).

In Mr. Gutierrez's case, the state used this erroneous instruction to its advantage, repeatedly telling the jury this was the law, and they had sworn to follow the law, and the law did not require any corroboration of N. A.'s testimony. It is clear that N.A.'s credibility was the critical issue in the case. The state fully understood the purpose of the instruction and used the instruction in its closing arguments to emphasize that exact point. It clearly benefitted the state to be able to tell the jury that N.A.'s testimony need not be corroborated. The state cannot show beyond a reasonable doubt that the error in giving this instruction did not contribute to the verdict.

Just as in Brown, this error cannot be held to be harmless. As the Gutierrez dissent makes clear, this instruction impermissibly singled out the testimony of N.A. for special treatment. It was an improper comment on the evidence. It was likely to confuse and mislead the jury on the most critical issue in the trial, i.e., N.A.'s credibility. The state's repeated use of this improper instruction in closing argument added to the harm and prejudice to Mr. Gutierrez' defense. As in the Court's recent discussion of harmless error in Marston v. State, 136 So.3d 563 (Fla. 2014), given the prosecutor's impermissible comments - here the use of this instruction in closing arguments to achieve a guilty verdict - the Fifth District erred in concluding the state met its very high harmless error burden.

The conflict between these cases and Mr. Gutierrez's must be resolved. Just as in those cases, Mr. Gutierrez is entitled to a proper application of the legal principles from Marr, Brown, DiGuilio, and Marston, and a reversal of his conviction for a new trial.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court must vacate the decision of the Fifth District and remand with instructions that Mr. Gutierrez be given a new trial.

RESPECTFULLY SUBMITTED this 16th day of October, 2014, at Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of October, 2014, this brief was efiled and that system furnished a true and correct copy to counsel for the Respondent: Pamela J. Koller and Wesley Heidt, Assistant Attorneys General, Daytona Beach, FL.

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I hereby certify that the brief is typed in Times New Roman 14 point font.

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