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IN THE SUPREME COURT OF THE STATE OF FLORIDA

RAFAEL ALEXANDER GUTIERREZ,

Petitioner,

v.

Case No. SC14-799
5th DCA No. 5D12-3461

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the four corners of the majority opinion of the district court.[1]

The Fifth District Court of Appeal's (Fifth District Court) majority opinion in Gutierrez v. State, 133 So. 3d 1125 (Fla. 5th DCA 2014), set out the following relevant facts:

> Gutierrez was charged with one count of sexual battery not likely to cause injury after the victim complained to detectives that she had been vaginally raped by him in the front seat of her car.
>
> On the night of January 27, 2010, the victim arrived for work at the Caliente Lounge around 10:00 p.m. Gutierrez, a regular patron at the bar, was already there. On that particular evening, the victim consumed approximately five or six beers over the course of her shift. She left around 2:15 a.m. while Gutierrez was still at the bar. When the victim attempted to drive herself home, she hit the sidewalk with her car. Gutierrez then offered to drive her home. She accepted Gutierrez's offer and the two departed for the victim's home in her car. Gutierrez drove while the victim rode in the front passenger seat. However, instead of driving her home, Gutierrez drove to an unknown apartment complex and informed her they were stopping to see a friend. When Gutierrez parked the car, he told the victim he wanted to talk with her "for a while." After listening to Gutierrez complain about his relationship with her boss, the victim called him a "stupid idiot." Gutierrez responded by grabbing the victim's hands. The two began to struggle inside the

[1] Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986).

victim's vehicle, at which time Gutierrez moved from the driver's seat to the front passenger seat where the victim was sitting. According to the victim, Gutierrez grabbed her wrists with one hand, and tried to grab at her breast and pull down her pants with the other. In defense, the victim tried to scream, but Gutierrez covered her mouth to stop her. During the struggle, Gutierrez was able to pull both his and the victim's pants down to just above the knee. Thereafter, Gutierrez had vaginal intercourse with the victim, without wearing a condom, and ejaculated. During the struggle, the victim continually told Gutierrez to stop, but he did not. Afterward, Gutierrez told her not to tell anyone about the incident, which the victim agreed to do because Gutierrez still had possession of her car keys.

Gutierrez then exited the victim's car and went to sleep in his own vehicle, which his friend had parked in an adjacent spot. He took the victim's car keys with him. The victim slept in her own car because Gutierrez would not give her car keys back, telling her that she still could not drive. After waking the next morning, the victim went to Gutierrez's vehicle to retrieve her keys. Gutierrez agreed to show her the way out of the complex, but the two were separated when Gutierrez drove away quickly. After managing to find her way home, the victim reported back to the Caliente Lounge later that night for her regularly scheduled shift. She expected to see Gutierrez at the bar in hopes that she could call the police to report the incident while he was there, but he never came in. The victim went to work the following night hoping to catch him, but again, Gutierrez never showed. On the third day after the incident took place, the victim told her manager what had occurred. She went to the hospital and the police were contacted. As part of the investigation, the police transported the victim to a clinic where a sexual assault

> nurse examiner conducted a head-to-toe physical and vaginal examination.
>
> At trial, the sexual assault nurse examiner testified that during her examination, the victim presented the following: red surface area markings on her right breast; left breast tenderness; bruising on her right thigh; scratches above her navel and on her back; tenderness of her hip joints and left thigh; and a swollen and bruised left hand. Moreover, Alvarez's vaginal examination revealed tenderness throughout the entire area, as well as an abrasion below the entrance to the vagina. While describing the injuries, the nurse examiner explained that when an individual engages in consensual sex, the body reacts in a manner where injuries are less likely to occur. However, she also explained that injuries can occur even when sexual intercourse is consensual. Vaginal swabs were taken during the examination by the nurse examiner for DNA comparison purposes. At trial, the parties stipulated that the DNA collected matched Gutierrez's DNA profile. The defense did not present any witness testimony.
>
> During the charge conference, the State, arguing Gutierrez opened the door, requested and received the following special jury instruction: "The testimony of the victim need not be corroborated in a prosecution for sexual battery." Gutierrez was convicted of one count of sexual battery. He was adjudicated guilty of the crime and sentenced to 7.9 years in prison. This appeal followed.

Gutierrez, 48 So. 3d at 1126-1127.

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court. The State's brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction in the instant case. While the Fifth District Court of Appeal held that it refused to adopt an absolute rule that the "no corroboration" instruction was not always error, this language was pure *dicta* and there is no express and direct conflict with this case on the face of the decision under review. Even assuming this Court agreed with the Brown v. State, 11 So. 3d 428 (Fla. 2d DCA 2009), opinion that seems to find a "no corroboration" instruction is always error, such a ruling by this Court would not change the result in this case and Petitioner would be entitled to no relief.

Moreover, Petitioner's second argument that the Fifth District Court's harmless error ruling was in conflict with State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), is not requiring of this Court's time and attention. Based upon the facts contained in the four corners of the majority opinion, the argument is wholly without merit, relies upon the dissenting opinion in this case, and appears to be an attempt to have this Court conduct a review of the Fifth District Court's harmless error analysis and ruling. Jurisdiction should be denied.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION.

Petitioner seeks discretionary review with this Honorable Court under Article V, Section 3(b)(3) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv). Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986), this Court explained:

> Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Reaves, 485 So. 2d at 830, n.3. Additionally, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. DHRS v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986). Respondent contends no such conflict exists between the cited cases and the instant opinion.

Section 794.022(1), Florida Statutes, Rules of Evidence, provides: "The testimony of the victim need not be corroborated in a prosecution under s. 794.011." In both Brown and Gutierrez,

a special "no corroboration" instruction[2] had been objected to at trial, and, on appeal, the district courts both concluded that the "no corroboration" instruction was improperly given requiring the employment of a harmless error analysis. Brown, supra; Gutierrez, supra. In Brown, primarily because of the lack of corroborating evidence, the instruction was found not to be harmless. Brown, 11 So. 3d at 439-440. On the other hand, in Gutierrez, primarily because there was corroborating evidence, the instruction was found to be harmless. Gutierrez, 133 So. 3d at 1131. These holdings by the Brown and Gutierrez courts do not expressly and directly conflict.

However, the Fifth District Court went beyond the necessary findings, i.e., that the instruction was improperly given in this case and constituted harmless error, holding that:

> While we disfavor the instruction because the standard instructions are generally sufficient to guide the jury, we decline to adopt a hard and fast rule that it is always error to give a special "no corroboration" instruction in sexual battery cases. We caution, however, that such an instruction should rarely be given, and only in very limited circumstances where the defendant's argument suggests the jury must require

[2]In this case, the standard instruction 3.9, weighing the evidence, was modified by the trial court so that, at number eight, the jury was informed that "[t]he testimony of the victim need not be corroborated in a prosecution for sexual battery." Gutierrez, 133 So. 3d at 1127. In Brown, the instruction was added to both instructions on the charges against Brown. Brown, 11 So. 3d at 431.

> corroboration. ... Such was not the case here.

Gutierrez v. State, 133 So. 3d 1125, 1131 (Fla. 5th DCA 2014) (footnote omitted). This language in Gutierrez regarding the refusal to adopt an absolute rule is pure *dicta* and is thus "without force as precedent." State ex rel. Biscayne Kennel Club v. Board of Bus. Regulation of Dept. of Bus. Regulation of State, 276 So. 2d 823, 826 (Fla. 1973). Accordingly, even assuming this Court agreed with the Brown opinion that seems to find the "no corrobation" instruction is always error,[3] such a ruling by this Court would not change the result in this case and Petitioner would be entitled to no relief. Jurisdiction should be denied. Ciongoli v. State, 337 So. 2d 780 (Fla. 1976) (declining to exercise conflict jurisdiction because conflicting language was *obiter dicta*).

Petitioner's second argument[4] that the Fifth District Court's finding of harmless error in this case was in conflict

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[3]In Brown, the Second District Court concluded that the giving of a jury instruction which followed the language of section 794.022(1), Florida Statutes, constituted an improper comment on the evidence and could confuse or mislead the jury. Brown, 11 So. 3d at 439.

[4]Petitioner, citing to the dissenting opinion, argues that the State of Florida's "repeated use of this improper instruction in closing argument added to the harm and prejudice to Mr. Gutierrez's defense." (IB 8). However, nowhere in either the majority opinion or the dissent is any mention made of the prosecutor's closing argument. Perhaps, Petitioner is confusing this fact with those in Brown where a finding was made that the

with State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), is wholly without merit. The Fifth District Court, in its majority opinion, made the following findings:

> The harmless error test places the burden on the State 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. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Application of the test requires an examination of the entire record 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, here the improper jury instruction, which might have possibly influenced the jury verdict. See id. Utilizing this standard, we find the error was harmless.
>
> Unlike Brown, the victim's testimony in this case was not completely uncorroborated. 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.
>
> For the foregoing reasons, we affirm the judgment and sentence.

Id. at 1019 (footnote omitted). Notably, there were several material factual differences between Brown and Gutierrez. For example, the Brown court found the instruction was not harmless because the victims' testimony was uncorroborated, i.e., there

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prosecutor made "misleading comments based on the special instruction[.]" Brown, 11 So. 3d at 440.

was no physical evidence, admissions, or collateral crimes evidence, and the prosecutor made misleading comments based on the instruction during closing argument. Id. at 439-40. In the instant case, unlike Brown, there was evidence corroborating the victim's assertion she was sexually battered including Petitioner's DNA evidence and injuries consistent with a sexual battery. Gutierrez, 133 So. 3d at 1131. Moreover, in this case, unlike in Brown, the instruction was not given to the jury twice, the instruction was included in the standard instruction on weighing the evidence, and there is no allegation that the prosecutor offered misleading comments about the instruction during closing argument. Id. at 1128. As the Fifth District Court specifically cited to and properly applied DiGuilio, this argument is wholly without merit and appears to constitute an attempt by Petitioner to have this Court conduct a review of the Fifth District Court's harmless error analysis and holding in this case.

Yet, in Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts. ... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to

> become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

Accordingly, not only has the Petitioner failed to establish jurisdiction as the Fifth District Court's refusal to announce an absolute ban on the "no corroboration" instruction constitutes *dicta*, but, also, another review of the facts in this case to make a new harmless error determination is not requiring of this Court's time and attention, as the district courts have fairly addressed the matter. Jurisdiction should be denied.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Honorable Court decline to accept jurisdiction in this case.

DESIGNATION OF E-MAIL ADDRESSES

I HEREBY DESIGNATE the following e-mail addresses for the purpose of service of all documents required to be served pursuant to Rule 2.516 in this proceeding: Primary Email Address: crimappdab@myfloridalegal.com, Secondary Email Address: pamela.koller@myfloridalegal.com.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief on Jurisdiction has been furnished via Email to counsel for Petitioner, Terrence E. Kehoe, Esquire, (Tinker Building, 18 West Pine Street, Orlando, Florida 32801) at tekehoelaw@aol.com this 27th day of May 2014.

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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133 So.3d 1125, 39 Fla. L. Weekly D364
(Cite as: 133 So.3d 1125)

H

District Court of Appeal of Florida,
Fifth District.
Rafael Alexander GUTIERREZ, Appellant,
v.
STATE of Florida, Appellee.

No. 5D12–3461.
Feb. 14, 2014.
Rehearing Denied March 21, 2014.

Background: Defendant was convicted in the Circuit Court, Orange County, Bob Leblanc, J., of sexual battery, and was sentenced to 7.9 years' imprisonment. Defendant appealed.

Holdings: The District Court of Appeal, Berger, J., held that:
(1) state was not entitled to special "no corroboration" instruction with respect to victim's testimony, and
(2) giving of such instruction was harmless error.

Affirmed; remanded for correction.

Evander, J., concurred in part and dissented in part with opinion.

West Headnotes

[1] Criminal Law 110 ⚿1152.21(1)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.21 Instructions
110k1152.21(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿1152.21(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.21 Instructions
110k1152.21(2) k. Failure to instruct. Most Cited Cases

Appellate court reviews the grant or denial of a jury instruction by the trial court for an abuse of discretion.

[2] Criminal Law 110 ⚿769

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k769 k. Duty of judge in general. Most Cited Cases

Criminal Law 110 ⚿805(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k805 Form and Language in General
110k805(1) k. In general. Most Cited Cases

Criminal Law 110 ⚿1172.1(5)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.1 In General
110k1172.1(5) k. Form and language; procedure in giving instructions. Most Cited Cases

While a trial court generally has wide discretion in instructing a jury, the use of a standard jury instruction is preferred if it adequately explains the law; thus, reversible error can occur when a trial court gives a non-standard jury instruction that could potentially mislead a jury.

[3] Rape 321 ⚿59(12)

321 Rape
321II Prosecution
321II(C) Trial and Review
321k59 Instructions
321k59(12) k. Complaints and declarations of female. Most Cited Cases

While there is no hard and fast rule that it is always error to give a special "no corroboration" instruction in sexual battery cases, such an instruction should rarely be given, and only in very limited circumstances where the defendant's argument suggests the jury must require corroboration.

[4] Rape 321 ⚿59(12)

321 Rape
321II Prosecution
321II(C) Trial and Review
321k59 Instructions
321k59(12) k. Complaints and declarations of female. Most Cited Cases

Defense counsel's statement, in opening argument in prosecution for sexual battery, that jury would hear from no eyewitnesses, and that it would not hear from anyone "to say that [victim's] story was corroborated from seeing it [,]" did not entitle state to its requested special instruction to effect that testimony of a sexual battery victim required no corroboration, as such statement was correct and did not constitute improper argument that eyewitness testimony was required.

[5] Criminal Law 110 ⚿1163(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error; Burden
110k1163(1) k. In general. Most Cited Cases

Harmless error test places the burden on the state 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.

[6] Criminal Law 110 ⚿1134.2

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.2 k. In general. Most Cited Cases

Application of the harmless error test requires an examination of the entire record 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.

[7] Criminal Law 110 ⚿1172.2

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.2 k. Instruction as to evidence. Most Cited Cases

Erroneous giving of state's requested special instruction, in prosecution for sexual battery, to effect that testimony of a sexual battery victim required no corroboration, did not prejudice defendant and was harmless, where victim's testimony was not completely uncorroborated; DNA evidence obtained from vaginal swab matched defendant, and testimony of sexual assault nurse and photographs of victim's injuries were consistent with described attack.

***1126** Terrence E. Kehoe, of Law Office of Terrence E. Kehoe, Orlando, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellee.

BERGER, J.

Rafael Alexander Gutierrez appeals the judgment and sentence entered after a jury found him guilty of sexual battery, pursuant to section 794.011(5), Florida Statutes (2010). He raises three issues on appeal, only one of which merits discussion. Gutierrez argues the trial court erred when it granted the State's request for a special jury instruction informing the jury that a sexual battery victim's testimony need not be corroborated. While we agree it was error to give the instruction, based on the specific facts of this case, we find the error was harmless and affirm.

Gutierrez was charged with one count of sexual battery not likely to cause injury after the victim complained to detectives that she had been vaginally raped by him in the front seat of her car.

On the night of January 27, 2010, the victim arrived for work at the Caliente Lounge around 10:00 p.m. Gutierrez, a regular patron at the bar, was already there. On that particular evening, the victim consumed approximately five or six beers over the course of her shift. She left around 2:15 a.m. while Gutierrez was still at the bar. When the victim attempted to drive herself home, she hit the sidewalk with her car. Gutierrez then offered to drive her home. She accepted Gutierrez's offer and the two departed for the victim's home in her car. Gutierrez drove while the victim rode in the front passenger seat. However, instead of driving her home, Gutierrez drove to an unknown apartment complex and informed her they were stopping to see a friend. When Gutierrez parked the car, he told the victim he wanted to talk with her "for a while." After listening to Gutierrez complain about his relationship with her boss, the victim called him a "stupid idiot." Gutierrez responded by grabbing the victim's hands. The two began to struggle inside the victim's vehicle, at which time Gutierrez moved from the driver's seat to the front passenger seat where the victim was sitting. According to the victim, Gutierrez grabbed her wrists with one hand, and tried to grab at her breast and pull down her pants with the other. In defense, the victim tried to scream, but Gutierrez covered her mouth to stop her. During the struggle, Gutierrez was able to pull both his and the victim's pants down to just above the knee. Thereafter, Gutierrez had vaginal intercourse with the victim, without wearing a condom, and ejaculated. During the struggle, the victim continually told Gutierrez to stop, but he did not. Afterward, Gutierrez told her not to tell anyone about the incident, which the victim agreed to do because Gutierrez still had possession of her car keys.

Gutierrez then exited the victim's car and went to sleep in his own vehicle, which his friend had parked in an adjacent spot. He took the victim's car keys with him. The victim slept in her own car because Gutierrez would not give her car keys back, telling her that she still could not drive. After waking the next morning, the victim went to Gutierrez's vehicle to retrieve*1127 her keys. Gutierrez agreed to show her the way out of the complex, but the two were separated when Gutierrez drove away quickly. After managing to find her way home, the victim reported back to the Caliente Lounge later that night for her regularly scheduled shift. She expected to see Gutierrez at the bar in hopes that she could call the police to report the incident while he was there, but he never came in. The victim went to work the following night hoping to catch him, but again, Gutierrez never showed. On the third day after the incident took place, the victim told her manager what had occurred. She went to the hospital and the police were contacted. As part of the investigation, the police transported the victim to a clinic where a sexual assault nurse examiner conducted a head-to-toe physical and vaginal examination.

At trial, the sexual assault nurse examiner testified that during her examination, the victim presented the following: red surface area markings on her right breast; left breast tenderness; bruising on her right thigh; scratches above her navel and on her back; tenderness of her hip joints and left thigh; and a swollen and bruised left hand. Moreover, Al-

varez's vaginal examination revealed tenderness throughout the entire area, as well as an abrasion below the entrance to the vagina. While describing the injuries, the nurse examiner explained that when an individual engages in consensual sex, the body reacts in a manner where injuries are less likely to occur. However, she also explained that injuries can occur even when sexual intercourse is consensual. Vaginal swabs were taken during the examination by the nurse examiner for DNA comparison purposes. At trial, the parties stipulated that the DNA collected matched Gutierrez's DNA profile. The defense did not present any witness testimony.

During the charge conference, the State, arguing Gutierrez opened the door, requested and received the following special jury instruction: "The testimony of the victim need not be corroborated in a prosecution for sexual battery." Gutierrez was convicted of one count of sexual battery. He was adjudicated guilty of the crime and sentenced to 7.9 years in prison. This appeal followed.

[1][2] We review the grant or denial of a jury instruction by the trial court for an abuse of discretion. *Worley v. State,* 848 So.2d 491, 491 (Fla. 5th DCA 2003) (citing *Palmore v. State,* 838 So.2d 1222, 1223 (Fla. 1st DCA 2003)). While a trial court generally has wide discretion in instructing a jury, the Florida Supreme Court has also acknowledged that the use of a standard jury instruction is preferred if it adequately explains the law. *See Carpenter v. State,* 785 So.2d 1182, 1199–1200 (Fla.2001) (internal citations omitted). Thus, reversible error can occur when a trial court gives a non-standard jury instruction that could potentially mislead a jury. *Id.* at 1200.

Defense counsel objected to the proposed instruction, arguing that such an instruction did not appear in the standard jury instructions approved by the Florida Supreme Court and, further, that the proposed instruction would mislead the jury into believing it did not have to weigh the credibility of the victim's testimony. It was Gutierrez's belief that the standard jury instruction on weighing any witness' credibility was sufficient to guide the jury. [FN1]

> FN1. The standard jury instruction to which defense counsel was referring is Florida Standard Jury Instruction (Criminal) 3.9 Weighing the Evidence. This instruction lists a minimum of five considerations a jury member should consider when weighing the credibility of trial witnesses. Additional factors are suggested and can be added into the instruction depending on their relevance to the particular issues at trial.

***1128** The trial judge initially indicated that he was not inclined to give the instruction. However, when the State argued that the requested special instruction used the exact statutory language from section 794.022(1), Florida Statutes (2010), and that Gutierrez opened the door by asserting in opening statement that there would be no corroborating evidence presented in the case, the trial judge opted, instead, to give the instruction. The judge determined that Gutierrez had argued lack of corroboration in his opening statement and that the statute appeared to apply to Gutierrez's case. Furthermore, in addressing defense counsel's continued concern that the proposed instruction could prevent the jury from properly assessing whether or not the victim's testimony matched the other witness' testimony, the trial judge stated:

> And I think you'll argue that, but—you did argue that—in your opening that there wouldn't be any corroboration and that there would be issues of credibility between defendant's version of consent, perhaps if he testifies, and her version of lack of consent. So if there's a statute that specifically says the testimony of the victim need not be corroborated in a prosecution for sexual battery, why shouldn't they be entitled to that instruction?

Defense counsel then stated she was also con-

cerned that a stand-alone instruction reciting the statute would unnecessarily emphasize the victim's testimony. The trial judge agreed and decided not to give a stand-alone instruction. Instead, the court included the language in the list of factors found in Florida Standard Jury Instruction (Criminal) 3.9 Weighing the Evidence.[FN2] Defense counsel then renewed her objection to the insertion of the statutory language into the standard jury instruction.

> FN2. The trial court inserted the requested language as item eight in the list of suggested factors a jury is to consider when weighing the credibility of a witness.

On appeal, Gutierrez renews his earlier contention that it was improper for the trial judge to include the "no corroboration" instruction as it unnecessarily emphasized the victim's testimony as deserving of special treatment. Gutierrez further argues that in light of existing Florida case law, the inclusion of such an instruction was reversible error. The State argues that it was within the trial court's discretion to include the instruction and that existing case law on this issue is distinguishable from the instant appeal.

The permissibility of a special "no corroboration" jury instruction rooted in the language of section 794.022(1) was recently addressed in *Brown v. State,* 11 So.3d 428, 431 (Fla. 2d DCA 2009). Similar to this case, the special instruction reviewed in *Brown* involved the verbatim use of the statutory language in section 794.022(1). And, the reasons provided by the trial judge for including the special instruction were identical to the two reasons articulated by the trial judge in the instant case—that the defense had put the question of corroboration at issue and that the instruction was an accurate statement of law. *Id.* at 433. In *Brown,* the second district determined that the special instruction, which informed the jury that a victim's testimony need not be corroborated in a prosecution for sexual battery, constituted an improper comment on the evidence and was likely to confuse and mislead the jury. *Id.* at 439. The court recognized that the special instruction provided a correct ***1129** statement of the law. However, it concluded the history of section 794.022(1) revealed that the statute was directed at the appellate review of the sufficiency of evidence, not the question of whether a jury should accept the uncorroborated testimony of a victim in a sexual battery prosecution. *Id.*

In *Brown,* the defendant was charged with committing sexual battery against two sisters. The crimes were alleged to have occurred sometime between 1983 and 1987, but were not reported until 2006. *Id.* at 430. At trial, the State presented the testimony of the two sisters, who detailed the four and a half years of sexual abuse they claimed to have experienced at the hands of Brown, as well as the testimony of the detective who took their statements. *Id.* Although the testimony of each sister reinforced the testimony of the other, their accounts were not supported by any other evidence, a fact defense counsel noted during opening statement and cross examination. Based on defense counsel's comments, the State requested the following special jury instruction based on section 794.022(1), Florida Statutes: "The testimony of the victim need not be corroborated in a prosecution for sexual battery." *Id.* at 430–31.

Over objection,[FN3] the trial court determined that Brown's counsel had put the uncorroborated nature of the sisters' testimony at issue and, because it was a correct statement of the law, agreed to give the instruction. The language in the special instruction was then added to the end of the standard sexual battery jury instruction and, because there were two victims, it was read to the jury twice. On appeal, Brown argued that the special instruction was an improper comment on the evidence and "constituted judicial approval of a crucial State argument." *Id.* at 431. The second district agreed and, using the Florida Supreme Court's holding in *Marr v. State,* 494 So.2d 1139 (Fla.1986), as its primary basis for determining it was error to give the instruction, reversed Brown's conviction and ordered a new trial after concluding the error was not harm-

less. *Id.* at 440.

> FN3. Brown opposed the requested instruction on the basis that section 794.022(1) was only pertinent to the State's burden of proof to survive a judgment of acquittal and thus, was not a proper subject for judicial comment. Additionally, defense counsel argued the subject matter of the special instruction was adequately covered in Florida Standard Jury Instruction (Criminal) 3.9 on Weighing the Evidence. *Brown,* 11 So.3d at 431.

The instruction in *Marr,* however, was quite different than the instruction requested in this case and in *Brown.* In *Marr,* the defendant was charged and convicted of sexual battery by oral penetration, pursuant to section 794.011(3), Florida Statutes (1983). 494 So.2d at 1139. The only evidence produced by the State at trial was the testimony of the victim. At trial, the defendant denied the sexual battery and requested the jury be given the following instruction: "In a case where no other person was an immediate witness to the alleged act, the testimony of the prosecutrix should be rigidly scrutinized." [FN4] *Id.* at 1140–41. The trial court ***1130** denied the request and, instead, gave the standard instruction on weighing the evidence. *Id.* at 1141.

> FN4. Under the old rape statute, section 794.01, Florida Statutes (repealed, effective Oct. 1, 1974, Laws of Florida 74–121), the standard jury instruction provided:
>
> > If the testimony of the female is not supported by other evidence her testimony should be rigidly examined, especially as it related to the nature and extent of the force used and as it related to the question of whether or not consent was ever finally given.
> >
> > This instruction, commonly referred to as the "Lord Hale instruction" was omitted from the standard instructions in 1976 and is not currently included in the standard jury instructions in criminal cases. *See Marr,* 494 So.2d at 1140–42.

On appeal, the Florida Supreme Court determined that the standard instruction given by the trial court was adequate to guide the jury without impermissibly commenting on the evidence or the credibility of any witness. *Id.* at 1142. Recognizing the well settled law that no corroborative evidence is required in a rape case when the victim is available to testify and can identify her accuser, the Court specifically held that:

> [A] jury instruction such as the one requested, which singles out the testimony of a sexual battery victim as somehow deserving more rigid scrutiny by a jury than other witnesses' or victims' testimony, should no longer play a role in Florida jurisprudence. The full panoply of due process rights exists to protect each criminal defendant from an unwarranted conviction. Appellate courts, as always, are available to ensure that a conviction of any crime is supported by sufficient evidence. But 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.*

Although the *Brown* court held that a special "no corroboration" instruction was reversible error based on *Marr* and decisions from other jurisdictions that have considered the issue,[FN5] several states have long adhered to precedent stating that a "no corroboration" instruction is permissible in sexual battery cases. *See People v. Gammage,* 2 Cal.4th 693, 7 Cal.Rptr.2d 541, 828 P.2d 682, 687 (1992) (holding that a "no corroboration" instruction is a correct statement of California law in sexual offense cases and that the instruction, when examined as a whole with all of the others, strikes a balance between the rights of both the defendant

and the complaining witness); *Stallworth v. State,* 150 Ga.App. 766, 258 S.E.2d 611, 612 (1979) (stating that the trial court properly instructed the jury on the issue of corroboration in light of the fact that Georgia law does not require corroboration of victim's testimony in rape cases); *People v. Smith,* 149 Mich.App. 189, 385 N.W.2d 654, 657 (1986) (stating that the trial court properly instructed jury it could convict defendant of criminal sexual conduct on basis of complainant's uncorroborated testimony, where defense counsel argued that, due to strength of defendant's alibi defense, jury should insist upon some corroborating evidence); *Gaxiola v. State,* 121 Nev. 638, 119 P.3d 1225, 1233 (2005) (finding that a "no corroboration" jury instruction did not unduly focus the jury's attention on the victim's testimony and was therefore an appropriate basis for a jury's decision if the victim's uncorroborated testimony establishes***1131** all of the material elements of the crime).

> FN5. *See Ludy v. State,* 784 N.E.2d 459, 461–62 (Ind.2003) (finding that a jury instruction directing a jury that it can find guilt on uncorroborated testimony alone "invite[s] it to violate its obligation to consider all of the evidence."); *Veteto v. State,* 8 S.W.3d 805, 816 (Tex.Ct.App.2000) (holding that despite a statutory provision authorizing a sexual assault conviction on uncorroborated testimony of the victim, such language as a jury instruction was an improper comment on the weight of evidence); *State v. Zimmerman,* 130 Wash.App. 170, 121 P.3d 1216, 1221–23 (2005) (expressing misgivings about an instruction advising the jury that an alleged victim's testimony need not be corroborated, but finding no error in giving the instruction as it was an accurate statement of the law).

[3] While we disfavor the instruction because the standard instructions are generally sufficient to guide the jury, we decline to adopt a hard and fast rule that it is always error to give a special "no corroboration" instruction in sexual battery cases. We caution, however, that such an instruction should rarely be given, and only in very limited circumstances where the defendant's argument suggests the jury must require corroboration. [FN6] *See Smith,* 385 N.W.2d at 657. Such was not the case here.

> FN6. Limiting use of the instruction should avoid opening the proverbial "can of worms" suggested by the dissent.

[4] The State requested the special instruction based on the following comment by defense counsel during opening statements: "You're not going to hear from any eyewitnesses. You're not going to hear from anybody to say that her story was corroborated from seeing it ...." The purpose of an opening statement is to outline what an attorney expects to be established by the evidence. *Gonzalez v. State,* 990 So.2d 1017, 1024–25 (Fla.2008). Defense counsel's statement was correct, as there were no eyewitnesses to the crime. Furthermore, it did not constitute an improper argument or in any way suggest to the jury that they require an eyewitness. Indeed, a closer look at the entirety of defense counsel's brief opening statement confirms that nothing improper was argued. Accordingly, it was error to give the special "no corroboration" instruction in this case. We now must consider whether the error was harmless.

[5][6] The harmless error test places the burden on the State 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. *State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986). Application of the test requires an examination of the entire record 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, here the improper jury instruction, which might have possibly influenced the jury verdict. *See id.* Utilizing this standard, we find the er-

ror was harmless.

Unlike *Brown,* the victim's testimony in this case was not completely uncorroborated.[FN7] 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.

> FN7. In *Brown,* there were no other witnesses to the acts of which Brown was accused. Neither of the two sisters had made any contemporaneous complaints about the alleged abuse and the crime went unreported for over twenty years. Additionally, there was no physical evidence and the State did not present any evidence of admissions by Brown or any collateral crimes evidence. 11 So.3d at 439.

[7] For the foregoing reasons, we affirm the judgment and sentence. We note, however, that the judgment contains several scrivener's errors. Specifically, the judgment lists defense counsel as "Carols [sic] Vega," when it was Ms. Heather Pastoor, and lists "Heather Pastoor" as representing the State when in fact Mr. Jonathan Mills was the prosecutor in the case. Moreover, the judgment does not reflect that Gutierrez was convicted after a jury trial as required by the rules of criminal procedure. Accordingly, we remand with ***1132** instructions to correct the aforementioned scrivener's errors found in Gutierrez's judgment.

AFFIRMED. REMANDED FOR CORRECTION OF SCRIVENER'S ERRORS.

PALMER, J., concurs.

EVANDER, J., concurring in part, dissenting in part, with opinion.

EVANDER, J., concurring in part, dissenting in part.

Because I do not believe the giving of the improper jury instruction in question was harmless error, I believe reversal is required.[FN8]

> FN8. I agree with the majority's resolution of the other two issues raised on appeal by Gutierrez.

As observed by our sister court in *Brown,* the special "no corroboration" jury instruction is improper because it is likely to confuse and mislead the jury. 11 So.3d at 439. Florida Standard Jury Instruction 3.7 [FN9] provides that: "[a] reasonable doubt as to the guilt of a defendant may arise from the evidence, conflict in the evidence, *or the lack of evidence.* " (emphasis added). Thus, a juror can properly conclude that an alleged victim's testimony in a particular case is not, in and of itself, sufficient to establish a defendant's guilt beyond a reasonable doubt. As a result, that juror may conclude that without "corroborating evidence," a reasonable doubt exists because of the lack of evidence. It is readily foreseeable that such a juror may be misled or confused by an ensuing, and arguably inconsistent, instruction that the alleged victim's testimony need not be corroborated. *See also Ludy v. State,* 784 N.E.2d 459, 462 (Ind.2003) ("[T]he meaning of the legal term 'uncorroborated' in this instruction is likely not self-evident to the lay juror. Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness's testimony, and ignore evidence that conflicts with the witness's version of events. Use of the word 'uncorroborated' without a definition renders this instruction confusing, misleading, and of dubious efficacy.").

> FN9. This particular instruction was given in the instant case.

The *Brown* court also concluded that the special "no corroboration" instruction is improper because it highlights the testimony of one witness. 11 So.3d at 439. I agree. I would also suggest that to approve the special jury instruction given below would open the proverbial "can of worms." For example, if the defendant had testified in the instant

case that the sexual encounter he had with the alleged victim was consensual, would he have been entitled to an instruction stating, "the testimony of a defendant need not be corroborated"?

The instant case was hardly a "slam dunk" case. Gutierrez' primary defense was that of consent. There was no evidence of any confession or incriminating statements by Gutierrez. Furthermore, the alleged victim's own testimony regarding the events that occurred right after the alleged attack could be viewed as supportive of a consent defense. Gutierrez did not "flee" the scene after the alleged sexual battery, but rather chose to sleep in his vehicle located in an adjacent parking space. The alleged victim did not seek help from any resident in the surrounding apartment complex after Gutierrez left her car, but rather slept in her vehicle until morning. Upon waking up, the victim ***1133** then chose to approach Gutierrez to obtain her car keys.

Based on the evidence presented below I cannot conclude that the State met its burden to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. *DiGuilio,* 491 So.2d at 1135.

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