

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 BRIEF ON JURISDICTION

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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 Appendix, which contains the Fifth District's opinion and accompanies this brief, will be referred to as "App. A," followed by the appropriate page number therein.

STATEMENT OF THE CASE AND OF THE FACTS

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)(App. A), 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 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 (App. A, p.3). Consent was his defense.

At a jury trial the N.A. testified that Mr. Gutierrez was a regular patron at a bar where she worked. On the evening in question, he drove her home in her car, while his friend followed them in Mr. Gutierrez's car. Along the way, they stopped at an unknown apartment complex. After a brief discussion, Mr. Gutierrez became angry at a statement by N.A., and grabbed her hands. The two struggled, and Mr. Gutierrez eventually pulled both his and her pants down to just above the knees, and had vaginal intercourse with N.A. (App. A, p. 3).

Mr. Gutierrez then exited N.A.'s vehicle (with her car keys) and went over to his own parked nearby, where he spent the night. N.A. stayed in her own vehicle by herself. The next morning she retrieved her car keys from Mr. Gutierrez, who showed her out of the apartment complex. N.A. reported the incident three days later. Mr. Gutierrez's DNA was found in semen collected from N.A. A nurse examiner testified that N.A. had bruises and scratches and tenderness in her vaginal region. She opined that such injuries can occur during consensual sex (App. A, pp. 3-4).

Over the defense's objection, the trial court agreed to give a special instruction requested by the state. 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.

The trial court initially stated that it was not inclined to give the instruction, but was persuaded to because the instruction was based on a statute and the defense was arguing that N.A.'s testimony was not corroborated. That instruction was included in the oral and written final instructions to the jury as part of the instruction on weighing the evidence (App. A, pp. 4-5).

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). It told the jury that this was the law, and the jury was to follow the law (T/104-05). 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, the state reiterated: "Members of the jury, use common sense, follow the law. The victim's testimony doesn't have

to be corroborated in a case like this.” (T/120).

Mr. Gutierrez was convicted as charged and sentenced to serve 7.9 years in state prison, with credit for time served (App. A, p. 4). He is currently serving this sentence.

Mr. Gutierrez filed a timely appeal to the Fifth District. In a 2-1 decision, that court affirmed the judgment and sentence¹ (App. A). The Fifth District majority ruled that while this instruction may be used in certain cases, it should not have been used in Mr. Gutierrez’s (App. A, pp. 5-8). However, it 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. (App. A, p. 8).

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 and it highlighted the testimony of one witness, and the state had not proven it to be harmless error (App. A, pp. 8-9).

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.

¹ It remanded for correction of some scrivener’s errors in the judgment (App. A, p. 8).

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 USED 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 exercise its jurisdiction and accept Mr. Gutierrez's case for review because the Fifth District's opinion 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.

ARGUMENT

THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS BY UPHOLDING A SEXUAL BATTERY CONVICTION WHERE TRIAL COURT USED 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' 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), 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 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 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.

The instruction offered by the state in Mr. Gutierrez’ case is the flip side of Marr. It is 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 it 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’ case. Id. at 430-31. The trial court 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 (App. A, pp. 5-7). 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 the nurse’s testimony corroborated N.A.’s testimony 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).

The nurse testified that injuries can occur during consensual sex, so her testimony was not an indisputable benefit to the state. Also, 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.

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 (App. A, pp. 8-9). 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, ___ So.3d ___ (Fla. 3/27/14)[39 Fla. L. Weekly S155](slip opinion at *8), 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 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 consideration of his petition on the merits, which will result in 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 grant Mr. Gutierrez's petition for review and order briefing on the merits.

RESPECTFULLY SUBMITTED this 1st day of May, 2014, at Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 2014, a true copy of this brief and appendix have been efiled and furnished by email addresses crimappdab@myfloridalegal.com and pamela.koller@myfloridalegal.com to counsel for the Respondent: Pamela J. Koller, Assistant Attorney General, Daytona Beach, FL.

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CERTIFICATE OF COMPLIANCE

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

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