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 REPLY BRIEF ON MERITS

TERRENCE E. KEHOE
LAW OFFICE OF TERRENCE E. KEHOE
734 Rugby Street
Orlando, FL 32804-4969
407-422-4147
407-849-6059 (fax)
email: tekehoelaw@aol.com

Counsel for Petitioner

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PRELIMINARY STATEMENT

In this brief, the parties and the record on appeal will be referred to as in Mr. Gutierrez's initial brief on the merits. That brief will be referred to by "IB." The state's answer brief on the merits will be referred to by "AB."

STATEMENT OF THE CASE AND OF THE FACTS

This appeal involves the use of a jury instruction. It is interesting to note that in its twelve page recitation of the facts, apparently in an effort to minimize or avoid the matter, the state a) does not set forth the actual jury instruction at issue, and b) avoids quoting the prosecutor's uses of the instruction in closing argument (AB 1-12). As those are the critical facts of this appeal, the state's failure to address them head on speaks volumes to the weakness of the state's position in this appeal.

The offending jury instruction read:

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

To minimize the use of the instruction by the prosecutor at trial, the state spends far more time setting forth the facts of the defense's closing argument than the state's closing arguments (AB 10-11). As to the use of the offending instruction in the state's initial closing argument, the state simply represents "The prosecutor also pointed out the special instruction to the jury during closing" (AB 10; record reference omitted). A review of the state's initial closing argument shows the prosecutor did not just "point out" this instruction. He affirmatively 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 actual argument to the jury, so critical to this Court's decision in this matter, reads:

> **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).

The prosecutor then again asked the jury to " . . . follow the law . . ." (T/105).

As to the prosecutor's rebuttal closing argument, the state's argument was all about the credibility issues raised by the defense (T/116-21). In the answer brief, again choosing not to quote the prosecutor's use of the challenged instruction, the state simply tells the Court "The State mentioned the special instruction once briefly during rebuttal" (AB 11; record reference omitted). The state failed to tell the Court that right at the end of his rebuttal closing argument, the prosecutor 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).

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 the state's arguments (AB 14-26), there is an express and direct conflict between the Fifth District's decision in Gutierrez v. State, 133 So.3d 1125 (Fla. 5th DCA 2014), and decisions of this Court and other Florida district courts on the same issues of law.

The Fifth District held that the use of the special instruction was error in this case, but that the special instruction may be properly used in other cases. 133 So.3d at 1131. The state here argues - despite the Fifth District's holding to the contrary - that the use of the instruction was not error in Mr. Gutierrez's case (AB 13, 25, 26). Both of those conclusions are contrary to established Florida law.

The express and direct conflict is clearly seen in reviewing this Court's decision in Marr v. State, 494 So.2d 1139 (Fla. 1986), also a prosecution for sexual battery. Yet, as it has throughout the appeal to the Fifth District and this Court, the state wishes to avoid any in depth discussion of Marr. The state glosses over Marr, mentioning it only briefly (AB 17-18). The Fifth District likewise sought to avoid the impact of Marr on this case. Gutierrez, 133 So.3d at 1129-30.

As a clear pronouncement from this Court on the use of special credibility instructions, Marr is the starting point for any reasonable analysis of this appeal.

Both the state and the Fifth District have chosen to ignore that point. The rule from Marr - that the use of a special credibility instruction to weigh the credibility of an alleged victim in a sexual battery case is prohibited - governs Mr. Gutierrez's appeal (IB 8-10). Marr clearly condemned and prohibited the use of special victim credibility jury instruction like the one used in this appeal: such an instruction " . . . should no longer play a role in Florida jurisprudence." Marr, 494 So.2d at 1142. This Court must apply that rule to the victim credibility instruction used in Mr. Gutierrez's case. It too 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.

In an effort to avoid the use of Marr, the Fifth District in its opinion, 133 So.3d at 1130-31, and the state in its answer brief (AB 18-20), have chosen to seek guidance on this issue from courts in other states. This is a conscious attempt to avoid controlling Florida authority from this Court which condemned such a special instruction in the strongest terms, in a effort to support a decision that was contrary to Florida law. In the face of Marr, there is simply no need to search for guidance in other states which may well have different rules on commenting or instructing on the credibility of witnesses.

The use of the **identical** instruction requested by the state in Mr. Gutierrez's trial, has already been condemned and found to be reversible error by the Second

District in Brown v. State, 11 So.3d 428 (Fla. 2d DCA 2009)[1]. That too is a basis to find direct and express conflict. Based on Brown, the use of the instruction should have been held to be reversible error in Mr. Gutierrez's case (IB 10-11). 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. The State's argument would have this Court ignore those improprieties and allow this instruction. That must not occur.

The state's reliance on Strong v. State, 853 So.2d 1095 (Fla. 3d DCA), review denied, 862 So.2d 728 (Fla. 2003)(AB 20-21), is misplaced. It did not involve, much less discuss, a jury instruction based on §794.022(1), Florida Statutes.

The state's argument (AB 20) that without an instruction §794.022(1), Florida Statutes, is a meaningless statute is, of course, erroneous. The statute sets forth a rule of evidence, clearly applicable to determination of motions for a judgment of acquittal at trial or on appeal. It does not set forth a rule of credibility, as was its use at trial.

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[1] Apparently neither the trial court nor either counsel was aware of the Brown decision. Had this decision been brought to the trial court's attention, the court would have been required to follow it as binding precedent. Pardo v. State, 596 So.2d 665 (Fla. 1992). The state does not acknowledge this fact in its answer brief.

The ruling of the Fifth District also expressly and directly conflicts with other appellate decisions on the harmless error issue. While it noted the rule by citing to State v. DiGuilio, 491 So.2d 1129, 1138-39 (Fla. 1986), it ignored the proper application of DiGuilio and its progeny.

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.

The Fifth District did not properly apply this test in Mr. Gutierrez's case because it completely ignored the most critical factor in deciding this issue: the use of the erroneous instruction by the state at trial. It failed to consider and evaluate the state's use of the offending instruction multiple times in closing arguments in an effort to obtain a guilty verdict. It simply looked at two pieces of non-conclusive evidence from the state's case. 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 Brown decision looked at the state's use of the instruction in closing argument, and that improper use was

clearly a basis for its finding of harmful error. 11 So.3d at 439 (in rebuttal closing argument, prosecutor used the special instruction to counter defense counsel's arguments; this was prejudicial to defense).

In discussing the harmless error issue, the state asserts " . . . while the State made two brief references to the instruction during its closing and rebuttal, the State did not mislead the jury regarding the purpose of the instruction or use it to undermine the defense's argument about this evidentiary rule, as the State had in Brown" (AB 25). Again, it failed to quote the two references, which is not surprising given how harmful they were to the defense at trial. These two references, while maybe brief, were strategically made at the close of both of the state's argument, in order to reinforce that point as the last - and most important - point to remember. As Brown and the dissent in Gutierrez show, this instruction does mislead the jury as to the law. Its strategic use was clearly intended to undermine the defense's argument that the jury should return a not guilty verdict because the accuser's testimony was not credible. This is the epitome of harmful error.

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.

In his initial brief, Mr. Gutierrez cited to four additional cases from this Court which discuss the proper application of the harmless error test in connection with how improper evidence (or instructions) was used at trial (IB 13-14). The state has chosen not to address these cases. Each would require a finding of harmless error and reversal of the conviction. See also Special v. West Boca Medical Center, ___ So.3d ___ (Fla. 11/13/14)[39 Fla. L. Weekly D 676](discussing application of the rule in civil cases).

The First District recently considered whether a credibility instruction dealing with reputation testimony for dishonesty or truthfulness was harmless error in Kelsey v. State, ___ So.3d ___ (Fla. 1st DCA 12/22/14)[2014 WL 7243168]. On appeal, both sides agreed that giving the instruction was error, but the state argued it was harmless. The First District disagreed, stating "As Kelsey's defense rested on questioning the alleged victim's veracity, there is a reasonable possibility the errant instruction affected the verdict." That same rationale and rule must be applied to hold that the errant credibility instruction in Mr. Gutierrez's case was also harmful error.

CONCLUSION

Based on the arguments and authorities set forth in this brief and in Mr. Gutierrez's initial brief on the merits, 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 5th day of January, 2015, at Orlando, Orange County, Florida.

LAW OFFICE OF TERRENCE E. KEHOE
734 Rugby Street
Orlando, FL 32804-4969
407-422-4147
407-849-6059 (fax)
email: tekehoelaw@aol.com

/s/ Terrence E. Kehoe
TERRENCE E. KEHOE
Florida Bar # 0330868

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January, 2015, 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.

/s/ Terrence E. Kehoe
TERRENCE E. KEHOE
Florida Bar # 0330868

CERTIFICATE OF COMPLIANCE

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

/s/ Terrence E. Kehoe
TERRENCE E. KEHOE
Florida Bar No. 0330868