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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER 79,162

THIRD DISTRICT COURT CASE NUMBER 91-191

RAFAEL JOSE PUERTAS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee,

APPELLANT'S JURISDICTIONAL BRIEF

The following is an appeal from an opinion given by the Third District Court of Appeal on the 24th day of December, 1991.

MIGUEL SAN PEDRO, ESQUIRE ✓
Law Offices of Miguel San Pedro, P.A.
Attorney For Appellant,
Four Ambassadors
Tower III, Suite 1246
825 South Bayshore Drive
Miami, Florida 33131
(305) 373-8211

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STATEMENT OF THE ISSUES

1. Did the trial Court err by:

- (a) denying Defense Counsel's continuing Motion In Limine to exclude witnesses hearsay testimony at trial with reference to Y.P.'s out of Court statements, which testimony constituted unfair and prejudicial bolstering of the child's in Court testimony;
- (b) allowing the State to introduce a video taped interview and also allow the child to testify as to the allegation contained therein, thereby unfairly bolstering the child/victim's credibility.

2. Did the trial Court err in denying Defense Counsel's Motion For Judgement of Acquittal as there is insufficient evidence to convict the Appellant of Count II and III in the Information, of Sexual Battery by penetrating the vagina of the child/victim, Y.P., with the use of his fingers and/or hand.

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STATEMENT OF JURISDICTION

This appeal is sought under the Fla. R. App. P. 9.030 (2) (iv) and (v). The Appellant, Rafael Jose Puertas, on or about the 10th day of September, 1991, by and through the undersigned attorney, filed a brief with the Third District Court of Appeal, thereby seeking review of the trial court's decision to admit a child/victim's out-of-court hearsay statements through witnesses and a video tape, as the child testified in open court. The appellant also contested the admittance of a child/victim's hearsay statements through the testimony of six witnesses used by the prosecution to prejudicially bolster the child's credibility. The Third District Court of Appeal on December 24th, 1991, filed a PER CURIAM decision and therein stated "Affirmed on the authority of State v. Pardo, 581 So.2d 1225 (Fla. 3d DCA 1991)."

The Third District Court of Appeal erred in rendering such a decision as it is in direct conflict with KOPKO v. STATE, 577 So.2d 956 (Fla.App.5 Dist. 1991), wherein the Court stated:

[4] Although, in this case, we cannot say that the trial court erred in ruling the child's out of court statements were admissible under section 90.803(23), Florida Statutes, we never conclude that it was reversible error to utilize this hearsay exception as a device to admit prior consistent statements. In reaching this conclusion we are convinced that the important function of section 90.803(23), Florida Statutes is in no way impaired. The purpose of the child victim exception to the hearsay rule is to salvage potentially valuable evidence of abuse from children who may, for many reasons, be unable or unwilling to give

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their evidence at trial to a jury in the same way an adult would be expected to do.

In addition the Court in Kopko, granted the state's request to certify the following issue as a matter of great public importance having a great effect on the proper administration of justice in this state:

IN A CASE IN WHICH THE CHILD VICTIM OF A SEXUAL OFFENSE TESTIFIED FULLY AND COMPLETELY AT TRIAL AS TO THE OFFENSE PERPETRATED UPON HIM OR HER, CAN IT CONSTITUTE REVERSIBLE ERROR TO ADMIT, PURSUANT TO SECTION 90.803 (23), FLORIDA STATUTES, PRIOR, CONSISTENT OUT-OF-COURT STATEMENTS OF THE CHILD WHICH WERE CUMULATIVE TO THE CHILD'S IN-COURT TESTIMONY OR MERELY BOLSTERED IT?

This issue was specifically submitted to the Third District Court of Appeal by the Appellant, Rafael Jose Puertas.

The Third District Court of Appeal was also in error as the case of State v. Pardo, 581 So.2d 1225 (Fla. 3d DCA 1991), gave no authority to render a PER CURIAM decision. The Appellant in the instant case, specifically addressed the issues of admissability and prejudicial bolstering in its brief and argument, which issues of law were certified to the Florida Supreme Court by the Third District Court of Appeal in Pardo.

There are two cases presently pending before this Honorable Court with basically the same issues of law, therefore it is in the best interest of justice for this Honorable Court to assume jurisdiction of the instant case as the questions presented by

Appellant, Puertas, are the same as those submitted in State v. Pardo and Kopko v. State.

CONCLUSION

In light of the foregoing, this Honorable Court should assume and accept jurisdiction over the subject matter hereof.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing motion was furnished the Clerk of the Court, Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399 and the Office of the Attorney General, Joan L. Greenberg, Esquire, Department of Legal Affairs, Post Office Box 013241, Miami, Florida 33101, by U.S. Mail on this 3rd day of January, 1992.



MIGUEL SAN PEDRO, ESQUIRE
Attorney For Appellant
Four Ambassadors
Tower III, Suite 1246
825 South Bayshore Drive
Miami, Florida 33131
(305) 373-8211

MSP/src