IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

WILLIAM RODERICK,

CASE NO.: 1D12-4510

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S MOTION FOR REHEARING, WRITTEN OPINION AND CERTIFICATION OF QUESTION

1. The Appellant, WILLIAM RODERICK ("Mr. Roderick"), moves this Honorable Court for a rehearing, written opinion and certification of question pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure. In support, Appellant states as follows:

I. MOTION FOR REHEARING

2. Appellant respectfully submits that this Court overlooked certain points of fact and law when it *per curiam* affirmed his conviction in the Fourth Judicial Circuit in and for Duval County, Case Number 16-2010-CF-008841-AXXX-MA.

3. The Appellant asked this Court (i) whether Appellant received effective assistance of counsel, or in the alternative, whether the admission of certain expert testimony and comments made by the prosecutor during summation denied Appellant his fundamental right to a fair trial; (ii) whether the verdict was against the weight of the evidence; and

(iii) whether the trial court's denial of Appellant's motions *in limine* and the introduction of certain evidence denied him the right to a fair trial.

4. It is the Appellant's position that this Honorable Court mistakenly affirmed his conviction in light of the argument offered in his initial brief, and respectfully requests that this Court rehear Appellant's position in the initial brief as outlined below.

A. Trial Counsel was Ineffective for Failing to Object to the State's Witness Vouching for the Credibility of the Complaining Witness and the Study Regarding Probability of Broken Hymens

5. The State called Lisa Cassidy, a registered nurse practitioner and expert child sexual assault examiner for the Child Protection Team. This witness vouched for the credibility of the complainant, and further testified about the findings of an unnamed study that supported and bolstered her credibility and the credibility of the complainant. As outlined in Appellant's initial brief, these two incidents resulted in the ineffective assistance of counsel.

i. The expert testimony vouched for the credibility of the complainant

6. In affirming *per curiam* the conviction of Appellant, this Court chose not to address the opinion of the Second District Court of Appeals in *Geissler v. State*, 90 So.3d 941 (Fla. 2d DCA 2012). In line with the Florida Supreme Court continuing to hold that "it is not proper to allow an expert to vouch for the truthfulness or credibility of a witness," *Frances v. State*, 970 So.2d 806, 814 (Fla. 2007), the Second District, in *Geissler*, held that this "general rule applies to prohibit an expert witness from testifying concerning the truthfulness or credibility of the victim in child sexual abuse cases." *Geissler* at 947.

7. In *Geissler*, the defendant was charged with sexually assaulting a child who lived with him. There was no medical evidence to support the child's accusation, and no witnesses other than the defendant and the child. At trial, the State called an expert witness, a registered nurse practitioner and medical examiner with the Child Protection team, who interviewed the victim and conducted a physical examination. The physical examination yielded no evidence to support the allegation that sexual abuse had occurred.

8. The Second District reversed the defendant's conviction and remanded for new trial, specifically finding that the expert's testimony left the jury with the impression that the victim's account was accurate and truthful. The case *sub judice* is strikingly similar, and in affirming Appellant's conviction, this Court has created a split in the District Courts of Appeal that requires remedy by the Florida Supreme Court.

ii. The admission of hearsay in the form of a medical study and failure to request a Richardson Hearing

9. Additionally, trial counsel failed to object to the admission of ad medical study on hearsay grounds and then failed to request a Richardson hearing. Ms. Cassidy discussed the findings of a study published in the official journal of the American Academy of Pediatrics, however, this study was not introduced into evidence by the State. Failure to request a Richardson hearing constituted gross error after trial counsel never received the study in discovery and was unaware it would be used at trial.

10. Here, the unnamed study was unquestionably hearsay. It was an out-of-court statement offered for the truth of the matter asserted – that just because the complainant had an intact hymen did not mean that Appellant did not penetrate her as she claimed. It

was also used to bolster the credibility of Lisa Cassidy and complainant by being used to support their testimony on the same topic. This failure proved fatal for the Appellant.

11. Trial Counsel should have made at least an attempt to keep this evidence out by objecting on Confrontation Clause grounds, or upon grounds that the State failed to provide this material in pre-trial discovery. This failure, combined with the others mentioned *infra* deprived Appellant of his right to the effective assistance of counsel.

B. Trial Counsel Failed to Properly Investigate and Develop Facts and Evidence to Contradict the Complainant's Testimony and the State's Theory of Prosecution

12. With regard to Appellant's first claim of ineffective assistance of counsel, trial counsel's strategy either to do nothing by failing to conduct an adequate investigation, vigorously cross-examine the complaining witness, consult with and call an expert to rebut the State's witness, call defense witnesses to establish the complainant's motive to lie, and to properly object to inadmissible, surprise evidence and inflammatory and prejudicial remarks made by the State's Attorney during summation should be afforded no deference.

13. Here, trial counsel was well aware of witnesses and facts that directly contradicted the State's theory that the complainant left Florida months after the alleged incident, rather than three weeks. Trial Counsel spoke with the complainant's mother and paternal grandmother (Appellant's mother), as well as Appellant, who confirmed that the complainant left Florida roughly three weeks after the alleged incident and reunited with her mother in Maine. After trial, Appellant obtained and provided trial counsel with a flight itinerary of the complainant confirming that she had, in fact, flown from Florida to

Maine within weeks, not months, of the alleged incident. This itinerary could have easily been obtained by trial counsel during the one year that she represented Appellant merely by seeking a subpoena for the information.

14. Had trial counsel simply sought a subpoena for the flight information Appellant gave her, not only would the State's theory have been contradicted by physical evidence, but the defense theory would have been corroborated and substantiated by the same evidence. At the sentencing hearing, when asked about this particular issue and her failure to investigate when the complainant had left Florida for Maine, trial counsel pled ignorance and was only able to repeat that she was unsure as to when the complainant left Florida. Ignorance is simply no defense in this situation and when representing a defendant on a case where he faces significant charges such as the ones here, counsel had a Constitutional duty to not be ignorant.

15. This failure, combined with trial counsel's (i) failure to present evidence that the complainant had been arrested for possession of marijuana at school in Maine after moving there; (ii) failure to present evidence that the complainant had been sexually active despite her claims to the contrary and professing ignorance of commonly-known sexual terms; and (iii) failure to cross-examine the complainant or present any evidence that she had told family members that the alleged rape had been just a dream, separately and cumulatively, rendered trial counsel's assistance ineffective.

C. Trial Counsel's Failure to Object to the Prosecutor Vouching for the Credibility of the Complainant and His Invocation of the Bible and Religion During Summation

i. The invocation of religious doctrine during summation

16. In the case *sub judice*, the State's Attorney invoked religion several times during his summation, comparing the instant case to the Biblical story of King Solomon being called upon to make an extremely difficult decision as to which one of two women was the rightful mother of an infant. The prosecutor asked the jury to substitute its common sense and experience, as well as the trial court's instructions on evaluating the credibility of witnesses, with its "God-given common sense" akin to that of the Bible and King Solomon. This argument went beyond the bounds of fair comment, was not a response to any similar religious argument made by the defense, and improperly inflamed the jury's religious passions. Trial counsel's failure to object to such an improper comment deprived Appellant of his right to the effective assistance of counsel.

ii. The Prosecutor vouched for the credibility of the complainant during summation

17. Here, the prosecutor implied to the jury that he had specialized information and experience, and that in his experience, an immediate disclosure or prompt outcry of rape meant that the witness was telling the truth. This implication was clearly improper, and had the effect of convincing the jury that the complainant was, in fact, telling the truth. Again, trial counsel's failure to object to this comment rendered her performance constitutionally deficient.

II. MOTION FOR WRITTEN OPINION

18. Mr. Roderick and the undersigned counsel alternatively and respectfully request a written opinion. As noted previously, undersigned counsel, based upon a reasoned and studied professional judgment, believes that a written opinion will provide a legitimate basis for Florida Supreme Court review because, this Court, in affirming *per curiam* Mr.

Roderick's conviction, has rendered judgment that is in contradiction to the Second District's application of the general rule of not permitting an expert to vouch for the truthfulness or credibility of a witness, as held by the Florida Supreme Court in *Frances v. State*, 970 So.2d 806, 814 (Fla. 2007), and extended to the truthfulness or credibility of the victim in child sexual abuse cases by *Geissler v. State*, 90 So.3d 941 (Fla. 2d DCA 2012).

19. Additionally, authoring a written opinion will provide the Florida Supreme Court a meaningful basis to review the discrepancy between the District Courts in the application of its general rule as outlined in *Frances*, and lead to uniformity in how courts view an expert's responsibility in not vouching for the truthfulness or credibility of a victim in a child sexual abuse case. Additionally, this Court should issue a written opinion to put the legal community of Florida on notice of the proper application of evidentiary rules concerning the scenario *supra.*

20. Due to the novel nature of this case, it is likely that the Florida Supreme Court would take this case for review if an opinion were written. The Florida Supreme Court has never considered a case involving an expert's vouching for the credibility or truthfulness of a victim in a child sexual abuse case, and the decision in this case shows that this issue is one on which reasonable trial and appellate courts can disagree.

III. MOTION FOR CERTIFICATION OF QUESTION

21. Finally, in the alternative, Mr. Roderick respectfully requests that this Honorable Court recognize its apparent disagreement with the Second District Court of Appeal and certify the following question of great public importance:

Does the general rule of not permitting an expert to vouch for the truthfulness or credibility of a witness extend to the expert and alleged victim in a child sexual abuse case?

IV. STATEMENT OF COUNSEL

22. I express a belief, based upon a reasoned and professional judgment, that a written opinion will provide a legitimate basis for Supreme Court review because of the reasons outlined in section II of this motion.

DATED: November 26, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail to the office of the Attorney General at crimappdab@myfloridalegal.com this 26th day of November, 2013.

/s/ Patrick Michael Megaro, Esq.

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