

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC05-2019

MICHAEL DOUGLAS BECRAFT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The district court opinion outlines the case and facts as follows. Becraft v. State, 910 So. 2d 413, 414 (Fla. 4th DCA 2005).

Becraft was charged with sexual activity with a female minor which occurred after the victim, Becraft, another woman, and Becraft's friend returned to the friend's home after a night at the bars. The victim

was seventeen years old. Becraft engaged in oral sex with the victim and confessed to his activities in a recorded statement to the officers. As part of that statement, he admitted that he and his friend intended to "tag team" the other woman, a practice which he discussed in the tape recording several times. These statements were admitted without objection at trial. When the other woman testified at trial, defense counsel objected to her testimony that Becraft asked her to engage in a c threesome c with him and his friend just before the incident with the minor victim. The objection was based upon prejudice and relevance. The trial court overruled the objection, and the witness testified.

On appeal, Becraft argues that the evidence provided by the female witness was improper Williams rule evidence, a ground on which Becraft's attorney did not object at trial. Because this specific objection was not made at trial, the issue is not preserved for appeal. Hunter v. State, 779 So. 2d 531, 532 (Fla. 2d DCA 2000) (citing Correll v. State, 523 So. 2d 562 (Fla. 1988); Esty v. State, 642 So. 2d 1074 (Fla. 1994)). Moreover, the evidence was merely cumulative and, in any event, considerably less offensive than the unobjected-to tape of Becraft's own statement to police. It was thus harmless. See Erickson v. State, 565 So. 2d 328, 334 (Fla. 4th DCA 1990) ("It is well settled that even incorrectly admitted evidence is deemed harmless and may not be grounds for reversal when it is essentially the same as or merely corroborative of other properly considered testimony at trial."); Somervell v. State, 883 So. 2d 836, 839 (Fla. 5th DCA 2004) (considering cumulativeness of improperly admitted Williams rule testimony as a factor in finding error harmless).

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal is not in conflict with the decisions of this court in Brown v. State, 206 So. 2d 377(Fla. 1968); Bailey v. State, 224 So. 2d 296 (Fla. 1969); Peek v. State, 488 So. 2d 52 (1986); and the decision of the Third District in Perez v. State, 717 So. 2d 605 (Fla. 3d DCA 1998). All of the decisions are vastly different and clearly distinguishable.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE
INSTANT CASE IS NOT IN CONFLICT WITH THE VARIOUS DECISIONS
LISTED BY PETITIONER IN THE BRIEF ON JURISDICTION

Petitioner contends that the Fourth District's decision in Becraft v. State, 910 So. 2d 413 (Fla. 4th DCA 2005) is in conflict with the decisions of this court in Brown v. State, 206 So. 2d 377(Fla. 1968); Bailey v. State, 224 So. 2d 296 (Fla. 1969); Peek v. State, 488 So. 2d 52 (1986) and the decision of the Third District in Perez v. State, 717 So. 2d 605 (Fla. 3d DCA 1998). The State of Florida asserts that conflict does not exist.

In order for two decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court as mandatory authority. See generally Jenkins v.

State, 385 So. 2d 1356, 1359 (Fla. 1980); Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, C[if] the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict cannot arise. C Id. at 887. Becraft is not in conflict with any of the decisions petitioner lists.

Becraft is distinguishable and dramatically factually different from each of the cases petitioner lists. In Becraft the Fourth District Court of Appeal examined the following factual scenario:

Becraft was charged with sexual activity with a female minor which occurred after the victim, Becraft, another woman, and Becraft's friend returned to the friend's home after a night at the bars. The victim was seventeen years old. Becraft engaged in oral sex with the victim and confessed to his activities in a recorded statement to the officers. As part of that statement, he admitted that he and his friend intended to "tag team" the other woman, a practice which he discussed in the tape recording several times. These statements were admitted without objection at trial. When the other woman testified at trial, defense counsel objected to her testimony that Becraft asked her to engage in a "threesome" with him and his friend just before the incident with the minor victim. The objection was based upon prejudice and relevance. The trial court overruled the objection, and the witness testified.

The Fourth District Court of Appeal in reviewing the argument involving the improper admission of alleged Williams rule evidence held as follows: AOn appeal, Becraft argues that the evidence provided by the female witness was improper Williams rule evidence, a ground on which Becraft's attorney did not object at trial. Because this specific objection was not made at trial, the issue is not preserved for appeal.@ Becraft at 414. This holding of the Fourth District clearly distinguishes this case from all the cases from this court cited in petitioner's brief on jurisdiction.

For example, petitioner cites to Brown v. State, 206 So. 2d 377 (Fla. (1968)). Brown involves the failure of a trial judge to give a requested jury instruction on the lesser included offense of larceny. The specific issue was preserved for review as the lawyer, at the proper time, objected to the judge's failure to instruct on larceny. @ Id. at 383.

Failure to give requested jury instructions was also the issue in Bailey v. State, 224 So. 2d 296 (Fla. 1969). In Bailey the specific argument was advanced in the trial court as the defendant's attorney orally requested the court give these charges @ and the court stated he would not give the requested charge. Id. at 297.

Likewise, in Peek v. State, 488 So. 2d 52 (Fla. 1986) the specific legal argument was advanced in the trial court. In Peek this court wrote: "At trial, over Peek's objection, the trial court held that evidence of Peek's admission and conviction of a subsequent rape ... was admissible pursuant to our decision in Williams v. State ... @ Id. at 54.

The Third District case upon which petitioner relies, Perez v. State, 717 So. 2d 605 (Fla. 3d DCA 1998), is quite consistent with the holding of present case. In Perez the district court initially reversed a first degree murder

conviction based on the improper admission of Williams rule evidence. The court granted the State's rehearing and affirmed the conviction because: Athe defendant did not object to any of the Williams rule evidence during trial, thus waiving his right to appellate review on those issues...@ Id. at 607.

This court should decline to accept discretionary jurisdiction as there is no conflict presented.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, The State of Florida respectfully requests this Court decline to accept jurisdiction in this case. court. Respectfully

submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the

foregoing "Respondent's Brief of Jurisdiction" has been furnished by mail to: Michael Douglas Becraft, Tomoka Correctional Inst., 3950 Tiger Bay Road, Daytona Beach, FL. 32124 on November_____2005.

Don M. Rogers

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type.

Don M. Rogers

