

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA



KEVIN HERRICK :
APPELLANT :
v. : Case No. 91-02478
STATE OF FLORIDA :
APPELLEE :
_____ :

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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TENTH JUDICIAL CIRCUIT

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v.

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STATE OF FLORIDA,
APPELLEE.

STATEMENT OF THE CASE

The State Attorney for Pinellas County, Florida filed an information charging appellant, Kevin Richard Herrick, with Armed Burglary, Sexual Battery and Aggravated Battery. (R4-5) Trial was held on October 2-3, 1990, before the Honorable Brandt Downey, Circuit Judge. The jury listened to the testimony of the witnesses, saw the evidence, heard the argument of counsel and the instructions of the court. The jury deliberated and found appellant guilty as charged. (R29-31) Appellant was adjudicated guilty and sentenced to life on the burglary count, life on the sexual battery count, and fifteen years on the aggravated battery count, all to run concurrently. This was within the guideline recommended sentencing range. (R67-73) Subsequently, appellant filed a motion for a belated appeal, (R74-80) which was granted by the court. (R81) On July 24, 1991, appellant filed a Notice of Appeal. (R82) That appeal is now before this court for review.

STATEMENT OF THE FACTS

Appellant, **Kevin Herrick**, was charged with armed burglary, sexual battery, and aggravated battery. At his trial on the charges, the following testimony was presented:

Cheryl Hagan testified that on July 14-15, 1989, she had been living with her fiancée, **Darren Scott Barfield**, and their child at a triplex apartment in Largo. They lived in the east apartment, **Dave and Barb Stewart** lived in the west apartment, and the landlord, **Theresa Porrey**, her son and appellant lived in the south apartment. (R105) Appellant had been staying with the landlord's son for several weeks and she and Scott had become acquainted with him. (R106)

On July 14th appellant had come over to play chess with Scott. Because Scott was not home yet, appellant said he would play a game with her. A few minutes later Scott came home with some friends. Appellant left, later Scott's friends and then Cheryl and Scott decided to go to a drive-in movie. They returned home around 11:00 p.m.. Cheryl got ready to go to bed, however, Scott told her he was going to take **Dave Stewart** to his mother's house to see about some tropical fish. (R108) Cheryl put the baby to bed and then went to bed herself.

She was awakened by the presence of a man with his knees on either side of her and a knife at her neck. (R109) The man put his penis in her face and told her to suck it or he would kill her baby. Cheryl explained she could not because she was frightened, however, the man did shove his penis in her mouth one

time. Cheryl stated she was screaming and the man started to cover her mouth and move the knife down. Then Scott appeared, the man jumped up, and he and Scott started fighting with each other.

(R110) The man held the knife in Scott's face and told him to back up and let him put on his pants. Scott did so, at which point Cheryl noted that the man's jeans had a large belt buckle.

(R111) The man then left the room and closed the door. She and Scott tried to get the door open, however, the man threatened to harm the baby if they did so. They finally got the door open and Scott chased the man while Cheryl went to check on the baby. She heard Scott say, "It's locked" and then he chased the man outside and down the street. Cheryl screamed out the front door that someone had tried to rape her and had stabbed Scott. (R112)

The first person to come out was Theresa, the landlord. Cheryl told her what had happened. Then Barb and Dave came out. Scott returned and told them to call the police. Scott had to be taken to the hospital because he had two stab wounds. Cheryl made the observation that appellant was the last person of all her neighbors to come out of their apartments. (R113) Cheryl was sure appellant was her attacker because he wore a dark shirt like those appellant always wore. He had dark curly hair and a similar build to appellant's. Appellant also had a large belt buckle like the one she had seen on her attackers' jeans. (R114)

On cross examination Cheryl admitted the bedroom where the attack occurred was pitch dark. She also admitted Scott had returned from chasing the intruder and asked if she saw who did

it. When she told Scott the man looked like the guy next door, he told her it was appellant. However, she did not tell the police appellant was her attacker. (R120)

Darren Scott Barfield testified he and Cheryl returned from the movie sometime between 11:00 p.m. and midnight. His neighbor Dave asked him to take him over to his mother's house because one of his fish was not doing well in his tank. Scott went and told Cheryl where he was going, and then took Dave to his mother's house. (R152) When he returned, he stayed outside to smoke a cigarette. He heard Cheryl crying, but at first thought she was on the phone. Then the crying got louder and he went to investigate. The lights were out inside. He opened the bedroom door and found someone on top of Cheryl. Scott told the person to get off, and the person told him to get out or he would kill him. (R153) The person jumped up and started struggling with him. Scott got stabbed twice in the chest and backed away. The person held the knife and was putting on his pants. Scott went to attack him again, but the person hit him in the jaw and waved his weapon at Scott's throat. The man left the room and shut the door. Scott tried to open it, but the man was holding it closed. He then threatened to kill the baby. After a few seconds, the man released the door and Scott and Cheryl rushed out. Scott chased the man while Cheryl went to check on the baby. Scott found the man trying to get out the sliding doors which were locked. (R154)

Scott told the man to leave through the front door. As the man went through the kitchen, Scott was able to recognize it was

appellant from the light shining through the open blinds. Scott chased appellant outside and down the street. He was able to see appellant in the light from the moon and the street lights. Scott pursued appellant past a couple of houses and around a corner.

(R155) There was a bush there and he hesitated for a moment thinking appellant might be behind it and lost sight of him. Thinking appellant might have jumped the fence, he jumped over and saw a car with its engine running. Thinking appellant could have gotten into it, he noted the license number and then returned to his apartment. (R159) He told David Stewart to write down the license number and call the police. A few moments later he saw appellant come out of Ms. Porrey's house and realized appellant could not have been in the car. (R160)

When the police arrived, Scott did not tell them he knew the attacker was appellant, nor did he tell them that the car and license number was a false lead. Scott gave several reasons for his failure to inform them including his desire to deal with appellant personally, fear for Cheryl and the baby, and that he was traumatized by the whole incident. (R161) After being treated at the hospital for his stab wounds, he thought better of it, and then called the police to inform them it was appellant. (R162)

Howard Crosby, a Largo Police officer, testified he was called to the scene as a backup. He observed appellant at the scene and noted he looked nervous, he was sweating and breathing heavily. (R201)

The prosecution and defense counsel both stipulated that the

latent fingerprints lifted from inside the apartment matched those of Scott Barfield, not appellant. (R225)

Theresa Porrey testified for the defense by means of videotape. The essence of her testimony was that when she heard Cheryl screaming, she went and awakened appellant who was sound asleep in her apartment.

On rebuttal, Cheryl Hagan and Scott Barfield testified that after the incident they overheard Ms. Porrey speaking on her cordless phone. They explained that their baby monitor sometimes picked up such phone conversations. Ms. Porrey was expressing her disbelief appellant could have done such a thing, but that his shoes and socks were wet and the door had been open. She told the person or persons on the other end to get a good lawyer. (R232)

ANDERS ARGUMENT

After examining Appellant's case, including a thorough reading of the record on appeal and review of the law on arguable points, the undersigned counsel concludes there is no meritorious argument to support the contention that the trial court committed reversible error. Consequently, the undersigned appellate counsel requests permission of the Court to withdraw as counsel of record in this case pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Appellate counsel has written the appellant advising him of this brief and enclosing a copy of the brief and record on appeal. This Honorable Court is directed to the following issues of law which might provide grounds for reversal.

ISSUE

DID ANY REVERSIBLE ERROR OCCUR IN THE INSTANT CASE?

Appellant, Kevin Herrick, was charged with armed burglary, sexual battery, and aggravated battery. The only issue at trial was whether appellant was the perpetrator. The sexual battery victim, Cheryl Hagan, testified she woke up to find a man straddling her and pointing a knife at her neck. The man demanded she perform fellatio or he would hurt her baby. While the man was threatening her and trying to force her to comply with his demands, her boyfriend, Scott Barfield, returned from a late-night errand and struggled with the intruder. The intruder stabbed Barfield in the chest. After retrieving his clothing, the intruder left the room pursued by Barfield. Barfield testified he was able to see the intruder's face from the light shining through the kitchen window and it was appellant, who also resided in their triplex. Barfield chased appellant out of the apartment and down the street, losing him a short distance away. Thinking appellant might have jumped a nearby fence, he too climbed over, and saw a car with its engine running. He noted the license number, returned to the apartment and told a neighbor to write down the number and call the police. A few moments afterwards, he saw appellant emerge from the landlord's apartment and realized he could not have been the person in the waiting car. However, when the police arrived, Barfield neither pointed to appellant as the perpetrator nor did he inform them the car and license number was a false lead. Barfield explained his failure was due to fear

for his family's safety, mental trauma from the incident, and a desire to deal with appellant himself. Subsequently he did contact the police and identify appellant. Cheryl, too, identified appellant as the perpetrator, however, her identification was suspect because the bedroom where the attack occurred was by her own words, "pitch dark", and unlike Barfield she had not followed the perpetrator into the kitchen or outside where there was light. It appeared that her suspicion that the intruder was appellant was confirmed by Barfield telling her it was so.

The physical evidence was equivocal as the only fingerprints identified were those of Barfield, not appellant. Ms. Porrey, the landlord, testified she had awakened appellant when she heard Cheryl screaming. However, on rebuttal, Cheryl and Barfield testified they had overheard Ms. Porrey telling someone on the phone after the incident that appellant's shoes and socks were wet, the door had been opened, and to get a good lawyer.

Clearly, this was not a question of legal sufficiency of the evidence, rather a question of credibility of the witnesses. Even defense counsel as much as conceded it was a question for the jury when he made his motion for judgment of acquittal at the conclusion of the state's case. (R226) Admittedly, there were inconsistencies in the victims' testimony between themselves, as well as, between their trial testimony and earlier statements they had made to the police and at deposition. Trial counsel did an admirable job in pointing out these inconsistencies and

discrepancies to the jury, however, such matters are for the trier-of-fact to resolve in whatever way they see fit and how they choose to do so is not reviewable by an appellate court.

The offenses for which appellant was convicted were a life felony, a first degree felony punishable by life and a second degree felony. Appellant scored in the life sentence range under the guidelines. Defense raised the issue of whether two of appellant's prior convictions were invalid, however, the prosecutor noted and it was not disputed that even minus the points for these offenses, appellant would still fall in the life sentence range. Therefore, the sentences imposed by the court were legal as being within both the guideline range and the statutory maximum.

From the record herein, there does not appear to be any legal error that would constitute grounds for a reversal of appellant's conviction.

CONCLUSION

For the above reasons, the undersigned counsel requests permission to withdraw as counsel for the Appellant. However, counsel requests this Court to allow Appellant, in his own behalf, or through counsel, to submit a brief on points he may deem appropriate.

If this Court finds reversible error in this appeal, counsel requests this application be withdrawn and an opportunity be granted to file another brief for the Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Attorney General's Office, 2002 North Lois Avenue, WestWood Center, Tampa, FL 33607, and to the Appellant, Kevin Richard Herrick, Inmate No. 240583, Okaloosa Correctional, P.O. Box 578, Crestview, FL 32536 this 25th day of February, 1992.



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