

22-7213

CASE NUMBER 5D21-2448

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Brian Evan Roth
Petitioner,

v.

State of Florida
Respondent.

On Certiorari to the United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner: Brian Evan Roth
DC# A21191

Okaloosa Correctional Institution
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Respondent: Attorney General, State of Florida
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PROVIDED TO OKALOOSA CI

ON 3/14/23

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QUESTION(S) PRESENTED

1. Did the trial Court Err in allowing uncharged crimes not contained in the information, to be introduced and spotlighted as testimony? As well as being brought up again during closing arguments?
2. ~~Were~~ the prosecutor's improper closing arguments impermissible, and did they shift the burden of proof to the petitioner?
3. Did the trial Judge abuse his discretion when he denied three cause challenges, which all had significant reasonable doubt as to juror impartiality?
4. Was the Sentence Vindictive because the petitioner went to trial? A deal that was not conveyed to the petitioner of 8 months in county was offered, followed by a "pleas charged" deal of 3 years before trial commenced. Petitioner was sentenced to 8 years after the trial, and was not properly informed of any deal.
5. Should an instruction to include a lesser charge have been included?
6. Was a sum of Cumulative error reached during the trial? With another outburst by the prosecutor, and his improper burden shifting comment, did it amount in a fundamental error, infringing on the petitioner's right to a fair and impartial trial?

Table of Contents

Index of Appendices	3
Table of Authorities	4
Petition for Writ of Certiorari	7
Opinions Below	5-7
Statement of Jurisdiction	7
Constitutional and Statutory Provisions involved	4
Statement of the Case	7-10
Reasons for granting the writ	10-15
Conclusion	15

Index of Appendices

Appendix A - Fla 5 th DCA decision	5
Appendix B - Mandate from Fla 5 th DCA	6

TABLE OF AUTHORITIES

1. Cases

Bethel v State, 122 So. 3d 508, 512 (Fla. 5th DCA 2014)...	12
Broomfield v State, 114 So. 3d 1008, 1009 (Fla. 5th DCA 2012)...	14
Cleavis v State, 605 So. 2d 974 (Fla. 3d DCA 1992)...	12
Holland v State, 636 So. 2d 1289, 1293 (Fla. 1994)...	11
Jones v State, 944 So. 2d 533, 536 (Fla. 5th DCA 2006)...	11
Mataarranz v State, 133 So. 3d 473 (Fla. 2013)...	13
McCall v State, 941 So. 2d 1280, 1283 (Fla. 4th DCA 2006)...	10
Morgan v State, 146 So. 3d 508, 512 (Fla. 5th DCA 2014)...	10
Pastor v State, 242 So. 2d 627, 630 (Fla. 4th DCA 2001)...	10
Rolie v State, 93 So. 3d 1230, 1231 (Fla. 2d DCA 2012)...	11
Rivera v State, 840 So. 2d 284, 288 (Fla. 5th DCA 2003)...	12
Sanders v State, 779 So. 2d 522, 523 (Fla. 3d DCA 2002)...	12
Sempier v State, 907 So. 2d 1277, 1278 (Fla. 5th DCA 2005)...	12
Singer v State, 109 So. 2d 7, 23-24 (Fla. 1959)...	13
Vega v State, 182 So. 3d 848, 851 (Fla. 4th DCA 2016)...	13
Williams v State, 110 So. 2d 654 (Fla. 1959)...	10
Wilson v State, 845 So. 2d 142...	14

2. Other Authority

Art 1, §9, Fla. Const.	11
Art 1 §16, Fla. Const.	13
U.S. Const. amend VI	11
U.S. Const. amend XIV	11
Fla. R. App. P 9.030(b)(2)(A)	7

I Basis for Invoking Jurisdiction

Article IV § 4(b) of the Florida Constitution provides that the district court of appeals have jurisdiction to issue writs of certiorari. See also Fla. R. APP. P. 9.030(b)(2)(f). The order to be reviewed in the present case was rendered in the District Court of Appeals of the State of Florida on November 15, 2022. Mandate Filed December 9, 2022. County of origin Brevard Circuit Court, Judge Stephen Henderson. Original trial court decided on June 22, 2021. Petitioner respectfully prays that a writ of certiorari be issued.

II. Statement of the Facts

The petitioner is the defendant in a criminal case ruled on in trial court on June 22, 2021, and ruled on in appeals court (5th DCA) November 15, 2022. The respondent is the State of Florida. The petitioner was charged with one count of unlawful sexual activity with a minor. The alleged offense occurred during the overnight period of August 7-8, 2015. The alleged victim of the offense was the niece of the petitioner's girlfriend. At trial, allegations were denied by petitioner. Petitioner was represented by Rennie L. Sanders-Randall, and Michael Sanders-Randall. The State was represented by Assistant State attorneys Donovan Wagner, Kari D. Kies, and Michael W. Doyle. The Honorable Judge Stephen G. Henderson presided over the trial. The trial began on June 14, 2021 and concluded on June 22, 2021. At the conclusion of the trial, the jury found petitioner guilty as charged. Sentencing was postponed until September 30, 2021 due to the Judge's Covid-19 illness, and the petitioner was remanded to Sharpes Correctional facility until then. The judge ordered ninety-six months imprisonment. The alleged victim stated that on August 7, 2015 her aunt, the petitioner's girlfriend was having a party

at her and the petitioner's house in Brevard County. She was visiting her grandmother at the time, and since she was celebrating her eighteenth birthday, she wanted to go celebrate at the gathering. As it turns out, she was two weeks away from her birthday. She stated that people were drinking alcohol at the gathering, and that she drank also. She stated she got to the house at 9pm on August 7, 2015 and that the other people present left around 11pm. She testified that her and the petitioner went outside to see his boat, alone, and that he tried to kiss her and stuck her hand down his pants. Tolani, the petitioner's girlfriend testified that she was present outside during that alleged incident, as well as their dogs, and that the incident didn't happen like the alleged victim said. Then the alleged victim said her, her aunt and the petitioner went to McDonald's to get food. The alleged victim claimed she rode in the front seat, and that the petitioner was rubbing her leg. Tolani, the petitioner's girlfriend testified that she rode in the front seat of the car, and that that incident also didn't happen as the alleged victim claims. When they returned, the alleged victim claims she began to "red out" due to her intoxication, and that the petitioner "led" her to the room where she would sleep which was petitioner's girlfriend's son's room. He wasn't home at the time. Alleged victim claims she fell asleep and "woke to someone licking her down there" but couldn't see because it was dark. The petitioner claims he showed her to the room, where she jumped on the bed, and fell off the side to which they laughed. He helped her on the bed, asked if she was OK, and turned off the lights and returned to his room where his girlfriend was waiting and went to bed.

When the alleged victim fell off the bed, the petitioner grabbed her by the belt loops to help her up, to which one ripped. When the alleged victim woke up, she claimed her shorts were on the floor and her underwear were "pulled down a bit". She stated she touched her "vaginal area" and it "was very sticky." She then wrote a letter to her aunt and petitioner stating "thank you for the good time, don't worry I called my grandma for a ride." When the grandmother picked her up, she told a story of what she alleged happened at her aunt's house, and took a shower. She reports leaving her underwear at her grandmother's house and went to the police department on August 8, and repeated her allegations.

On the morning of August 8, 2015, the alleged victim's mother and grandmother came to confront the petitioner at his home. He answered the door and was accosted and assaulted by both women. He denied the allegations and the grandmother slapped him across the face dragging her fingers through his mouth. He then spit her hand out of his mouth, and saliva got on the grandmother's face and shirt, to which she wiped it off with her hand. The women then left, and went to the grandmother's house to where the grandmother admitted to not washing her hands and grabbed the underwear and bagged them up for the police to come get.

The underwear was tested for DNA, and concluded that there was DNA present on the underwear, and that it belonged to the petitioner. The FDLE analyst, Yvonne Stiles, testified that there were multiple ways the DNA could have shown up there, and that it wasn't semen. It was "touch" DNA, and was transferred from the bed the alleged victim slept in, that the petitioner also frequently sleeps in due to his

working late as a bartender, and has girlfriend snoring.

After the testimonies, the jury found the petitioner guilty as charged.

III Nature of Relief Sought

The nature of relief sought by the petitioner is a writ of certiorari reversing the trial court's decision and remanding for a new and fair trial.

IV Argument

The petitioner contends that he is innocent and did not receive a fair trial. He raises six issues where the trial court erred. First, the trial court erred by allowing the State to introduce testimony relating to an uncharged crime, (i.e. the outside incident, where she claimed the petitioner kissed her and grabbed her arm and put it down his pants.)

"A criminal defendant is entitled to a trial on charges contained in the information, and may not be prosecuted for uncharged offenses, even if they are the same general character." *Morgan v State*, 146 So. 3d 508, 512 (Fla 5th DCA 2014). "The improper admission of similar fact testimony is presumed to be harmful error." *Paster v State*, 792 So. 2d 627, 630 (Fla 4th DCA 2001). The Judge stated that the testimony in question was "somewhat inextricably intertwined," with the charged offenses. "Evidence is inextricably intertwined with the underlying crime if the State is unreasonably hampered, without the evidence, in explaining how the crime came to light," *McCall v. State*, 941 So. 2d 1280, 1283 (Fla. 4th DCA 2006). The state was not hampered to prove the charged crimes without the testimony, and it amounted to improper Williams rule evidence. *Williams v. State*, 110 So. 2d 654 (Fla. 1959) This admittance of evidence caused the jury to view the petitioner in a bad light as

in *Jones v State*, 944 So. 2d 533, 536 (Fla 5th DCA 2006).

"Evidence that a defendant committed a collateral crime is inherently prejudicial because it creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof he committed the charged offense.) Which is what this amounted to, propensity evidence, which is inadmissible.

"It is only when it is impossible to give a complete or intelligent account of the charged crime without reference to uncharged crimes that evidence of those uncharged crimes is admissible," *Pitts v State*, 935 So. 2d 125, 128 (Fla. 2d DCA 2006) *Dollar v State* 93 So. 3d 1230, 1231 (Fla. 2d DCA 2012). The defense was taxed with having to address the testimony and shine more light on it putting up a defense to it, when it shouldn't have been admitted and was not charged. The error in admitting was not harmless, and the effect was prejudicial and outweighed probative value. Evidence of uncharged "collateral crimes" is not admissible to show a criminal defendant's guilt or propensity to commit a criminal act," *Holland v State* 636 So. 2d 1289, 1293 (Fla. 1994). Undersigned counsel also referred to the uncharged crime during closing arguments. The improper introduction of the testimony resulted in violation of petitioner's constitutional right to a fair trial. See U.S. Const. amend. V & XIV; art. I, § 9, Fla. Const.

Second, the petitioner was denied a fair trial as the result of the prosecutor's improper closing argument. Mr Wagner stated that, "But she remembers what happened to her. And what you have to remember is, if you believe [alleged victim], he's guilty. If you believe what she told you." "It is improper for a prosecutor

to argue to a jury it can convict a defendant based solely on whether a witness is believable." *Scampier v. State*, 907 So. 2d 1277, 1278 (Fla 5th DCA 2005).

The prosecutor's argument was improper and impermissibly shifted the burden of proof to the petitioner. "The test for reasonable doubt is not which side is more believable but whether, taking all of the evidence in the case into consideration, guilt as to every essential element of the charge has been proven beyond a reasonable doubt." *Clemis v State*, 605 So. 2d 974 (Fla 3d DCA 1992). "It is impermissible [to]... ask the jury who was lying as the test for deciding if appellant was not guilty." *Rivera v State*, 840 So. 2d 284, 288 (Fla 5th DCA 2003). The statement invited jurors to convict on who they believed, improperly shifting the burden of proof, and amounted to fundamental error, depriving petitioner of due process and right to a fair trial... *Sanders v State*, 779 So 2d 522, 523 (Fla 2d DCA 2000).

The third argument relates to jury selection and the striking of jurors. The abuse of discretion standard applies to the review of a trial court's denial of a cause challenge. See *Bethel v State*, 122 So. 3d 944, 948 (Fla. 4th DCA 2013).

During Selection, juror 10 indicated she had a child and was asked if she would be "imagining her child in this situation," to which she responded, "I'll try my best, it's hard not to." She also indicated she received seventy-eight emails on the morning of jury selection. The trial court denied the cause challenge for Juror 10.

During selection Juror 20 indicated three years prior to this trial, she was sexually assaulted. The victim was the same age as alleged victim in this

case. The trial court denied cause challenge for Juror 20.

Also, Juror 27 showed concern for the charge at this trial explaining his friend was a victim of sexual assault. Defense moved to strike for cause and was denied.

In this case, the trial courts rulings denied the petitioner a fair trial and an impartial jury, as guaranteed by article I, section 16 of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

"If there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict... he should be excused." *Singer v State*, 109 So. 2d 7, 23-24 (Fla. 1959). The Florida Supreme Court's decision in *Mattarrazz v. State*, 133 So. 3d 473 (Fla. 2013) supports petitioner's argument that the trial court erred by denying cause challenges, stating, "Trial courts are endowed with the responsibility to determine that jurors render a verdict solely on the evidence presented and the law given by the court." There was reasonable doubt as to all three jurors impartiality, as in *Vega v State*, 182 So. 3d 848, 851 (Fla. 4th DCA 2016), "... Florida Supreme Court has moved the bar in the direction of excusing the challenged juror..." The petitioner was denied a fair trial.

A Fourth claim by petitioner is that of a vindictive sentence. The petitioner was never relayed a plea offer of one year in county jail with a misdemeanor battery charge. The first day of trial he was informed of the deal, and when the prosecutor was asked if the deal was available, he replied no, and he offered to plea as charged to the three-year felony that is charged. The petitioner

elected to proceed with trial and was sentenced to ninety-six month incarceration. In *Wilson v State* 845 So. 2d 1412, the Supreme Court held the district courts should employ a totality of the circumstances reviewing when determining whether a defendant's constitutional rights to due process of law was violated by the imposition of an increased sentence.

Finally, the petitioner argues that a jury instruction should have been given on a lesser charge like a simple battery, one that the petitioner should have been properly offered before trial. The petitioner has no prior criminal history, is a loving father and friend and his long time fiancée was present to retort and refute the alleged victim's testimony. An instruction for guilt on a lesser charge should have been given.

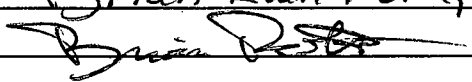
All of these issues add up to a cumulative error or part of the trial court, and is subject to de novo standard of review. The petitioner's rights to a fair trial and constitutional rights were infringed upon. In closing arguments, Mr. Wagner also had a yelling outburst to which Judge Henderson called it "totally inappropriate." That along with the improper burden shifting point to *Broomfield v State* 114 So. 3d, 1008, 1009 (Fla. 5th DCA 2012), where the prosecutors improper closing arguments constituted a fundamental error. As in this instant case, the cumulative effect of the errors of trial denied the petitioner a fair and impartial trial.

V In Summary, the appropriate remedy for all arguments is a reversal of conviction and a remand for a new and fair trial.

VI Conclusion

For the foregoing reasons, this Court should grant the writ of certiorari in this case, appoint counsel for petitioner to represent him in this cause, and order full briefing.

Respectfully submitted,

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