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

GEORGE G. HEADY,

Appellant,

v. CASE NO. 1D15-4013

STATE OF FLORIDA,

Appellee.

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Opinion filed March 31, 2017.

An appeal from the Circuit Court for Escambia County.
J. Scott Duncan, Judge.

Andy Thomas, Public Defender, and David A. Henson, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Heather Flanagan Ross, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTIONS FOR REHEARING, ISSUANCE OF WRITTEN OPINION, CERTIFICATION OF CONFLICT, AND REHEARING EN BANC

BILBREY, J.

Appellant, pursuant to rules 9.330(a) and 9.331(d), Florida Rules of Appellate Procedure, moves for rehearing, issuance of a written opinion,

certification of conflict with decisions of other district courts of appeal, and rehearing en banc. We deny all of Appellant's motions other than his motion for issuance of a written opinion. We withdraw the prior per curiam affirmance and substitute in its place the following written opinion which addresses the only issue raised in Appellant's motions. We affirm the other issues in the initial brief raised by Appellant without comment.

Following a trial, Appellant was convicted of three counts of sexual battery on a child less than 12 years of age, lewd or lascivious molestation on a child less than 12 years of age, lewd or lascivious exhibition, and battery of a child. The trial court imposed lawful sentences following trial including concurrent life sentences for each of the sexual battery convictions.[1] Appellant contends that the trial court erred by denying a motion for mistrial made by his trial counsel after the eight-year old child victim interacted with her family members during a break in the victim's testimony. We disagree and affirm.

The child victim initially was somewhat equivocal in her testimony. She testified that Appellant touched her with his hand in her "privates" which she uses to "pee" and that the touching occurred under her clothes. However she denied or

[1] Appellant's counsel calls these sentences "never-leave-prison-alive sentences" which is not the correct term. These sentences are for capital felonies, the maximum constitutional punishment for which is life imprisonment. See §§ 775.082(2) & 794.011(2)(a), Fla. Stat.; Kennedy v. Louisiana, 554 U.S. 407 (2008).

expressed no memory of other allegations she had previously made against Appellant.

The State asked for a recess. Appellant's counsel expressed concern about the victim discussing her testimony with anyone during the recess. After the recess the Assistant State Attorney positioned herself so that the victim would look at her and not the Appellant. The State continued its direct examination of the victim and the victim testified, consistent with her prior statements, to all of the offenses committed by Appellant.

On cross examination, the victim was asked about her communications with anyone during the recess. The victim testified that she talked with someone about how important it was to remember, but did not know who she talked to. The victim also stated that it was her mother who spoke to her outside the courtroom. The victim answered affirmatively when asked if her mother said it was important for her, in the words of defense counsel, to "say this stuff."

After the victim concluded her testimony, Appellant moved for a mistrial. The evidence as to what happened during that break varied. The State proffered the testimony of its victim's advocate, who testified she was with the victim during break and that the victim did not speak with anyone about the case, but that the victim's mother did give her a hug and said "I love you." The mother testified that she only said "I love you" while giving a hug to the victim. She thought her

mother (the child's grandmother) also gave a hug and said "I love you." But, the victim's advocate testified that she did not think the child hugged her grandmother and was unsure that anything was said by the grandmother. The trial court denied the motion for mistrial.

Generally, the standard of review for a ruling on a motion for mistrial is abuse of discretion. Perez v. State, 919 So. 2d 347, 363 (Fla. 2005) (citing Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999)). "A motion for mistrial should be granted only when the error is deemed so prejudicial that it vitiates the entire trial, depriving the defendant of a fair proceeding." Jennings v. State, 123 So. 3d 1101, 1125 (Fla. 2013) (quoting Floyd v. State, 913 So. 2d 564, 576 (Fla. 2005)). A mistrial "is a drastic remedy to be granted only when an error is so prejudicial as to vitiate the entire trial, and only when necessary to ensure the defendant receives a fair trial." Jones v. State, 128 So. 3d 199 (Fla. 1st DCA 2013); see also Salazar v. State, 991 So. 2d 364, 372 (Fla. 2008); Power v. State, 605 So. 2d 856, 861 (Fla. 1992).

In essence, the claimed error which was the basis for the mistrial motion was a violation of the rule of sequestration. "The rule of sequestration is intended to prevent the shaping of testimony by witnesses." Dumas v. State, 350 So. 2d 464, 465 (Fla. 1977) (citing Geders v. United States, 425 U.S. 80, 87 (1976)). Enforcement of the rule is a matter for the trial court's discretion, and the rule

should not be enforced in such a manner that it produces injustice. Lott v. State, 695 So. 2d 1239 (Fla. 1977).

There is no doubt that it was improper for the child victim to be allowed to interact with her mother and grandmother (both of whom were also State witnesses) during the brief break in the proceedings. Even the trial court conceded such. Certainly the defense was prejudiced by the change in the child's testimony. But, Appellant has not established that the change in testimony was the result of anything said or done during the break. That is, the Appellant has not established that the prejudice he experienced was a result of the error in allowing the child to interact with her mother and grandmother mid-trial.

The mother and grandmother, as State witnesses, were not present in the courtroom during the child's testimony as the rule of sequestration had been invoked.[2] They would not have known, therefore, that the child had been initially non-responsive to the prosecutor's questions — unless the victim advocate told the mother and grandmother such, and Appellant does not allege such conduct by the victim advocate. Because there is no basis for finding that the mother and child colluded during the break and no basis for concluding the child fabricated her testimony (especially given the fact that her trial testimony after the recess was consistent with what the child previously told the Child Protective Team), there

[2] The mother could have been present for the child's testimony unless the trial court determined that her presence was prejudicial. § 90.616(2)(d), Fla. Stat.

was no abuse of discretion in the denial of a mistrial. See Knight v. State, 746 So. 2d 423 (Fla. 1998) (explaining purpose of rule of sequestration is to discourage fabrication, inaccuracy or collusion).

AFFIRMED.

OSTERHAUS, J., CONCURS, WINOKUR, J., CONCURS in part and DISSENTS in part.

WINOKUR, J., concurring in part and dissenting in part.

I concur in the denial of motions for rehearing, certification of conflict, and rehearing en banc. I have no objection to the substance of the substituted opinion because it properly addresses why the trial court's denial of Heady's mistrial motion should be affirmed. However, I cannot join the substituted opinion because I would deny Heady's motion for written opinion as improper.

"When a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the party may request that the court issue a written opinion." Fla. R. App. P. 9.330(a). The purpose of a motion for written opinion is to provide a basis for supreme court review, not to require the Court to explain itself.

Heady's motion for written opinion argues that "[t]he decision of this Court to affirm the denial of the motion is contrary to the mistrial standard set by the Florida Supreme Court in Ibar v. State, 938 So.2d 451, 470-471 (Fla. 2006) and Banks v. State, 46 So.3d 989, 997 (Fla. 2010)." In Ibar, the defendant moved for mistrial because a detective testified that the first lead in solving the case came from a police homicide unit, from which the jury could have inferred that Ibar was being held on another homicide. Ibar, 938 So. 2d at 470. The supreme court, in reviewing the trial court's denial of Ibar's motion, cited well-established law on the standards for review of mistrial motions, and concluded that the trial judge did not

abuse his discretion because Ibar never asked for a curative instruction. Id. Banks involved a mistrial motion following a witness implicating the defendant in an uncharged crime. Banks, 46 So. 3d at 997. Citing the same general standards for review of mistrial orders as it did in Ibar, the supreme court ruled that the trial court did not abuse its discretion in denying the mistrial motion. Id. at 998.

Ibar and Banks merely applied familiar standards for review of mistrial motions; they did not establish any particular rules that the decision in this case may have violated. Other than involving review of a motion for mistrial, the issue in this case is unrelated to the issues in Ibar or Banks. Heady cited neither case in his briefs. Nor did Heady argue that the trial court violated some specific standard or requirement set forth in specific cases; he merely argued that the trial court erred in denying the mistrial motion. Under these circumstances, the contention that our unelaborated affirmance here is so contrary to Ibar and Banks that supreme court review is warranted is simply unreasonable.[*]

The appellant in Unifirst Corp. v. City of Jacksonville, 42 So. 3d 247, 248 (Fla. 1st DCA 2009), made a similar argument in moving for written opinion, arguing that this Court's per curiam affirmance conflicted with an opinion issued

[*] This point is proven by the substituted opinion itself. The substituted opinion applies the same well-known mistrial standards as cited in Ibar and Banks. No reasonable reading of the substituted opinion could conclude that it expressly and directly conflicts with Ibar and Banks to the extent that the supreme court review on that ground is justified. See Fla. R. App. P. 9.030(a)(2)(A)(iv).

by another district court of appeal and that clarification "would provide a legitimate basis for Supreme Court review." Id. This Court held that "[i]t is meritless to argue that an opinion which says nothing more than 'Affirmed' conflicts with a written opinion issued by another district court." Id.

The same is true here. The per curiam opinion was not "contrary to" Ibar or Banks, and a written opinion would not (and does not) demonstrate an express and direct conflict with Ibar or Banks. Again, while I do not dispute anything in the substituted opinion, I cannot join it because Heady has misused the motion for written opinion.