

FLORIDA LAW WEEKLY SEX CRIMES EDITION BY DENNIS NICEWANDER

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Garrett v. State, 33 Fla. L. Weekly D891 (Fla. 5th DCA 2008):

Evidence was sufficient to support child abuse conviction; evidence showed that defendant, who was employed by school board as a special education teacher assigned to provide vocational instruction to autistic children, placed her body weight upon child with enough force and for a long enough period of time until he turned blue from a lack of oxygen.

Trial court's supplemental instruction to jury in child abuse trial, which stated that physical injury meant asphyxiation, suffocation, or drowning, was proper; instruction was appropriately used by the courts to define excessive or abusive corporal discipline, and jury was instructed that corporal discipline that did not result in harm to the child did not constitute criminal child abuse, and therefore jury had to conclude that the child suffered asphyxiation and physical injury as a result of defendant's actions to reach their verdict.

Fehringer v. State, 33 Fla. L. Weekly D868 (Fla. 4th DCA 2008):

Defense counsel should have been allowed to proffer minor victim's testimony regarding prior accusation of sexual assault she made against another man, even where victim did not previously recant allegation, in prosecution for lewd or lascivious conduct committed on victim less than 16 years old by offender 18 years old or older; prior accusations could have cast doubt on current one by, for example, being remarkably similar in content, or made against person similar to defendant, and state's argument that defense counsel should not have been permitted to go on "fishing expedition," was not recognized ground for denying proffer if proposed fishing expedition was reasonably related to issues at trial.

No error in denying defendant's motion in limine regarding defendant's conduct in text messaging, tickling, and telling victim to "take it out in trade," because these acts were not evidence of collateral crimes, but were relevant evidence admissible as part of, or inextricably intertwined with, the crime charged.

Woodard v. State, 33 Fla. L. Weekly D899 (Fla. 1st DCA 2008):

Vague testimony of witness regarding an incident described only as a "sexual assault"

committed on her by defendant seventeen years before the charged crimes was erroneously admitted. There was insufficient showing that offense was sufficiently similar to the charged offenses.

Discussion: This case was decided under section 90.404(2)(b). The court applies the standard set by the Florida Supreme Court in McLean v. State, 934 So.2d 1248 (Fla. 2006) in evaluating the admissibility of such evidence. It appears that the appellate courts do not agree with the legislature's intent on passing this law, so they are going to chip away at it until it becomes meaningless.

Donohue v. State, 33 Fla. L. Weekly D863 (Fla. 4th DCA 2008):

Remand for resentencing was necessary for trial court to make findings necessary to support imposition of electronic monitoring as condition of probation under **Jessica** Lunsford Act, specifically whether community control or probation officer deemed the monitoring necessary and whether monitoring was recommended by the Department of Corrections; trial court appeared to believe that electronic monitoring was mandatory and that no additional factual findings were necessary.

Donohue v. State, 33 Fla. L. Weekly D864 (Fla. 4th DCA 2008):

Defendant's testimony, at trial on charge of indecent assault on a child under the age of sixteen, concerning victim's age and autism did not constitute an admission regarding victim's vulnerability, so as to permit trial court to enhance defendant's sentence above the sentencing guidelines even absent a jury finding as to vulnerability.

Trial court's error in treating defendant's testimony, at trial on charge of indecent assault on a child under the age of sixteen, concerning victim's age and autism as an admission as to victim's vulnerability, so as to permit trial court to enhance defendant's sentence above the sentencing guidelines even absent a jury finding as to vulnerability, was harmless, where there was clear and uncontested record evidence, both from defendant and from other witnesses, of victim's young age and vulnerability.