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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,887

STATE OF FLORIDA,

Petitioner,

v.

MARTIN DAVID KOPKO,

Respondent.

FILED
SID J. WHITE
JUL 8 1991
CLERK, SUPREME COURT
By Chief Deputy Clerk

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Pages

OTHER AUTHORITIES

STATEMENT OF THE CASE

On October 26, 1987, the Respondent was charged in a Two (2) Count Information. Count I charged that the Respondent, a person over eighteen (18) years of age, between the first (1st) day of October 1986 and the fifteenth (15th) day of November, 1986, did commit a Sexual Battery upon D[redacted] L[redacted], a person less than twelve (12) years old. Count II charged that the Respondent did, between June 1 and June 15, 1987, perform an Indecent Assault, without the intent to commit Sexual Battery, upon D[redacted] L[redacted] (R: 304)

Appellee filed a Notice of Intent to Use Similar Fact Evidence (R: 340) and for Admission of child victim's hearsay statement (the videotape). (R 341-342). Appellant filed timely objections to both motions. (R: 355-383, 387-395).

The Court, in finding the videotape admissible pursuant to Florida Statutes §90.803(23), determined among other things, that the content of the tape coincides with the testimony that the victim gave as part of the pre-trial hearing. (R: 496-496).

Going further, however, the Court refused to allow the tape to be played, finding that the prejudicial value of

the tape outweighed any probative value and would be improper to be presented to the jury. Stating further,

> Unless during the testimony of this trial, the testimony of the victim is ostensibly less, than the Court may reconsider that motion, the possible motion by the State, the motion of the videotape at that time, if I deem its probative value then becomes more important.

The Court finally stated:

> Right now it appears to me that the victim is able to testify clearly to the facts that have occurred, and therefore, the probative value would be minimal in admitting the tape so I will prohibit it coming in unless it becomes necessary at the trial. (R: 495-496).

It is clear that the Judge properly ruled that the videotape was cumulative and more prejudicial than probative and would not add anything to the proceedings. He further very clearly articulated that he would reconsider his motion, only if the child victim was unable to testify in a clear and coherent manner as she had done at the pre-trial hearing.

On the first day of trial, the State, after the above ruling was rendered, made an oral motion to allow a member of the Child Protection team to testify about the statements made by the child during the videotaped interview. (R: 496). Obviously, this ore tenus request failed to satisfy the specifics required by Florida Statutes § 90.803(23)(b). The Appellant objected. The Court acknowledged that it had previously denied the admissibility of the videotaped interview, however, the Court then reversed itself in an

obvious contradiction of its ruling as to the admission of the videotape. The Court determined that while the tape could not be played, he would allow Nurse Lobbes to testify as to the child's hearsay statements during the interview and as depicted on the videotape. Such evidence being admitted pursuant to Florida Statutes § 90.803(23). (R: 496-497).

Jury trial began shortly thereafter and after a jury was panelled and opening statements were made, the first witness called was the child victim, D[redacted] L[redacted].

This witness was examined completely and thoroughly by both counsel.

The second witness to testify was Dr. Penny Tokarski (a physician member of the Child Protection Team, hereinafter referred to as C.P.T.). When the State attempted to introduce evidence of out of court statements of the child victim, the defendant objected. (R: 75). Again, no written notice was provided pursuant to Florida Statutes § 90.803(23)(b).

The Court ruled that the statement was cumulative but that the prejudicial effect was outweighed by its probative value. (R: 77). The Doctor then testified that,

> The History that I received from D[redacted] was to corroborate and ask further what had already been given to me by Ms. Jane Wilson who had given me the preliminary history from the

> child after they did a videotape interview. I specifically had asked D[redacted] if she had any previous injuries to her perianal or vaginal area and she talked about one entry that had occurred but nothing that had occurred anally. Specifically, she talked about where he hit her buttocks; did not involve her anus or vagina.... I also asked her if she was aware if Mr. Kopko had done anything to any other children and she stated she thought something happened to her little sister.

This latter portion of the Doctor's testimony was objected to and the Court advised the jury to disregard it (R 78-79). Further along, the Doctor testified that the medical history was actually provided to her from Ms. Wilson, a nurse member of the Child Protection Team, who also testified at trial. (R: 79).

Most importantly, the Doctor testified that her physical examination revealed no scarring, no fissures, nothing wrong; and that the anus, the labia and the hymen were normal. (R: 83).

The third witness to testify was Jane Wilson Lobbes (a nurse member of the C.P.T. and the person who videotaped the interview of the child victim). Over objection, the Court permitted this witness to testify about the interview. (R: 87).[1]

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[1] Despite the State telling the Court that there had been no reference to the videotaping of the interview this was the second time that the videotape was mentioned by State witnesses answering questions posed by the prosecution. (R: 78,89).

When the child victim was asked if she knew why she was seeing Nurse Loppes, the child said it was to talk about what her dad had done to her. (R: 90).

The Nurse also testified to what she had been told by the child during the videotaped interview.

During cross-examination, counsel for the Respondent questioned this witness about the videotaping of the interview, so as to impeach her credibility. Upon motion and argument by the State and over the objection of the Respondent, the Court then decided to allow the videotape to be played stating the cross-examination had raised the probative value considerably. (R: 101).

After renewed objections by the State and after some matters were edited out of the videotape, it was played for the jury. (R: 144).

The last witness to testify was N[redacted] B[redacted] W[redacted], the wife of the Respondent and the mother of D[redacted] L[redacted]. She testified that her marriage with Dave was getting worse and worse and that she decided to leave him on Father's Day of 1987. (R: 196).

She further stated that the child told her about the sexual allegations the following day and despite these serious allegations, she stayed with the Respondent for several more days. According to her rebuttal testimony, the first night after these startling allegations were made, she fell asleep; the second night she was ill; and another night she had sexual relations with Dave. (R: 196). Furthermore, the Police were not notified until June 29, 1987 (R: 124) and the C.P.T. videotaped interview was made on July 1, 1987 (R: 74).

Statement of the Facts

Martin David Kopko (hereinafter referred to as Dave) met N[redacted] W[redacted] in a lounge where she was celebrating her divorce from her first husband. At the time, Dave was twenty years old and in the United States Navy. (R: 115-116). They ultimately married and a child K[redacted] was born. Dave worked as a painter and his wife worked cleaning houses and then at Subway Sandwich Shops in May and June of 1987. Despite there being financial difficulties, Dave did not like his wife working at night and insisted she quit. (R: 115, 170).

The short marriage was characterized by constant and intense arguing and had deteriorated to the point that on Father's Day, June 19, 1987, a big argument took place and Dave told his wife to get out, but that she couldn't take his daughter with her (R: 119). She agreed it was time to leave. The fight was about Dave's desire to discipline his stepson and Mrs. W[redacted] resenting that. (R: 117). D[redacted] was aware of the fighting. (R: 47).

Prematurely for a child of this age, D[redacted] had several instances of exposure to sexuality. A friend of the child victim, one S[redacted], had been molested by her father and told D[redacted] about it. (R: 52). A neighborhood boy, one R[redacted] B[redacted], who liked to touch the little girls in the

neighborhood, pushed D[redacted] down on the ground and laid on top of her and was "humping" her. (R: 126, 127, 168). Lastly, Mrs. W[redacted]'s son C[redacted], who was 13 years old at the time, was permitted to watch X-rated movies. Although the testimony was in dispute over whether Mrs. W[redacted] permitted it (R: 169) or whether Dave permitted it (R: 128). D[redacted]'s exposure to these films is unknown.

The day after Mrs. W[redacted] had decided to leave Dave was the first time that D[redacted] told her mother of improper activity between her and Dave. (R: 106, 107). Mrs. W[redacted] stayed with Dave the rest of the week. During that time, she did not report the allegations of sexual contact to the Police, H.R.S. or the C.P.T. The authorities were first notified when Mrs. W[redacted] and D[redacted] met a Police Officer at the Turkey Lake Plaza on the Florida Turnpike on June 29, 1987. (R: 108). At that time, Mrs. W[redacted] wrote a statement for D[redacted] for the Police Officer. (R: 109).

When Dave returned home from work and found his family gone, he wept and went looking for his family for two hours, then called up his Dad (Roy Woods) for help. He also hired a private investigator to try and find them. (R: 176). Shortly after Mrs. W[redacted] had fled with the children, she spoke to Dave and his father Roy Woods. She did not repeat or report the sexual allegations D[redacted] had related to her to

either one of them. Her major complaint as related to both of them was Dave's disciplining her children. (R: 159, 177).

D[redacted] was examined, interviewed and videotaped by the C.P.T. on July 1, 1987. Dave later filed for a divorce from Mrs. W[redacted] and in his moving papers, he sought custody of his daughter, K[redacted]. (R: 125).

In her testimony, Nurse Loppes stated that D[redacted] told her of sexual abuse by her Dad, she spoke of fondling. The child also knew she was there to see Nurse Loppes to talk about what her Dad had done to her. (R: 90). The purpose of the interview was to find out the child's version of the abuse. (R: 86).

D[redacted] testified that the shower incident wherein Dave was to have penetrated her occurred around Halloween; a few months after her mom met Dave (R: 30) and that Dave got into the shower with her while her mom was at work. (R: 31). Mrs. W[redacted] testified that she worked at Subway, a night job, in May and June of 1987. (R: 114).

The child also testified that what Dave did hurt for a couple of days (R: 32) or two to three weeks (R: 62) and that she couldn't use the bathroom for a couple of days. (R: 32). D[redacted] testified that his "private" in her butt felt like

a "thousand; million ants crawling up your butt and biting". (R: 63, 91). Despite this testimony, D[redacted] said there was no bleeding. (R: 60).

Mrs. W[redacted] testified that the bathroom situation made her think that D[redacted] was constipated; that D[redacted] said there was no bleeding; and that she didn't feel it was necessary to examine D[redacted] herself or to take D[redacted] to a Doctor. (R: 128, 129). She also stated that D[redacted] was fine in a day or so and she never brought it up again.

D[redacted] also testified that she had been interviewed, questioned and prepared for testimony by the Prosecutor on the day of the trial (R: 41), the day before (R: 42), the prior Friday, a couple of weeks before the trial and a month before the trial. (R: 43). She had spoken about her testimony to Nurse Loppes and Dr. Tokarski of the C.P.T., a Police Officer, and Dr. Mara (3 to 5 times). (R: 59). Even Mrs. W[redacted] conceded that they had talked to so many people. (R: 129). D[redacted] was videotaped, deposed, she testified at a pre-trial hearing, as well as in front of the Jury. D[redacted] was doing terribly in school, she got D's and F's and she had to repeat the third grade (prior to the alleged acts herein). (R: 48, 165, 166). At the time of her trial testimony, her mother had married for the third time. (R: 104).

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal was correct in ruling that the child victim's prior consistent out of Court statements were not admissible under Florida Statutes §90.803(23). The blatant hearsay consisted of Dr. Tokarski repeating the information she had obtained from Nurse Loppes, who had initially interviewed the child victim. It also included the testimony of Nurse Loppes who also repeated the child victim's story. The third repitition of the child's testimony was later introduced through the video tape.

The State seeks to remedy this problem by arguing that these statements are admissible as the opinion of an expert witness or as medical history. The C.P.T. interview was solely for the purpose of finding physical evidence to corroborate the allegations of sexual abuse. Furthermore, this issue was not certified by the District Court.

Lastly, the Prosecution argues that the errors are harmless beyond a reasonable doubt due to the overwhelming evidence of guilt. On the contrary, this case, is predicated solely on the testimony of a child victim who had a motive and the opportunity to fabricate these allegations. There is absolutely no independent corroboration of her allegations

other than her mother, who was going through an acrimonious break-up of her marriage to Respondent and who also had the opportunity and motive to fabricate these allegations.

ARGUMENT

THE DISTRICT COURT WAS CORRECT WHEN REVERSING RESPONDENT'S CONVICTIONS AND ORDERING A NEW TRIAL ON THE GROUND THAT WHEN A CHILD VICTIM OF A SEXUAL OFFENSE TESTIFIES FULLY AND COMPLETELY AT TRIAL AS TO THE OFFENSE PERPETRATED UPON HIM OR HER, IT IS REVERSIBLE ERROR TO ADMIT PRIOR CONSISTENT OUT OF COURT STATEMENTS OF THE CHILD, PURSUANT TO FLORIDA STATUTES, SECTION 90.803(23).

On April 18, 1991, the Fifth District Court of Appeal certified the following question:

> In a case in which the child victim of a sexual offense testified fully and completely at trial as to the offense perpetrated upon him or her, can it constitute reversible error to admit s, pursuant to Section 90.803(23), Florida Statutes, prior, consistent out of court statements of the child which were cumulative to the child's in court testimony or merely bolstered it?

Kopko v. State, 16 F.L.W. 508 (Fla. 5th D.C.A. April 18, 1991).

Respondent, Martin David Kopko (hereinafter referred to as Dave) maintains that the District Court was correct in its ruling that the repetition of the child victim's testimony by Nurse Loppes and Dr. Tokarski, as members of the Child Protection Team, as well as the replaying of the videotape, were cumulative to the live testimony of D[redacted] and were unnecessary and forbidden bolstering.

Florida Statute 90.803(23) provides:

(23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM OF SEXUAL ABUSE OR SEXUAL OFFENSE AGAINST A CHILD.

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The Court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:
   a. Testifies; or
   b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other

particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

The purpose of the statute is to protect victimized children "from emotional harm and trauma occasioned by judicial proceedings." See Chapter 85-53, Laws of Florida, setting forth the legislatures intent in adopting Section 90.803(23). Russell v. State, 572 So.2d 940, 942 (Fla. 5th D.C.A. 1991).

The videotape that was offered in evidence was made on July 1, 1987, at the premises of the Child Protection Team in the presence of Nurse Jane Loppes and child victim D[redacted] Linsey[2]. It was made for the purposes of verifying the child's allegations of sexual abuse. (R: 86). Dr. Tokarski was not present during the interview, she did not observe it, but later learned of it from Nurse Loppes. (R: 79).

D[redacted] was 11 years 7 months old when she testified at the pre-trial hearing and at the trial. (R: 26).

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[2]The Notice for admission of child victim's hearsay statement states the videotape was done on July 6, 1987 but the Doctor testified that the examination (R: 341) took place on July 1, 1987 (R: 74).

The principle is well settled that a child's competency is fixed when he or she is offered as a witness and not when the facts testified to occurred. Griffin v. State, 526 So.2d 752 (Fla. 1st D.C.A. 1988).

The State never moved the Court to find that D[redacted] was unavailable on the basis that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm pursuant to Florida Statute 90.803(23). The State never requested the Court find the child victim unavailable pursuant to Florida Statute 90.804(1).

The State did not seek to have D[redacted]'s deposition videotaped so as to enable her to avoid having to go through the potential trauma of live testimony before a jury, pursuant to Florida Statute 92.54.

The primary factor in admission of hearsay statements of a child victim is necessity, since, in most cases, the child is the only witness and often there is no objective evidence of the offense. Nevertheless, the commentators also recognized the tension between the need to protect the child and the right of the accused to a fair trial. Griffin, supra, at 758.

In a case such as this one, where the child witness is available to testify, and does so completely, there is no need for the protection provided to child victims pursuant to Florida Statute 90.803(23). Such repetitive testimony has been consistently prohibited in Florida.

In Wise v. State, 546 So.2d 1068 (Fla. 2d D.C.A. 1989), a six year old victim was the state's eyewitness. However, the State sought to bolster her testimony by having her mother testify about what the child had previously related about the allegations. The Court held that as a general rule, a witnesses' trial testimony cannot be corroborated by his own prior consistent statements. Wise v. State, supra at 1069; Jackson v. State, 498 So.2d 906, 909 (Fla. 1986). [3] The Court, in Wise, went on to hold that the disclosure of the out of court statements were inadmissible because it only served the impermissible purpose of placing a "cloak of credibility" upon the testimony of the child victim. Wise, supra, at 1070.

The very same problem that occurred in Wise occurred in this case. The Doctor and Nurse, particularly through their repetition of the child victim's testimony, served the

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[3]In the case before the bar, there was no express or implied charge of recent fabrication pursuant to Fla. Statute 90.801(2)(b) which would have permitted the prior consistent statements. Furthermore, the witnesses' prior consistent statements occurred after the separation which arguably would have been the reason for giving false testimony at trial.

same impermissible purpose of placing a "cloak of credibility" upon D[redacted]'s testimony.

In Perez v. State, 371 So.2d 714 (Fla. 2d D.C.A. 1979), a witness, Joel Gutierrez, testified that Perez shot him. The State called a Police Officer to testify that Gutierrez reported to the officers that Perez had shot him. The Court observed the testimony of the Police Officer was not only hearsay, but consistent with Gutierrez's trial testimony. The rationale for prohibiting the use of prior consistent statements is to prevent "putting a cloak of credibility" on the witnesses' testimony. Perez, supra, at 717; Brown v. State, 344 So.2d 641 (Fla. 2d D.C.A. 1977)2. The Court further held that when a Police Officer who is generally regarded by the jury as disinterested and objective and therefore, highly credible, is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave.

If that statement is true of a Police Officer's credibility, it can only be magnified significantly when, as in this case, the corroborating witnesses are Dr. Tokarski, a pediatrician, and Jane Loppes, a nurse, medical professionals who are also members of a law enforcement entity known as "The Child Protection Team".

As stated in Allison v. State, 162 So.2d 922 (Fla. 1st D.C.A. 1964), the general rule is well recognized that the testimony of a witness cannot be bolstered up or supported by showing that he had made statements out of court similar to and in harmony with his testimony on the witness stand

> The salutary nature and the necessity of such a rule are clearly apparent upon reflection in cases like the present, for without that rule a witnesses' testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witnesses. This danger would seem to us to be especially acute in a criminal case like the present when the prosecutrix is a minor whose previous out of court statement is repeated before the jury by adult law enforcement officers.

Allison, supra, at 924.

As applied to the present case, the testimony of the CPT worker and the CPT physician was purely an adult's reiteration of the child's prior statements consistent with her trial testimony. Kopko, supra, at D510.

The purpose of the child victim's exception to the hearsay rule is to salvage potentially valuable evidence of abuse from children who may be unwilling or unable to give their evidence at trial. Where a child victim is able at trial to fully and accurately recount the crime perpetrated on

him or her, it is error also to allow the introduction of prior consistent statements made by the child. Where the child's out of court statements are needed to provide evidence of any aspect of the crime or related events which the testifying or unavailable child cannot adequately supply, such out of court statements are available pursuant to Section 90.803(23) of the Florida Statute. Kopko, supra, at D510.

Respondent maintains that Section 90.803(23) should not have been implicated based on the facts and circumstances of this case. However, in light of the fact that it was, a careful analysis must be made as to the means by which it was implemented.

The notice provided pursuant to 90.803(23) was provided on a timely basis. (R: 341, 342). However, the notice states that request is made for admission of the videotape only. It provides no written notice that the State wishes to have Nurse Loppes and Dr. Tokarski testify as to the child's statements. Obviously, this was something they contemplated as they moved for it orally immediately after their request to play the videotape was denied. (R: 496). This untimely, unwritten motion was made immediately before the Jury was brought in. (R: 496).

Furthermore, the motion failed to describe any circumstances surrounding the statement which indicate its reliability. Despite the inadequacy of the notice and over objection by trial counsel (R: 469) the Court conducted a hearing on the admissibility of the videotape at which the child victim and her mother testified and the videotape was played.

At the conclusion of the hearing, the Court found that the child victim was able to testify competently, her memory was clear and the tape coincided with her testimony at the hearing. (R: 495).

The Court made no finding

> ...that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability," as to which the court may consider "the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate.

Fricke v. State, 561 So.2d 597, 602 (Fla. 3rd D.C.A. 1990).

In DiStefano v. State, 526 So.2d 110, 113 (Fla. 1st D.C.A. 1988), the Court found that the immediate reporting of the offense before there was any time for fabrication as a very significant factor in finding the hearsay reliable. Here, we have an eight month lapse between the incident and

its first being reported to the child victim's mother, and then a further delay of ten days before the CPT interviewed the child. [4]

In light of the failure of the State to establish the reliability of the hearsay statements, their admissibility fails to meed minimum requirements of the confrontation clause of both the Florida and Federal Constitutions. Fricke, supra, at 602; Jesus v. State, 565 So.2d 1361 (Fla. 4th D.C.A. 1990); Perez v. State, 536 So.2d 206 (Fla. 1988); Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 3139, 111 L.Ed 2d 638 (1990).

The testimony of Nurse Loppes was equally impermissible as was the playing of the videotape. While the State argued that defense questioning opened the door as to the admissibility of the videotape, it is quite clear from the record that the State established its existence when Dr. Tokarski testified she obtained a preliminary history from the child after the CPT did a videotape interview. (R: 78).

The State later asked Nurse Loppes if the interview with the child victim was videotaped. (R: 89). All of this was done in violation of the Court's order prohibiting

[4]Although the Police were contacted within those ten days, the State never sought to introduce that statement of D[redacted]'s.

admission of the videotape and before defense counsel ostensibly "opened the door" to its admission.

It is obvious that the only reason Nurse Loppes was called to testify was to repeat the statements made by the child victim.

The State argues that if the CPT physician's testimony is not admissible under Section 90.803(23) then it is admissible under Florida Statutes 90.702, 90.704, 90.705 and 90.803.

Section 90.702 of the Florida Statute permits the testimony of experts in the form of an opinion; only if the opinion can be applied to the evidence at trial.

Dr. Tokarski of the CPT testified there was no objective findings to support the alleged sexual penetration. (R 80,83).

These facts are unlike those in Schwark v. State, 568 So.2d 1326 (Fla 3d D.C.A. 1990) where, in a sparsely worded opinion, the Court noted that the child victim had tears in her hymen that had healed and that other abnormalities found in the victim's genitalia were consistent with her having been molested.

The victim in this case had no symptoms of sexual abuse as observed by the Doctor's examination. Furthermore, Dr. Tokarski was never asked her opinion as to whether or not D[redacted] was sexually abused as she described.

The repetition of the child victim's testimony through Nurse Loppes to Dr. Tokarski is not admissible under Florida Statute 90.803(4), which permits admission of statements taken as part of a patient's medical history.

Mrs. W[redacted] brought D[redacted] to the Child Protection Team four days after speaking with a Police Officer. D[redacted] told Nurse Loppes that she was there to talk about what her dad had done to her. Kopko, supra, at D510 Note #2. (R: 90).

Nurse Loppes testified that after getting input from H.R.S. or law enforcement about possible abuse, the CPT interviews the child to find out what their version is and to have them seen by the Doctor, if needed. (R: 86).

The Doctor testified that she has been declared an expert in the area of child abuse cases approximately forty times (R: 73). She also stated that she told D[redacted] what the examination was about, and as for most sex abuse cases, she performed a complete physical examination, head and neck, chest, abdomen, genitalia... (R: 74). Over objection, Dr.

Tokarski was permitted to restate what she had been told by the child victim, as well as what Nurse Loppes had told her the child victims said on the videotaped interview:

> Q: Did you obtain the medical history of exactly the alleged sexual abuse that occurred to the parts of the body you examined?
>
> A: The information I received was from Mrs. Wilson (nee Loppes) after her interview with the child. (R: 79).

The record is devoid of any evidence showing that this interview was for any other purpose then to find evidence corroborative of the child victim's statement. There is no evidence to show this interview and examination were for the purpose of diagnosis and treatment. Bradley v. State, 546 So. 2d 445 (Fla. 1st D.C.A. 1989), Begley v. State, 483 So.2d 70 (Fla. 4th D.C.A. 1986).

The District Court properly held that on re-trial, the child victim's version of events can be submitted by the State to the jury only once. Kopko, supra, at 8-9. Admission on the grounds of expert opinion and medical diagnosis were flatly declined.

Finally, the State asserts that despite the errors in admitting the repetitions of the child victim's statements that the evidence is overwhelming, that the impermissible

testimony was merely cumulative and thus, the error was harmless beyond a reasonable doubt.

In deciding what is harmless error, the United States Supreme Court has held

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

Chapman v. Calif., 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967).

The Supreme Court of Florida adopted the Chapman standard which established that the harmless error test places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternately stated, that there is no reasonable possibility that the error contributed to the conviction. See, Chapman 386 U.S. at 24, 87 S.Ct. at 828.

Application of the test requires an examination of the entire record by the Appellate Court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition, an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. State v. DeGuilo, 491 So.2d 1129, 1135 (Fla. 1986).

The District Court of Appeal rejected a finding of harmless error and held that admission of the repetition of the child victim's out of court statements were reversible error.

The State, upon retrial, will not be permitted to introduce the child victim's version of what happened more than once. Not allowing Dr. Tokarski and Nurse Loppes to repeat her statements and thus enhance their testimony with their "cloak of credibility" may well lead to a different result. Furthermore, upon retrial, the videotape of the child victim's statement will also be inadmissible. Delete this impermissibly used evidence and the State's case is hardly overwhelming.

The sexual battery wasn't reported to the mother until eight months after it occurred. The mother, if she is to be believed, waited another week to talk to the police and even longer before the child was actually interviewed by anyone independent of the mother. Mrs. W[redacted] clearly had ample time to coach the child as to what to say, and she had sufficient motive to encourage the child to fabricate her testimony as she and her husband Dave were going through a bitter separation and custody fight.

In a case such as this where an allegation of sexual abuse is made by the child of one parent who is going through a negative experience with the accused, and there is no objective corroboration of the accuser, then it would be extremely difficult for these facts to establish an overwhelming case against Dave. As the record is clear, there is no other family member to corroborate these allegations nor is there any other incriminating evidence known to exist that was precluded from the Jury because of a legal deficiency. The repeated testimony or observations of other witnesses to the crimes alleged, rather, the trial Court permitted the child's version of the events to be repeated. This was in error.

CONCLUSION

Based on the foregoing argument and authorities cited herein, Respondent respectfully requests this Honorable Court affirm the decision of the Fifth District Court of Appeals, in setting aside the convictions of the Respondent in the trial court and remanding the matter for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been provided to Judy Taylor Rush, Assistant Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114 this 4th day of July 1991.

Christopher A. Grillo

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