IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,887

MARTIN DAVID KOPKO,

Respondent.

_____/

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

On October 26, 1987, Petitioner, the State of Florida [hereinafter "the state"], filed a two count Information charging Respondent, Martin David Kopko [hereinafter "Kopko"], with sexual battery upon a child less than twelve years old and lewd assault upon a child less than sixteen years old. (R 304). The child is Kopko's step-daughter, nine year old, D L . (R 26, 29, 104, 111, 304).

On October 26, 1988, the state filed its notice of intention to use similar fact evidence. (R 340). It also filed a motion for admission of child victim's hearsay statement [hereinafter "hearsay motion"]. (R 341-342). Kopko filed an objection to both motions. (R 355-383, 387-395).

The trial judge, the Honorable Gary L. Formet, Sr., ruled that the similar fact evidence was admissible. (R 436). Regarding the hearsay motion, on April 18, 1989, Judge Formet ruled that the videotaped statement given by the child victim to the Child Protection Team [hereinafter "CPT"] member, Nurse Jane Wilson Lobbes, was admissible pursuant to the provisions of Florida Statutes § 90.803(23). (R 465, 495). However, the court decided that "the prejudicial value of this tape at this point outweighs any probative value" and denied its admission into evidence. (R 495). Judge Formet cautioned both parties that his ruling on the hearsay motion would be reversed if, during the course of the trial, the videotaped statement became more probative than prejudicial in light of the testimony adduced. (R 495-496).

Immediately following this ruling, the state made an *ore tenus* motion that the court permit Nurse Lobbes to testify to the child's hearsay statements made during the interview depicted on the videotape, "leaving out the prejudicial comments about divorce proceedings, the jail and his punishment." (R 496). Kopko objected on the basis that his motion in limine, which had been granted, regarding excited utterances of the child prohibited Nurse Lobbes' proposed testimony. (R 496). Judge Formet disagreed and held that Nurse Lobbes could testify to the hearsay statements under Florida Statutes § 90.803(23). (R 496). The defense did **not** object to admission of Nurse Lobbes' testimony pursuant to Florida Statutes § 90.803(23). (R 496-497).

Kopko's jury trial began on April 18, 1989. (R 1). When the state asked Nurse Lobbes what the child victim had told her, Kopko objected on hearsay grounds. (R 87). After argument, Judge Formet again ruled Nurse Lobbes' testimony admissible under Florida Statutes § 90.803(23). (R 87-89).

During cross examination, Kopko asked Nurse Lobbes, ". . . the tape itself would no doubt be the best evidence of what was actually said; am I correct?" (R 93). Then, he opined, and sought to illicit from the witness, that the videotape itself would be more accurate than her testimony. (R 93). In response, the state renewed its motion for admission of the videotape on the ground that Kopko's questions on cross had raised the probative value of the videotape. (R 100). The trial judge agreed, and ruled the videotape admissible. (R 101, 139).

However, Judge Formet also ruled that certain statements on the videotape were inadmissible, and ordered counsel for both parties to view the videotape and agree on the areas which should be excised to prevent undue prejudice. (R 101). Defense counsel announced that they had done so. (R 137). When the state moved to admit the evidence at trial, Kopko was asked if he objected; his response was, "[W]e welcome it's (sic) admission at this time." (R 142). The videotape was admitted into evidence, and the edited version was played to the jury.[1] (R 143-144).

Doctor Penelopy Ann Tokarski, a pediatric specialist and member of CPT, was declared an expert in pediatrics and child sexual abuse after Kopko stipulated as follows: "I'll stipulate that the doctor is a qualified medical physician, able to give her opinion with regard to the specifics of this particular case and to the extent that there won't be any predicate necessary . . .." (R 71-74). Dr. Tokarski was asked to testify to the child victim's medical history. (R 74). Kopko objected on two grounds: cumulative hearsay and the evidence "wouldn't aid and assist the jury as to the ultimate issue that they have to decide." (R 75). Judge Formet ruled that, "[T]he statement is cumulative; however, prejudicial effect is outweighed by the probative value; goes to her testimony as an expert . . . for the basis for her examination." (R 77). Dr. Tokarski testified to

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[1] The portions of the tape which were edited out when played to the jury are specified at page 145 of the record on appeal.

statements made to her by Nurse Lobbes and directly by D regarding the specifics of the sexual battery. (R 74-79).

The jury deliberated for one and one-quarter hours and returned its verdict of guilty as charged on both counts. (R 279-280, 427-428). On May 2, 1989, Kopko filed a Motion for New Trial in which he alleged that the child victim's testimony was "inconsistent," and he did not raise the instant issue in his new trial motion. (R 431-432). On July 7, 1989, Kopko was sentenced to life imprisonment for child sexual battery and to a concurrent term of fifteen years on count two. (R 296, 440-442). He filed his Notice of Appeal on July 14, 1989. (R 445).

In his appellate brief, Kopko alleged that admission of the videotaped interview was error because the state's notice was inadequate and the trustworthiness of the interview was not established. Kopko also complained about the admission of Nurse Lobbes' testimony on notice and trustworthiness grounds, and argued that Dr. Tokarski's testimony was not proper medical history and was unreliable. He raised three additional points not at issue in this Honorable Court.

The Fifth District Court of Appeal held that:

> [W]here 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).

. . .

> [W]e cannot conclude the repetitious testimony did not influence the jury's verdict. Appellant is entitled to a new trial in which . . . the child victim's version of events can be submitted by the state to the jury once . . ..

16 F.L.W. at 510. The district court granted the state's request that it certify the issue as a matter of great public importance to this Honorable Court. The certified question, as framed by the Fifth District Court of Appeal, is:

> 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, 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. 1058 (Fla. 5th DCA 1991).

STATEMENT OF THE FACTS

Child victim, D L , was the nine year old stepdaughter of Appellant, David Martin Kopko [hereinafter "Kopko"]. (R 26, 29, 104, 111). When D first met Kopko, she "liked him." (R 30, 49). However, the relationship between them changed around Halloween of 1986 when Kopko ". . . took his clothes off and got in the shower with [D]." (R 30). There, in the words of the child victim, "[H]e made me stand up against the wall, and he was holding me by my waist. He stuck his private in my butt." (R 31). The child testified that this hurt her, and it continued to hurt for two to three weeks. (R 32, 62). She also testified that she "couldn't use the bathroom" after the assault. (R 32).

D 's mother, N F W , was at work when this attack occurred. (R 31). Kopko locked D 's thirteen year old brother into his bedroom before assaulting the child. (R 65). D 's two year old sister, K , was in her room. (R 27, 31).

A couple days after the shower assault, D told her mother about her difficulty using the bathroom, but the child did not tell her about the sexual assault. (R 31-33). D testified that she did not tell her mother about the assault because Kopko told her "he would hit me if I told anybody." (R 33, 68). The child was afraid of him "[b]ecause he -- whenever he hit us, it hurt very bad." (R 68).

The child described Kopko's acts which occurred in mid June, 1987 and were the basis of the lewd assault count as follows: "[H]e would lay me on the bed and he would -- he wouldn't have

anything on and I was trying to squeeze out from underneath him." (R 33, 35, 36). Kopko made the child lay on his bed with her face down. (R 33, 34). Although Kopko removed all of his clothing and tried to remove her clothes, D "held them so he couldn't." (R 33, 34). The child testified that Kopko then got on top of her, and "He tried to stick his private in my butt again, but I got out from underneath him." (R 34). D also testified that the conduct constituting the lewd assault had happened before, always at times when her mother was away from home at work or grocery shopping. (R 36-37).

Shortly after the mid June, 1987 assault, on June 21, 1987, D 's mother decided to leave Kopko. (R 106). The next day Ms. W told D , and the child told her mother about Kopko's sexual assaults on her. (R 35, 106, 107). Ms. W testified that D approached her as follows: "At first she wanted to be sure that we were leaving before she told me. Are we really leaving. I said yes. She said, are we really leaving? I said, yes. I said, why. She said, because I need to . . . tell you something. She was afraid to tell me until she was sure we were going to leave." (R 106-107). D testified that she told her mother only after making sure that they were leaving because "that way I knew he couldn't -- he wouldn't do nothing to me because . . . we were going to leave and he couldn't find us." (R 35-36).

A couple of days later, D , her mother and siblings left Kopko's house. (R 53, 107). At some unspecified time shortly after leaving, D 's mother reported the assaults to HRS. (R

108). Two days after they left Kopko, on June 27, 1987, the assaults were reported to the police. (R 56). On July 1, 1987, D was interviewed by Nurse Lobbes and examined by Dr. Tokarski, both members of the Child Protection Team [hereinafter "CPT"]. (R 74).

On cross examination, D said that Kopko disciplined her more severely than her mother did. (R 48). His discipline included hitting the children, telling them they were "grounded for the rest of . . . our life," telling them not to "ever come out of your room again," and not letting them go outside. (R 48). The child also said that at some unspecified time, she heard her mother and Kopko arguing, and Kopko said, "[I]f I ever leave you, I'm taking K with me because . . . she's my kid." (R 49).

On redirect, the child testified that no one had ever told her what to say about the sexual assaults. (R 67). She also related that one time Kopko "hit me so hard on my leg he left a real big bruise on my leg." (R 67).

D 's testimony was followed by that of Dr. Tokarski, an experienced pediatric specialist who also worked for the CPT. (R 71-73). The court declared Dr. Tokarski an expert in pediatrics and child sexual abuse. (R 73-74). The doctor testified that she examined D , and the examination included "a complete physical examination, head and neck, chest, abdomen, genitalia," and some tests, including cultures. (R 74).

Dr. Tokarski testified that she obtained a medical history of the child prior to her examination. (R 74). The information

given her came from Nurse Lobbes and directly from D . (R 78). Dr. Tokarski specifically asked the child "if she had any previous injuries to her perianal or vaginal area, . . . how often the alleged events had taken place." (R 78). Nurse Lobbes told the doctor that, "Kopko had laid on the child with clothes off and touched her on her outer vaginal area while the child had her clothes on. This happened on several occasions. She also described the first occasion was one in which there had been anal penetration." (R 79).

Dr. Tokarski testified that she found no abnormalities to D 's anus. (80). She then explained how that finding could be consistent with anal penetration. (R 80). She also stated that the child's difficulty going to the bathroom could be the result of a "psychological layover" from sexual abuse. (R 80-81).

On cross examination, Dr. Tokarski agreed with defense counsel that constipation or a dietary problem could cause such difficulty, however, D 's history indicated that sexual abuse was the cause. (R 81). On redirect, she told the jury that a child could pass a stool larger than a penis without having anal tearing. (R 84).

The next witness was Nurse Lobbes who was working with CPT at the time she interviewed D on July 1, 1987. (R 85-86, 95). Nurse Lobbes testified that the interview is done with open-ended questions so as not to lead the child toward a particular answer. (R 86). The interviewer does not know what has happened to the child before the interview. (R 86).

D 's mother was not present during the interview. (R 479, 484-485). Both D and Ms. W testified at a pretrial hearing that D 's mother did not tell the child what to say during the interview. (R 479, 485). At the hearing, the trial court found:

> [I]t's clear from the tape that the victim . . . recites the facts well, her memory seems clear; she was not unduly prompted by the interviewer. The circumstances are relaxed, she seems relaxed, very forthright with the interviewer . . and answers the questions fully and concisely. Further, the content of the tape coincides with the testimony that the victim gave as part of the hearing. Further, it coincides with the statement related by her mother after the, or at the first initial reporting of this matter.

(R 495).

At trial, Nurse Lobbes testified that D "described multiple instances of fondling and suggestive remarks." (R 90). She described the lewd assault scenario and then the shower assault. (R 91). As to the shower assault, the child told her that when Kopko entered the bathroom, stating he needed to use it, "he kept asking her to look at him but she wouldn't." (R 91). She then quoted the words the child used to describe the anal penetration she experienced as follows:

> She said that he got into her butt is the way she described it and she said it felt like it was about this much was in her butt and that it felt like -- I asked her what it felt like and she indicated that it felt like a million ants crawling up your butt and biting.

(R 91). Nurse Lobbes also testified that D told her that "she often asked her mom if she could go to the store because she felt she knew what might happen." (R 92). On cross examination, Nurse Lobbes testified that D told her the shower episode occurred "soon after they moved into the yellow house." (R 96).

The final state witness was the child victim's mother, N K W . (R 104). Ms. W testified that when she was married to Kopko, they lived in a "yellowish green" colored house. (R 104-106). Her marriage to Kopko "was deteriorating," and after "a big argument," he told her "to get out," and she decided to do so. (R 106). During the argument, Kopko told her that he intended to hit her son in the head to reprimand him for some behavior he felt was inappropriate. (R 119). He also told her that if they separated she could not take F . (R 119). Ms. W told D of her decision, and after repeatedly inquiring whether they were really leaving, the child told her mother about the sexual abuse. (R 106-107, 130).

D 's mother recalled a time when the child victim complained of having difficulty going to the bathroom. (R 109). "[D] was in the bathroom, and she called me . . . and she was sitting on the toilet crying. And she only said, I can't go to the bathroom, mom. I said, why, what's the matter. She said, I just can't go. She was crying. She reached out and held my hand." (R 109). This episode occurred just after the child's mother had gone to the store. (R 109).

Ms. W testified that Kopko would often send her to the store after dinner, "insisting that he was still hungry." (R

110). She said that the children stayed home with Kopko, although D asked to go with her. (R 110). Ms. W left Kopko on Thursday. (R 120).

Kopko sued for divorce, asking for primary custody of K . (R 125). Defense counsel asked Ms. W if she told Kopko that she "would do everything and anything [she] could to keep [Kopko] from gaining custody of [K]." Ms. W responded, "He molested my nine-year-old daughter. I couldn't, in my mind, let him have my two-year-old daughter." (R 125).

The defense presented two witnesses, Kopko's father, Roy John Woods, and Kopko. (R 136, 158). Mr. Woods said that he was talking to Kopko by telephone and D 's mother got on the phone and told him that she and Kopko had argued, and he told her that if she did not like the way he disciplined the children, "she could take her two kids and get out; he was taking K , coming back to Jersey with her." (R 159). This call occurred on Father's Day, 1987. (R 158). He added that the next Wednesday, he called again, and D 's mother said that "everything was okay." (R 159-160). On Thursday, Kopko called his father and told him his wife and the children were gone. (R 160). Mr. Woods said that he talked to Ms. W at her mother's home about two weeks later, and she told him she would consider "talking to a marriage counselor," and "she would never stop [Kopko] from seeing the baby." (R 161). On cross examination, Mr. Woods admitted that Ms. W did not let Kopko see K . (R 162).

Kopko testified that D , her brother and their mother did not like his methods of discipline. (R 166). He and his wife fought regularly about discipline, the kids and money. (R 167). He said that he told his wife that if she did not like it, she could leave, but she was not going to take K from him. (R 167). Kopko said he told his wife he would fight her for custody of K . (R 167).

Kopko denied his guilt of the sexual assaults. (R 167, 173-174). He also denied that he often told his wife to go buy food at night, and claimed that when she did go, he was home alone. (R 175). Kopko testified that when he got home from work on **Wednesday**, his wife and the children were gone. (R 175). He said that he called his dad later that night. (R 175).

Kopko went to his in-laws' home looking for his wife and daughter, but he did not make contact with them. (R 177). As he was leaving, a deputy sheriff served him with a restraining order. (R 177). He said that he called and talked to his wife by phone, and she told him she was "tired of the whole situation." (R 177).

Kopko said that he filed divorce pleadings asking for custody of K about a month or two before he was arrested. (R 178). He was arrested for Lewd Assault Upon a Child on August 26, 1987. (R 301-302). Ms. W testified that Kopko knew that he had been reported to the police for the instant charges prior to his arrest. (R 125). Defense counsel asked Kopko, "Why do you think you're facing this kind of offense?" (R 179). He responded, "When I told her I'd fight for custody, she told me she'd do anything to stop me from getting custody . . .." (R 179).

On cross examination, Kopko admitted that he has smacked D and her brother in the face, although he had never done so to K . (R 180-181). He also admitted leaving a bruise on D 's leg where he smacked her. (R 181). He admitted that his wife sometimes went to the store at night, and he stayed home with the children. (R 183). Regarding nine-year-old D , Kopko said that she did not have any boyfriends, he did not think she had seen any of the x-rated movies brought into the home, and she was having a hard time with her school work. (R 181, 182, 184).

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal erred in finding reversible error on the ground that the child victim's prior consistent out-of-court statements were not admissible under Florida Statutes § 90.803(23), any other statute or Florida case law. Petitioner asserts that the testimony of the Child Protection Team members was properly admitted at trial under Florida Statutes §§ 90.803(23). In addition, the doctor's testimony is admissible under Florida Statutes §§ 90.702, 90.704, 90.705 and 90.403 (1987) as the opinion of an expert witness and under Florida Statutes § 90.803(4) (1987) as medical history. The issue of admissibility of the nurse's testimony is not properly preserved for appellate review. However, the nurse's testimony is admissible even under the holding of the district court, and that court erred in concluding otherwise. The videotape is also admissible under Section 90.803(23) and because Kopko opened the door thereto and welcomed its admission. Finally, even if admission of the doctor's and nurse's testimony relating to the out-of-court hearsay statements of the child victim is error, that error is harmless beyond a reasonable doubt due to the overwhelming evidence of guilt, corroboration of the child victim's version of events, and cumulative nature of the subject evidence.

ARGUMENT

THE DISTRICT COURT ERRED IN REVERSING RESPONDENT'S CONVICTIONS AND ORDERING A NEW TRIAL ON THE GROUND THAT THE CHILD VICTIM'S PRIOR CONSISTENT OUT-OF-COURT STATEMENTS WERE NOT ADMISSIBLE UNDER FLORIDA STATUTES § 90.803(23), ANY OTHER STATUTE OR FLORIDA CASE LAW.

Petitioner, the State of Florida [hereinafter "the state"], asserts that the Fifth District Court of Appeal erred in reversing Respondent's convictions and ordering a new trial on the ground that the prior consistent out-of-court statements of the child sexual battery victim, D I , were not admissible under Florida Statutes § 90.803(23). The district court concluded that the out-of-court statements of the child victim describing the acts constituting the instant crimes of sexual battery and lewd assault are not admissible pursuant to Florida Statutes § 90.803(23) because the child "testified fully and completely at trial." *Kopko v. State*, 16 F.L.W. 508, 510 (Fla. 5th DCA February 14, 1991). Specifically, the district court found reversible error in the trial court's admission of statements made by Dana to Child Protection Team [hereinafter "CPT"] members, Nurse Jane Wilson Lobbes and Doctor Penelopy Ann Tokarski.[2]

The subject statute provides:

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[2] Although the district court did not find error in the trial judge's ruling that Kopko opened the door to admission of the videotape, *Kopko v. State, supra*, at 509, 510, the appellate court erred in holding that on retrial, the videotape of the interview between Nurse Lobbes and the child victim may not be introduced into evidence on the authority of Florida Statutes § 90.803(23).

> [T]he following are **not** inadmissible as evidence, even though the declarant is available as a witness:
>
> (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, . . .** not otherwise admissible, **is admissible . . . if:**
>
> 1. The court finds . . . the statement provides sufficient safeguards of **reliability**. . . .
>
> 2. **The child** either:
>
> a. **Testifies**; or
>
> b. Is unavailable as a witness . . ..

(emphasis added) §90.803(23), Fla. Stat. (1987). In the instant case, the child victim was nine years old when she made the subject statements regarding her sexual abuse by Respondent, Martin David Kopko [hereinafter "Kopko"]. The trial court declared the statements reliable, and the district court held that the lower court did not abuse its discretion in so concluding. *Kopko v. State, supra*, at 510. The child victim testified at trial and underwent strenuous cross examination. (R 38-66, 69).

The language of the subject statute is unambiguous, and states that if reliable, the child victim's out-of-court statement "is admissible" when the child testifies. §90.803(23), Fla. Stat. (1987). In the instant case, all of the statutory requirements were met. Therefore, the subject out-of-court statements of the child victim are admissible.

In holding that the out-of-court statements were not admissible, the district court applied the wrong standard. The court said that:

> The purpose of the child victim exception . . . is to salvage potentially valuable evidence of abuse from children who may . . be unable or unwilling to give their evidence at trial . . ..
>
> . . .
>
> [S]ection 90.803(23) is designed to help remedy this problem by providing an avenue for admissibility of the out-court-[sic] statements.
>
> . . .
>
> [N]owhere in the statute or in any of the legislative history . . . is there any discussion of the problem of prior consistent statements bolstering the victim's in-court testimony. If the child abuse hearsay exception were meant to abrogate prior caselaw forbidding the use of repetitious, prior statements to bolster in-court testimony, some expression of that intent should exist.

Kopko v. State, supra.

The law is clear that when language used by the Legislature is not ambiguous, a law or rule must be construed according to

the plain and ordinary meaning of the language used. *Turkette v. United States*, 452 U.S. 574, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). Where the statutory language is not ambiguous, that language is conclusive unless there is a "'clearly expressed legislative intent to the contrary.'" *Id.* The state asserts that there is no such legislative intent.

On the otherhand, the plain and unambiguous language of the statute itself clearly and expressly conveys the legislative intent to permit a child victim's out-of-court statements involving an unlawful sexual act to be **repeated** at trial. It expressly provides for admission of this testimony even though it is cumulative to the child victim's testimony, stating that the evidence is admissible "even though the declarant is available as a witness" and testifies at trial. § 90.803(23), Fla. Stat. (1987).

Further, the district court's conclusion that since it was not provided with an expression of legislative intent to "abrogate prior caselaw forbidding the use of repetitious, prior statements to bolster in-court testimony, . . . the long-standing proscription against introduction of prior consistent statements still has force" is erroneous. First, the unambiguous statutory language declaring the statements admissible is *the* authoritative expression of legislative intent. Second, the state submits that another rule of statutory construction should be applied, resulting in the conclusion that the prior caselaw was, in fact, abrogated.

In *Carlisle v. Game and Fresh Water Fish Commission*, 354 So.2d 362, 364 (Fla. 1977), this Court said that when a statute is amended, courts must assume that the amendment was intended to alter some provision of law, absent a clear expression of intent to the contrary. The state asserts that this rule may properly be analogized to the instant situation, as follows: Absent a clear expression of legislative intent to the contrary, courts must assume that a statute enacted subsequent to caselaw, which addresses the subject of that caselaw, was intended to alter or abrogate it. Therefore, Florida Statutes § 90.803(23) (1987) altered or abrogated "the long-standing proscription against introduction of prior consistent statements" where a child victim's out-of-court statements meeting the statutory requirements are concerned.

The state contends that based on the plain language of the subject statute, the certified question should be answered in the negative. The subject statements are admissible under section 90.803(23). Therefore, the district court erred in ordering a new trial.

Assuming *arguendo* that Dr. Tokarski's testimony is not admissible under section 90.803(23), it is admissible under Florida Statutes §§ 90.702, 90.704, 90.705 and 90.403 (1987). Section 90.702 provides:

> Testimony by experts. - If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert . . . may testify about it in the form of an opinion.

§ 90.702, Fla. Stat. (1987). However, the probative value of the expert evidence must outweigh its potential prejudicial effect. § 90.403, Fla. Stat. (1987). Sections 90.704 and 90.705 provide that the basis of the expert opinion may be testified to by the expert. §§ 90.704 and 90.705, Fla. Stat. (1987). *See* Wharton's Criminal Evidence, by Torcia (13th Ed. 1972), Vol. 2, section 312, at 111-112. A trial court has broad discretion to determine what matters an expert witness may testify to, and absent a "clear showing of error, its decision will not be disturbed on appeal." *Glendening v. State*, 536 So.2d 212, 220 (Fla. 1988), *cert. denied*, 492 U.S. 907, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989).

In *Glendening v. State, supra*, this Court addressed expert testimony in the context of a child sexual battery prosecution. In *Glendening*, a witness was "recognized, without objection by the defense, as an expert in conducting interviews with children regarding suspected sexual abuse." 536 So.2d at 220. That witness was permitted to testify that in her opinion, the child victim had been sexually abused.[3] *Id.*

This Court determined that the expert testimony was helpful to the jury due to the age of the child victim. *Id.* The expert's testimony "provided the jury more information from which to decide whether the child had actually been a victim of sexual abuse." *Id.* The jury could use the testimony to connect the medical findings to the cause of those findings. *Id.* This Court

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[3] Since this testimony went directly to the ultimate issue for decision by the jury, it was admissible under both Florida Statutes §§ 90.702 & 90.703. 536 So.2d at 220.

concluded that the probative value of the expert testimony was not outweighed by any unfair prejudice. *Id.*

In the instant case, Kopko stipulated that Dr. Tokarski was an expert in pediatrics and child sexual abuse, and she was admitted as such. (R 73-74). The doctor's testimony assisted the jury in understanding the significance of the absence of objective evidence of sexual abuse and connected the victim's difficulty in going to the bathroom to anal penetration. Dr. Tokarski's testimony was relevant and admissible because it showed the victim's symptoms were consistent with sexual molestation by Kopko as described by the child. *See Schwarck v. State*, 568 So.2d 1326, 1327 (Fla. 3d DCA 1990). Thus, Dr. Tokarski's expert opinion aided the jury in the proper consideration of the evidence admitted at trial.

Helpfulness of the testimony is an important factor to be considered in making the probative/prejudicial determination. *See Kruse v. State*, 483 So.2d 1383, 1386 (Fla. 4th DCA 1986). The trial judge found that the probative value of the expert opinion outweighed the prejudicial potential. (R 77). Kopko has not alleged, much less demonstrated, that the trial judge abused his discretion in making this determination. The state asserts that he did not.

Dr. Tokarski's expert testimony could be applied by the jury to the medical evidence, or lack thereof, to connect same with anal penetration. It provided the jury information useful in its decision whether D had actually been a victim of sexual abuse. The statements received from D regarding the specifics of her

sexual abuse by Kopko were relevant to show the basis of the doctor's expert opinion.

Dr. Tokarski's testimony is also admissible under Florida Statutes § 90.803(4) which permits admission of statements taken as part of a patient's medical history. The record shows that Dr. Tokarski performed "a complete physical examination, head and neck, chest, abdomen, genitalia," and some tests. (R 74). She also weighed the child and measured her height. (R 74).

In conducting her examination, Dr. Tokarski asked D questions about her medical history. She asked the child if she had ever suffered injury to her anus or vaginal area. (R 79). The doctor then used that history in her examination of specific parts of the child's body. She also relied on it to reach certain conclusions which she testified to at trial.[4]

In the instant case, Dr. Tokarski indicated that in her opinion, the child victim experienced difficulty going to the bathroom because she had suffered anal penetration. (R 80-81). She rejected Kopko's theory that the trouble was as easily explained by constipation or diet, stating that the child did not have a medical history consistent therewith. (R 81, 84). She also explained the medical reason why a child could suffer anal penetration by a man's penis and exhibit no objective injury

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[4] The state submits that if the doctor's only purpose in examining D was to look for objective evidence of sexual abuse, she would not have concerned herself with areas such as head and neck or height and weight. The child victim was "not sure if I told [Dr. Tokarski]" the specifics of the sexual abuse; rather, she remembered her visit to Dr. Tokarski as one in which she had "a checkup" and was checked out everywhere. (R 57, 58).

observable with the naked eye.[5] (R 80-81). The state asserts that Dr. Tokarski's testimony of the out-of-court hearsay statements of the child victim is admissible as medical history given for the purpose of medical **diagnosis or treatment.** *See Sampson v. State*, 541 So.2d 733, 735 (Fla. 1st DCA 1989).

The state contends that Nurse Lobbes' testimony regarding the child victim's out-of-court statements was not objected to on the basis on which the district court finds error. Kopko objected that the subject testimony was "a hearsay proposition" and there is no "exception to the hearsay rule that would require some caseworker to tell what was said at some future time out of the presence of anybody, certainly out of court, to admit it." (R 87). This objection is a far cry from an assertion that the evidence should not be admitted because section 90.803(23) does not permit admission of child victim hearsay statements where the child fully and accurately testifies at trial. Kopko did not even object to Nurse Lobbes' testimony on the ground that it was cumulative or prejudicial.[6] Accordingly, this issue is not properly preserved for appellate review, and therefore, admission of Nurse Lobbes' testimony was not reversible error.[7] *See Hines*

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[5] It was established that the doctor only examined the child's anus with her naked eye. (R 83).

[6] Although at trial, Kopko specifically objected to Dr. Tokarski's testimony and the videotape on the grounds of the cumulative and prejudicial nature of the evidence, he did not raise either ground in objecting to Nurse Lobbes' testimony.

[7] Kopko did not raise the specific legal issue the district court decided the instant case on in his appellate pleadings. He appealed the trial court's findings regarding the sufficiency of the notice of intent to introduce the out-of-court statements and the trustworthiness of them. (See Appellant's initial brief at

v. State, 425 So.2d 589, 590 (Fla. 3d DCA 1983), *pet. rev. denied*, 430 So.2d 452 (Fla. 1983)["When an objection is made on one ground at trial, no new or different ground may be considered on appeal."]. *See also Sanderson v. State*, 390 So.2d 744, 745 (Fla. 5th DCA 1980)[Only ground on which a defendant may attack the denial of trial court motions is the specific one argued below.]; *Carr v. State*, 561 So.2d 617, 619 (Fla. 5th DCA 1990)[Purpose of "contemporaneous objection is to signify to the trial court that there is an issue of law and to give notice as to its nature and the terms of the issue."].

Assuming *arguendo* that Kopko preserved the instant issue as to Nurse Lobbes' testimony for appellate review and that the district court's determination that a child victim's out-of-court statements are admissible only if the child does **not** testify fully at trial is correct, the state asserts that Nurse Lobbes' testimony is admissible. Nurse Lobbes' testimony as to the out-of-court hearsay statements of the child victim includes some crucial information which neither the child victim, nor any other witness, testified to at trial.[8] Nurse Lobbes testified that

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8-14 and reply brief at 1-6). Kopko did not contest the admission of the out-of-court statements on the ground that Florida Statutes § 90.803(23) does not authorize admission of such evidence where the child victim testifies fully at trial. The state asserts that the district court's opinion granting Kopko relief on a basis not advocated by him on appeal should be reversed.

[8] Although this evidence did come in when the videotape was introduced at trial, the videotape would not have been admitted at all if Kopko had not opened the door to its admissibility by questioning which greatly increased the probative value of that evidence. At the time Nurse Lobbes testified, the court and both parties believed that the videotape would not be admitted at trial. Further, the district court's holding is that if **the**

the nine year old child told her that the anal penetration "felt like a million ants crawling up your butt and biting." (R 91). The state asserts that this description of anal penetration is crucial because the reasonable inference from it is that the child victim did not make up the sexual abuse charges. Neither was the child programmed to make the allegations by an adult, her mother included. These crucial conclusions are compelled by this evidence, for only a child who actually experienced the event would describe anal intercourse in this manner.

In addition, there are several other important pieces of information provided by Nurse Lobbes' testimony which are not contained in the testimony of any other witness. Nurse Lobbes also told the jury that the child told her that her abuser "got into her butt." (R 91). It is apparent that Nurse Lobbes then repeated the child's demonstration to her, as follows: "[S]he said it felt like it was about **this much** was in her butt . . .." (emphasis added) (R 91). This evidence is important to the jury's determination of whether anal penetration occurred. More importantly, however, is the reasonable inference from the demonstration that the degree of penetration explains the lack of objective physical evidence in the form of readily observable injury to the child's anus.

Further, Nurse Lobbes testified to other out-of-court hearsay statements of the child victim which were not testified to by the child at trial, including:

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child does not testify fully and accurately **at trial**, the out-of-court hearsay statements can be admitted through other witnesses. Kopko v. State, *supra*, at 510.

(1) The child victim was sexually fondled and "suggestive remarks" were made to her; (R 87, 90);

(2) During the shower incident, Kopko kept asking the child to look at him naked, but D refused; (R 91);

(3) The child victim often asked her mother if she could go to the store with her because the child knew that she might be sexually assaulted while her mother was gone; (R 92); and,

(4) The sexual abuse began "soon after they moved into the yellow house." (R 96).

These statements are important to present the jury with a full and accurate picture of what happened to this child. The out-of-court statements made to Nurse Lobbes which the child testified to at trial are properly included in Nurse Lobbes' testimony to establish the proper context and time references of the above statements. Therefore, even under the decision of the district court, Nurse Lobbes' testimony is admissible.

Finally, since both the child victim's testimony and the videotape were properly admitted at trial,[9] the subject testimony of Nurse Lobbes and Dr. Tokarski is merely cumulative.[10] Therefore, any error in its admission is not

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[9] The videotape is admissible because Kopko opened the door thereto. (R 142). Kopko's objection to the videotape on the grounds that it is cumulative and prejudicial occurred during the pretrial proceeding regarding its reliability and was later abandoned when the defense welcomed its admission. (See R 142). The state asserts that the videotape is also admissible under section 90.803(23).

[10] Regarding section 90.803(23), the district court states, "The statute itself suggests at least one repetition is permissible . . .." *Kopko v. State*, *supra*, at 8-9. However, later in the opinion, the court concludes that upon retrial, "the child victim's version of events can be submitted by the state to the

reversible. *See Woodfin v. State*, 553 So.2d 1355 (Fla. 4th DCA 1989), *rev. denied*, 563 So.2d 635 (Fla. 1990); *Salter v. State*, 500 So.2d 184, 186 (Fla. 1st DCA 1986). *See also Torres-Arboledo v. State*, 524 So.2d 403, 408 (Fla. 1988), *cert. denied*, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988)[evidence cumulative to properly admitted evidence, harmless beyond a reasonable doubt]; *Rose v. State*, 16 F.L.W. 403, 404 (Fla. 4th DCA Feb. 6, 1991)[evidence cumulative to four other doctors not reversible error].[11]

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jury once . . . ." *Id.* at 14. The state asserts that section 90.803(23) does not limit admission of a child victim's hearsay statements to only one repetition. However, in the event that this Court finds that such is the case, the state asserts that if either Nurse Lobbes' or Dr. Tokarski's subject testimony is not deemed admissible under one of the statutory provisions set out hereinabove, it is admissible as the "one repetition."

[11] The district court cites to two cases in support of the position that cumulative or repetitive testimony can be harmful error, *Griffin v. State*, 526 So.2d 752 (Fla. 1st DCA 1988) and *Lazarowicz v. State*, 561 So.2d 392 (Fla. 3d DCA 1990). The state asserts that neither case is applicable to the instant situation. In *Griffin*, the issue was whether the child was competent to testify. However, the court also discussed the admissibility of out-of-court consistent hearsay statements of the child victim under section 90.803(23). 526 So.2d at 758-759. The court concluded that such evidence was inadmissible because the trial court did not "comply with the section 90.803(23) procedural safeguards." *Id.* Although the court mentioned that the hearsay statements had been repeated four times by other witnesses, it is not at all clear that the court would find this indicative that harmful error occurred where, as in the instant case, the procedural safeguards are followed. Regarding *Lazarowicz*, the state points out that the victim was seventeen years old, therefore, section 90.803(23) was not applicable. In the instant case, the express provisions of the statute itself make the out-of-court consistent hearsay statements admissible, even though cumulative. To the extent that *Lazarowicz* indicates that admission of cumulative evidence, absent a statutory provision authorizing it, is harmful error, the state asserts that the decision is contrary to the overwhelming view of Florida courts and is wrong.

Further, the evidence of Kopko's guilt from the two sources the district court finds properly admitted, the child victim and the videotape, is overwhelming. The victim's testimony is corroborated by another witness in three important respects: (1) The child reported the sexual abuse as soon as she made certain that she was going to be taken away from Kopko; (2) The child had bowel problems at a time coinciding with Kopko's anal penetration of her; and, (3) Kopko often sent the child's mother away at night during the time the sexual abuse occurred. (R 476, 488). Also, the child told Nurse Lobbes that the sexual attacks began when she was living in the yellow house, and the child's mother confirmed that the family lived in a yellowish house when she was married to Kopko. (R 104-106). Dr. Tokarski connected the child victim's bowel problems to sexual abuse - evidence within her expertise and not a repetition of the child victim's statements. (R 80-81). Finally, the child victim's description that the anal penetration felt "like a million ants crawling up your butt and biting" is extremely credible. (R 91). Thus, the evidence overwhelmingly establishes Kopko's guilt of the subject offenses.

The overwhelming view is that cumulative or repetitive evidence cannot be harmful error. *Kopko v. State, supra,* at 510. *See, e.g., Torres-Arboledo v. State, supra; A. M. v. State,* 574 So.2d 1185 (Fla. 3d DCA 1991); *Rose v. State, supra; Woodfin v. State, supra; Sampson v. State, supra; Salter v. State, supra; Westley v. State,* 416 So.2d 18 (Fla. 1st DCA 1982); *Fern v. Krantz,* 351 So.2d 1144 (Fla. 3d DCA 1977). Due to the overwhelming evidence of guilt and the fact that the subject evidence was merely cumulative, the error, if

any, in admission of the subject testimony of Nurse Lobbes and Dr. Tokarski was harmless beyond a reasonable doubt. *See State v. Diguilio*, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

Based on the arguments and authorities cited herein, the petitioner respectfully requests this Honorable Court reverse the holding of the Fifth District Court of Appeal and affirm the judgment and sentence of the trial court in all respects. Should this court find that any issues presented are not preserved for appellate review, the state requests a clear and express statement that the judgment rests on a state procedural bar. *See Harris v. Reed*, _____ U.S. _____, 109 S.Ct. 1038, _____ L.Ed.2d _____ (1989).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Initial Brief on the Merits including Petitioner's Appendix has been furnished by U. S. Mail to Christopher A. Grillo, Attorney for Respondent, at 888 S.E. 3rd Ave., #400, Fort Lauderdale, FL 33316, on this 28th day of May, 1991.

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