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 AMENDED REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #438847
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR PETITIONER

STATEMENT OF THE CASE

Petitioner, the State of Florida [hereinafter "the state"], files this amended reply brief so as to comply with the page limit imposed by Florida Rule of Appellate Procedure 9.210(a)(5).

The state objects to the following matter contained in Respondent's Statement of the Case for the following reasons:

(1) Respondent makes several statements which are arguments and/or conclusions of appellate counsel, are disputed by the state, and are not "facts" stating the "nature of the case, the course of the proceedings, and the disposition in the lower tribunal." *See* Fla. R. App. 9.210(b)(3). The state asserts that such arguments and/or conclusions are improper in a statement of the case.

(a) Respondent claims: "It is clear that the Judge properly ruled . . .. He further very clearly articulated that he would reconsider his motion, only if the child victim . . .." (Respondent's brief at 2).

(b) Respondent argues that: "Obviously, this ore tenus request failed to satisfy the specifics required by Florida Statutes § 90.803(23)(b) . . ." and "[I]n an obvious contradiction of its ruling . . .." (Respondent's brief at 2-3).

(c) Respondent alleges that: "This witness was examined completely and thoroughly by both counsel." (Respondent's brief at 3).

(d) Respondent claims that: "During cross-examination, counsel for the Respondent questioned this witness . . . so as to impeach her credibility." (Respondent's brief at 5).

(2) Respondent's following statement is misleading: "[T]he medical history was actually provided to [Dr. Tokarski] from Ms. Wilson (sic) . . .." (Respondent's brief at 4). The record shows that although the doctor received some medical history information from her nurse, Jane Wilson Lobbes, she also spoke directly to D[redacted] on this subject. (See R 78). Dr. Tokarski testified:

> Q: Did you obtain a medical history from D[redacted] L[redacted] of what had occurred?
>
> A: Yes, ma'am, I did.
>
> Q: And what was that?
>
> A: The history that I had received from D[redacted] was to corroborate and ask further what had already been given to me by Ms. Jane Wilson (sic) 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 . . .. I asked her about . . . and we talked about . . .. I also asked her . . ..

(emphasis added) (R 77-78).

(3) Respondent represents that: "Most importantly, the Doctor testified that her physical examination revealed no scarring, no fissures, nothing wrong . . .." (Respondent's brief at 4). The state clarifies this statement by pointing out that the record reflects that Dr. Tokarski testified that no scarring or fissures were visible to "the naked eye." (R 80). The doctor's examination was a naked-eye examination, and did not involve the use of "tools or instruments." (See R 83).

(4) Some of Respondent's statements are not supported with "[r]eferences to the appropriate pages of the record . . ." as **required** by the appellate rules. Fla. R. App. P. 9.210(b)(3).

STATEMENT OF THE FACTS

Petitioner asserts that Respondent materially misrepresented the record on appeal as follows: "D[redacted] testified that his "private" in her butt felt like a "thousand; (sic) million ants crawling up your butt and biting". (R: 63, 91)." (Respondent's brief at 10). D[redacted] did not make the quoted statement attributed to her by Respondent. Rather, Respondent asked her, "And was it like a thousand ants or million ants?" and the child responded, "Felt like it." (R 63). The testimony given at page 91 is that of Nurse Lobbes not D[redacted]. (See R 91).

This misrepresentation is material because even under the district court's ruling in the instant case, Nurse Lobbes' testimony is admissible because it "includes some crucial information which neither the child victim, nor any other witness, testified to at trial." (See Petitioner's Initial Brief on the Merits, at 25-27). This includes the nurse's testimony regarding the child's description of how the anal penetration felt, 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).

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal 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. The subject child sexual battery victim hearsay statements are admissible under the "doctrine of necessity" Respondent advocates in his answer brief. However, most importantly, the testimony is admissible because it is directly and explicitly authorized by Section 90.803(23). The rules of statutory construction compel the conclusion that the statute means what it says.

Further, the Third District Court of Appeal recently issued a well reasoned opinion in which it expressly disagrees with the reasoning and result of the *Kopko* district court. The subject statements qualify for admission into evidence under the decision of the Third District Court of Appeal.

Finally, the notice and reliability issues raised by Respondent in his answer brief are not properly before this Honorable Court as he failed to file a notice of cross-appeal. However, even if he had done so, the issues are not preserved for appellate review by this Court. Further, even if the merits of the issues are reached, Respondent cannot prevail thereon.

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.

In his answer brief, Respondent, Martin David Kopko [hereinafter "Kopko"], argues that: "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." (emphasis added) (Respondent's brief at 16). Petitioner, the State of Florida [hereinafter "the state"], responds that if this is an accurate statement of the law, then the subject child victim's hearsay statements should have been admitted. This is true under Kopko's logic because without the hearsay statements the child is the only witness giving evidence of the acts constituting the sexual battery and there is no objective evidence of the offense.[1] Therefore, the hearsay evidence is admissible under Kopko's doctrine of necessity.

More importantly, however, the subject testimony is admissible because it is directly and explicitly authorized by Florida Statutes § 90.803(23) (1989). In an attempt to avoid the application of the statute, Kopko proposes two purposes of it as

---

[1] In arguing against application of the harmless error doctrine, Kopko asserts: "[T]here is no other family member to corroborate these allegations nor is there any other incriminating evidence known to exist . . .." (Respondent's brief at 28). He also claims: "[T]here is no objective corroboration of the accuser . . .." *Id.*

follows: (1) "[T]o protect victimized children "from emotional harm and trauma occasioned by judicial proceedings[;]'" (Respondent's brief at 15); and (2) "[T]o salvage potentially valuable evidence of abuse from children who may be unwilling or unable to give their evidence at trial." (Respondent's brief at 19). The state contends that there is at least one other purpose, i.e., to authorize corroboration of the child victim's in-court testimony with her out-of-court prior consistent statements. *See* C. W. Ehrhardt, *Florida Evidence* § 803.23(a), at 193 (Supp. 1989)["As a part of a legislative package dealing with the involvement of children in judicial proceedings, the 1985 session of the Florida legislature attempted to balance the need for reliable out-of-court statements of child abuse victims against the rights of the accused . . .."].

The *Kopko* court's rejection of corroboration as an intended purpose of the statute is reflected in its condemnation of the use of "prior statements to bolster in-court testimony . . .." *Kopko v. State,* 577 So.2d 956, 962 (Fla. 5th DCA 1991). The district court claims that such use of evidence has long been proscribed. *Id.* However, the state points out that the use of generally inadmissible evidence for the purpose of corroborating the in-court testimony of a child sexual battery victim is well established and recognized by both case and statutory law. In *Heuring v. State*, 513 So.2d 122, 124-125 (Fla. 1987), this Honorable Court held that similar fact evidence is admissible "**to corroborate**" the sexual battery victim's testimony where the child victim is the only eyewitness, "corroborative evidence is

scant," and "[c]redibility becomes the focal issue." (emphasis added). The Fifth District Court of Appeal's disagreement with the wisdom of the legislative purpose does not constitute legally valid grounds on which to refuse to apply the subject statute.

Application of the rules of statutory construction to Section 90.803(23) compels the conclusion that the *Kopko* court's instant decision cannot stand. If the legislature intended for the statute to authorize only those prior statements which were inconsistent with the child victim's in-court testimony or which were omitted by the child victim during her in-court testimony, it could have limited the statute to do so. Rather, in plain and unequivocal language, the legislature provided: "[A]n out-of-court statement made by a child victim . . . describing . . . sexual abuse, or any other offense involving an unlawful sexual act, . . . not otherwise admissible, is admissible . . . if: . . . 2. The child . . . [t]estifies . . .." § 90.803(23), Fla. Stat. (1987). The plain language of the statute cannot be ignored. *See, e.g., Turkette v. United States*, 452 U.S. 574, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981).

In *State v. Lane*, 16 F.L.W. 1631 (Fla. 4th DCA June 19, 1991), the defendant was charged with purchase of cocaine within one thousand feet of a school. The statute under which he was convicted required a minimum mandatory sentence of three years. 16 F.L.W. at 1631. However, the trial court chose to impose probation on the authority of a statute which had been enacted prior to the statute under which Lane was charged. *Id.*

Relying on its earlier decision in *State v. Ross*, 447 So.2d 1380 (Fla. 4th DCA 1984), *rev. denied*, 456 So.2d 1182 (Fla. 1984), the district court held that: "[U]nder the rules of statutory construction[,] the legislature is presumed to know the earlier law when it passes the later." *Id.* at 1632. The court held that: "[I]t was not the legislature's intent to have section 397.12 be an exception to the mandatory minimum sentencing requirement of section 893.13(1)(e) . . . or it would have so stated." *Id.* Accordingly, the district court reversed the probation order for imposition of a three year minimum mandatory sentence. *Id.* at 1631-1632.

In contrast, in the instant case, the Fifth District finds that the **earlier** law is controlling over the **later** statute. The court states: "[I]t appears the long-standing proscription against introduction of prior consistent statements still has force. *Wise v. State*, 546 So.2d 1068 (Fla. 2d DCA 1989), *rev. denied*, 554 So.2d 1169 (Fla. 1989)."[2] *Kopko v. State, supra,* at 962. The court adds that: "If the child abuse hearsay exception were meant to abrogate prior caselaw forbidding the use of

---

[2] Section 90.803(23) was **not** addressed in *Wise*. Further, the statement on which the *Kopko* court relies is merely that "[a]s a general rule, a witness's trial testimony cannot be corroborated by his own prior consistent statements." 546 So.2d at 1069. The court acknowledged that "this rule is not without exceptions," but found "none of those exceptions apply . . .." *Id.* The state asserts that in the instant case, an exception to the general rule stated by the *Wise* court is Section 90.803(23) which provides for admission of a child victim's prior consistent hearsay statements. Therefore, neither *Wise* nor *Jackson v. State*, 498 So.2d 906, 909 (Fla. 1986), to which the *Wise* court cites for support, apply to preclude admission of the subject hearsay statements in the instant case.

repetitious, prior statements to bolster in-court testimony, some expression of that intent should exist." *Id.*

Applying the rules of statutory construction enunciated in *State v. Lane, supra*, this reasoning is wrong. Since the legislature is presumed to know the law, if it was the legislature's intent that the general rule prohibiting admission of prior consistent statements for corroboration was to prevail over the later enacted statute, Section 90.803(23), it would have so stated. Since it did not, the later rule, authorizing admission of a child victim's prior consistent hearsay statements, controls.[3] The Fifth District Court of Appeal reversibly erred in concluding to the contrary.

Subsequent to the state's initial brief, the Third District Court of Appeal directly confronted the subject issue and the *Kopko* decision. *See State v. Pardo*, 16 F.L.W. 1791 (Fla. 3d DCA July 9, 1991). In *State v. Pardo, supra*, the court said: "We are unable to subscribe to the reasoning of the Kopko court. The limitation which has been read into subsection 90.803(23) runs counter to the plain language of the statute." 16 F.L.W. at 1792. The court further stated: "[S]ubsection 90.803(23) explicitly provides that the child's hearsay statements qualify for the exception if the child testifies." *Id.* In the instant case, the state asserts that once the trial court ruled that the subject hearsay statements qualified for admission under Section

---

[3] The state asserts that it has long been recognized that the more specific controls over the general, and that is especially true when the more specific rule originates later in time than the general.

90.803(23), the rule excluding hearsay could not be invoked to preclude admission of the statements. *Cf. Id.*

In *State v. Pardo, supra*, the court also said that: "Although the child's statements cannot be excluded as hearsay, the statements, like any other evidence, are subject to analysis under section 90.403 . . .." *Id.* Therefore, upon request, the trial judge must determine whether the probative value of the hearsay statements outweighs the danger of unfair prejudice to the defendant. *Cf. Id.*

In the instant case, the record shows that in ruling on the objection to Dr. Tokarski's subject testimony, the trial court specifically decided that the "prejudicial effect is outweighed by the probative value. . .." (R 77). Likewise, the trial judge determined that the potential prejudicial effect of the videotape did not outweigh the probative value of same. (R 100-101). Regarding Nurse Lobbes' testimony, the record shows that Kopko did not raise the issue, (See R 87-89, 496-497), and therefore, it is not reviewable by this Court. *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982). However, if he had done so, Kopko would not have prevailed as it is readily apparent that the nurse's testimony was more probative than prejudicial because it provided material information which was not testified to by any other witness. *See* Petitioner's Initial Brief on the Merits, at 25-27.

In his answer brief, Kopko raises and argues two issues which are not properly before this Honorable Court, to-wit: (1) The adequacy of the notice of intent to use hearsay statements under

Section 90.803(23); and, (2) the reliability of the subject statements. (*See* Respondent's brief at 20-22). The Fifth District rejected Kopko's challenges to admission of the subject statements on these bases. *Kopko v. State, supra*, at 959-960. Kopko did not properly challenge the district court's holding on these issues, and therefore, they are not preserved for appellate review by this Court.

Florida Rules of Appellate Procedure 9.110(b) & (g) provide:

> (g) Cross Appeal. An appellee may cross appeal by serving a notice within 10 days of service of the appellant's notice or within the time prescribed in section (b) of this rule, whichever is later. . . ..
>
> (b) Commencement. Jurisdiction of the court under this rule shall be invoked by filing . . . a notice . . . within 30 days of rendition of the order to be reviewed.

Kopko did not file a notice of appeal from the district court's decision. The time in which he may do so has passed, and it expired prior to the filing of his answer brief herein. Accordingly, these issues should not be considered by this Honorable Court. *See* Fla. R. App. P. 9.110(b) & (g). *See also McNair v. State*, 579 So.2d 264, 266 (Fla. 2d DCA 1991)[state's cross-appeal, filed on the basis of an untimely notice of appeal not accompanied by motion for leave of court to file untimely cross-appeal, dismissed]; *Sampson v. Sampson*, 566 So.2d 831, 832 (Fla. 5th DCA 1990)[untimely cross-appeal, unaccompanied by motion for leave of court to permit the untimely cross-appeal, dismissed].

Further, assuming *arguendo* that the answer brief is deemed adequate to meet the requirements for a cross-appeal, these issues are still not properly before this Honorable Court. Kopko did **not** raise or argue the notice or reliability issues relating to Dr. Tokarski's testimony in either the district or trial courts. Therefore, his attempt to do so in this Court must fail. *Steinhorst v. State, supra*. *See also Hines v. State*, 425 So.2d 589, 590 (Fla. 3d DCA 1983), *pet. for 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."]; *Sanderson v. State*, 390 So.2d 744, 745 (Fla. 5th DCA 1980)[The only ground on which a defendant may attack the denial of trial court motions is the specific one argued below.].

Similarly, admission of Nurse Lobbes' testimony cannot be challenged in this Court on notice and/or reliability grounds. Regarding Nurse Lobbes' testimony, the trial judge raised the issue of notice, as follows:

> The Court: If you're seeking to have this admitted under 90.803.23, it requires the same notice. . . . [T]he notice . . . was directed to the interview by the Child Protection Team. . . .
>
> **Defense Counsel:** This is the woman on the videotape who did the interview.
>
> The Court: Is that what you're talking about now?
>
> Prosecutor: Yes. The interview was videotaped. We have not referred to a videotape, specifically since you ruled it not to be admissible.

. . .

The Court: You wish any further hearing?

Defense Counsel: No, sir.

(emphasis added) (R 88-89). Defense counsel did **not** make any notice or reliability arguments regarding this witness's testimony even though the trial court had just mentioned the notice issue. Therefore, this issue is not preserved for appellate review. *Steinhorst v. State, supra.*

Finally, the videotape was admitted because Kopko opened the door to its admission at trial, a ruling with which the district court agreed. *Kopko v. State, supra* at 959, 963. Accordingly, the notice and reliability arguments are not relevant to the issue of the admissibility of the videotaped interview.

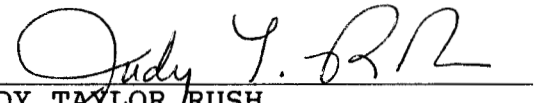
However, assuming *arguendo* that the issue of the notice and/or reliability of the videotape and/or Nurse Lobbes' testimony is properly before this Honorable Court, the state reasserts and incorporates herein the arguments on these issues which it made in its answer brief filed in the Fifth District Court of Appeal. *See* Appendix 1 - 14.

CONCLUSION

Based on the arguments and authorities cited herein, Petitioner respectfully requests that this Honorable Court reverse the Fifth District Court of Appeal and affirm the judgment and sentence of the trial court. If this Court finds 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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

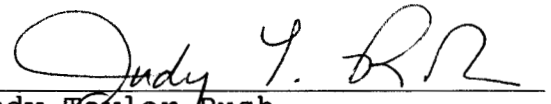


JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #438847
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Amended Reply Brief on the Merits has been furnished by U.S. Mail to Christopher A. Grillo, Attorney for Respondent, at 888 S.E. 3rd Ave., Suite 400, Ft. Lauderdale, FL 33316, on this the 1st day of August, 1991.



Judy Taylor Rush
Assistant Attorney General

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

A P P E N D I X

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JUDY TAYLOR RUSH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #438847
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR PETITIONER

INDEX TO APPENDIX

PAGE(S):

*Table of Contents, Table of Authorities, Summary of Arguments, Argument on Points III, IV and V, Conclusion and Certificate of Service omitted.