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IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,318

DCA CASE NO. 90-1526

JAMES ANTONIO PARDO, ETC.,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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THE STATE OF FLORIDA,

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PETITIONER'S BRIEF ON THE MERITS

INTRODUCTION

The petitioner, JAMES ANTONIO PARDO, was the defendant in the trial court and the respondent in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the prosecution in the trial court and the petitioner in the District Court of Appeal. In this brief, the appellant will be referred to as petitioner and the appellee as the state.

The symbol "R" will designate the index on appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On March 18, 1991, the state filed an amended information against the Petitioner which charged him with seven (7) counts of Capital Sexual Battery. (R. 10-16). The state had filed at an earlier time a Notice of Intent to Rely on Hearsay Statements of a Child Victim pursuant to section 90.803(23), Florida Statutes (1989). (R. 17-23). On February 26, 1991, the trial judge, the Honorable Richard V. Margolius conducted a hearing on the state's motion. (R. 160-278).

At this hearing, the trial judge viewed a videotape interview of the child victim and reviewed her pretrial deposition. (R. 208-218, 272). The trial judge also heard testimony from mental health counselor Dawn Bralow, state attorney children's center interviewer Merci Restani, and child psychologist Raquel Bild-Libbin. (R. 166-218).[1] The trial judge found that the statements made to these three witnesses by the child victim contained sufficient indicia of reliability so as to comply with the requirements of Section 90.803(230)(A)(1). (R. 234-41). The trial judge also found that the child in question had the ability to testify fully concerning all the elements of the alleged crimes and that the state intended to call her as a witness at trial. (R. 277).

The trial judge ruled, however, that the hearsay testimony of the three witnesses had to be excluded under the authority of *Kopko*

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[1] Bild-Libbin was misidentified in the district court opinion as the "Rape Treatment Center Physician". (R. 290). In fact, she was a child psychologist who became involved in this case after the child victim was referred to her by the state attorney's office. (R. 191).

v. *State*, 577 So.2d 956 (Fla. 5th DCA 1991).[2] (R. 251). Since the child victim was able to testify fully, the trial judge followed *Kopko*'s holding that the hearsay statements at issue amounted to inadmissible prior consistent statements. (R. 278).

The trial judge allowed the state to seek review of his ruling via a petition for writ of certiorari in the Third District Court of Appeal. (R. 258-60). The Third District reversed the trial judge's ruling and held that, once the criteria of section 90.803(23) had been satisfied, the child's statements to the three witnesses could not be excluded on hearsay grounds. (R. 293). The Third District proposed a test under section 90.403, Florida Statutes (1989), by which the trial judge could still decide to exclude the admissible hearsay statements if their probative value was substantially outweighed by the danger of unfair prejudice to the petitioner by their admission. (R. 294-95).

The Third District certified that its opinion was in express and direct conflict with *Kopko v. State*. (R. 295). In addition, the Third District then certified the case as involving a question of great public importance. The certified question, as framed by the Third District Court or appeal, is:

> WHERE A CHILD VICTIM'S HEARSAY STATEMENTS SATISFY SUBSECTION 90.803(23), FLORIDA STATUTES (1989), AND THE CHILD IS ABLE TO TESTIFY FULLY AT TRIAL, MUST THE HEARSAY STATEMENTS BE EXCLUDED SOLELY BECAUSE THEY ARE PRIOR CONSISTENT STATEMENTS BY THE CHILD, OR

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[2] The *Kopko* case is currently pending in this Court under case number 77,887.

IS THE TEST FOR EXCLUSION THAT FOUND IN SECTION 90.403, FLORIDA STATUTES (1989)?

QUESTION PRESENTED

THE DISTRICT COURT ERRED IN REVERSING THE TRIAL JUDGE'S PRETRIAL ORDER EXCLUDING THE CHILD VICTIM'S PRIOR CONSISTENT OUT-OF-COURT STATEMENTS.

SUMMARY OF ARGUMENT

The trial judge was correct in following *Kopko v. State* and excluding the testimony at issue. Under a long line of Florida cases, prior consistent statements are inadmissible when used to bolster the in-court testimony of the witness who made the statements. While section 90.803(23) does indicate that such statements qualify as exceptions to the hearsay rule, the analysis does not end there, as the Florida cases do not rely on hearsay grounds alone to prohibit the statements. The Third District based its opinion only on a finding that such statements were not hearsay and proposed a further relevance test that, in effect, eviscerates the doctrine established by the prior cases. The Third District decision thus relies on misguided logic and an incomplete analysis and must be reversed.

ARGUMENT

THE DISTRICT COURT ERRED IN REVERSING THE TRIAL JUDGE'S PRETRIAL ORDER EXCLUDING THE CHILD VICTIM'S PRIOR CONSISTENT OUT-OF-COURT STATEMENTS.

The principle of law reaffirmed by the Fifth District Court of Appeal in case of *Kopko v. State*, 577 So.2d 956 (Fla. 5th DCA 1991) and followed by the trial judge in this case is sound. The use of prior consistent statements to bolster a witness' in-court testimony has long been condemned by Florida courts. There is no legal basis to conclude that section 90.803(23), Florida Statutes (1989) abrogated this caselaw. The trial judge was, therefore, legally correct in following *Kopko* and denying the state's Notice of Intent to Rely on Hearsay Statements, and the District Court of Appeal was incorrect in reversing the trial judge.

Section 803(23) states in relevant part:

> [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, 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).

In the instant case, the trial judge found, after a hearing, that the statutory requirements of section 90.803(23) had been satisfied but that the statements were, nevertheless, excludable under *Kopko v. State*, 577 So.2d 956 (Fla. 5th DCA 1991), as cumulative or bolstering prior consistent hearsay statements. (R. 294-95). The trial judge's finding, as well as that of *Kopko v. State*, was eminently correct.

The well-established rule in Florida is that a witness' trial testimony may not be corroborated by that witness' own prior consistent statements. *Von Gallon v. State*, 50 So.2d 882 (Fla. 1951); *Holliday v. State*, 389 So.2d 679 (Fla. 3d DCA 1980); *Allison v. State*, 162 So.2d 922 (Fla. 1st DCA 1964). The purpose behind this rule was stated by the court in *Allison* as follows:

> 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 witness' 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 out on 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 witness.

162 So.2d at 924.

Section 90.801(2)(6), Florida Statutes (1989) sets forth the following exception to the general rule establishing the inadmissibility of prior consistent statements:

> A statement is not hearsay if the declarant testified at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
>
> * * *
>
> Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication . . . .

Section 90.801(2)(b) only permits the admission of prior consistent statements made <u>before</u> the existence of the facts giving rise to the improper influence or motive for falsification. *See Preston v. State*, 470 So.2d 836 (Fla. 2d DCA 1985); *McElveen v. State*, 415 So.2d 746 (Fla. 1st DCA 1982). Prior consistent statements made <u>after</u> the existence of facts giving rise to the motive for falsification are inadmissible as hearsay and as tending impermissibly and prejudicially to bolster trial testimony. *Reyes*

v. State, 580 So.2d 309 (Fla. 3d DCA 1991); *Lazarowicz v. State*, 561 So.2d 392 (Fla. 3d DCA 1990).

In *Kopko v. State, supra.*, the Fifth District Court of Appeal reaffirmed this principle of law, despite the state's claim that section 90.803(23), in effect, overruled it in cases involving alleged child sexual abuse victims. The *Kopko* court addressed the issue of whether section 90.803(23) amounted to a change in the existing law concerning the admissibility of prior consistent statements and found nothing in the statute or in the legislative history to indicate a legislative intent to abrogate the prior caselaw. *Kopko v. State*, 577 So.2d at 962. The *Kopko* court concluded that "[i]n the absence of such an expression of intent, it appears the long standing proscription against introduction of prior consistent statements still has force." Id. *Kopko* reconciled the facial inconsistency of section 801.(2)(b) and section 803(23) by finding that the purpose of section 803(23) is to provide an avenue to have a child sex abuse victim's statements introduced at trial when the child is unable at trial to fully and accurately recount the crime perpetrated. Id.

The principal factor in admission of hearsay statements made by a child victim is necessity. The intention of the child victim exception to the hearsay rule is to "salvage potentially valuable evidence of abuse from children who may . . . be unable or unwilling to give their evidence at trial in the same way as an adult would be expected to." *Kopko v. State*, 577 So.2d at 962. In the same manner, 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 legislature's intent in adopting section 90.803(23). *See also Russell v. State*, 572 So.2d 940 (Fla. 5th DCA 1991). In a case where the child witness is available and testifies fully and completely, there is no need to invoke the protection provided by section 90.803(23). Additional consistent statements that are allowed into evidence in this situation amount to repetitive testimony of the variety consistently prohibited in Florida.

In *Wise v. State*, 547 So.2d 1068 (Fla. 2d DCA 1989), *rev. denied*, 554 So.2d 1169 (Fla. 1989), for instance, the state's only eyewitness to the events in question was the six year old victim. The state wanted to introduce statements made by the child to the child's mother. The court held that "[a]s a general rule, a witness's trial testimony cannot be corroborated by his own prior consistent statements." *Wise v. State, supra* at 1069; *see Jackson v. State*, 498 So.2d 906, 909 (Fla. 1986). The court went on to hold that allowing in the mother's testimony concerning the prior consistent statements was inappropriate because it only served the impermissible purpose of placing a "cloak of credibility" on the child's testimony. *Wise v. State, supra*, at 1070.

In its opinion in this case, the Third District Court of Appeal noted that subjection 90.803(23) had been placed within section 90.803 -- a group of hearsay exceptions which apply regardless of whether the declarant is available to testify at trial -- as opposed to section 90.804, which only applies where the

declarant is unavailable as a witness. (R. 292-93). The District Court also found that subsection 90.803(23) "explicitly provides that the child's hearsay statements qualify for the exception if the child testifies." (R. 293). The District Court concluded that, once the trial judge had found that the requirements of subsection 90.803(23) had been satisfied, then the statements could not be excluded on hearsay grounds. (R. 293). The District Court rejected the reasoning of *Kopko v. State* and found that the *Kopko* Court requirement "runs counter to the plain language the statute." (R. 294). The District Court proposed an alternative approach where prior consistent statements of a testifying child victim, while not excludable as hearsay, could be excluded under section 90.403, Fla. Stat. (1989), if the trial judge were to find that the probative value of the statements "is substantially outweighed by the danger of unfair prejudice." (R. 294-95).

The Third District opinion in this case ignores some of the crucial points made in *Kopko v. State, supra*. To begin with, the Third District apparently based its opinion on the holding that the evidence in issue could not be excluded on the ground that it was hearsay. (R. 293). The *Kopko* court points out, however, that some of the Florida cases discussing the problem of prior consistent statements do not limit their logic to a hearsay analysis but also base their holdings on the "underability of bolstering credibility of trial testimony." *Kopko v. State*, 577 So.2d at 960 n. 9. The Third District itself, in a recent opinion, voted that "[t]here is no question that evidence of the prior consistent statements of a

witness is an impermissible -- and probably hearsay -- attempt to bolster the credibility of trial testimony." *Reyes v. State*, 580 So.2d 309, 310 (Fla. 3d DCA 1991) (citations omitted). The *Kopko* court did not explicitly base its opinion on hearsay grounds but, rather, relied upon the long line of Florida cases condemning the use of prior consistent statements to bolster a witness' testimony.

The Third District also felt that the placement of subsection 803(23) within section 803 -- as opposed to 804 -- supported the conclusion that the legislature clearly intended to allow into prior consistent hearsay statements of a child victim even if that child testified at trial. Yet, subsection 803(23)(a)2.b. contains a lengthy discussion of unavailability and a specific reference to section 90.804. It seems apparent that the purpose of section 90.803 was not only to create a new hearsay exception but to deal with the Sixth Amendment Confrontation Clause concerns addressed in cases such as *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597, 600 (1980). The inclusion of the requirement that the "child . . . testifies" in section 90.083(23)(a)2.a. was a response to Confrontation Clause concerns.[3] *See Perez v. State*, 536 So.2d 206, 209 (Fla. 1988). This language was not intended by the legislature to allow a wholesale introduction of prior

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[3] It should be noted that the corroborative evidence requirement established by the legislature in section 90.803(23)(a)2.b. is of dubious validity, given the recent United States Supreme Court opinion of *Idaho v. Wright*, 497 U.S. ___, ___, 110 S.Ct. 3139, 3149-50, 111 L.Ed.2d 638, 649 (1990), and that at least this subsection of section 90.803(23) is probably unconstitutional.

consistent statements and overrule the mass of cases prohibiting the use of prior consistent statements to bolster in court testimony. *See Kopko v. State*, 577 So.2d at 962.

By proposing the use of section 90.403 as a safegap measure to limit section 90.803(23), the Third District implicitly admitted that the concerns at issue in this case go beyond a simple hearsay analysis and that section 90.803(23) is fundamentally flawed. In this the Third District opinion and the *Kopko v. State* opinion agree -- section 803(23), if considered alone, intrudes upon a criminal defendant's right to a fair trial and contradicts the established doctrine that prohibits the bolstering of a witness' testimony through the introduction of prior consistent statements. The *Kopko* court took the same approach followed by the prior cases and simply banned the introduction of prior consistent statements by a testifying witness unless those statements can add something to the witness' trial testimony. *Kopko v. State*, 577 So.2d at 962. The test proposed by the Third District represents a deviation from precedent in that it leaves the question of admissibility to the trial judge and thus narrows the scope of appellate review. The *Kopko* court test certainly represents the better approach.

The *Kopko* court employed sound and time-tested rationale in reaching its decision:

> [a]s Florida courts have long expressed, overbroad use, as occurred in this case, of the statutorily authorized device for admission of a child victim's out-of-court statements creates unfair prejudice to a criminal defendant.

Kopko, 577 So.2d at 963. (citations omitted). In the instant case,

the three witnesses who the state sought to use as vehicles for the child's hearsay statements all had contacts with the state attorney's office -- one was even an employee. The state attempted to use section 803.(23) as an "evidence factory" to manufacture more bolstering evidence. Conceivably, the state attorney's office could attempt to parade in hearsay witnesses *ad infinitum*, if the Third District's opinion is allowed to stand by this Court.

The circumstances of this case are identical to those which caused the *Kopko* to express its concern that:

> [b]y having the child testify and then by routing the child's words through respected adult witnesses such as doctors, psychologists, CPT specialists, police and the like, with the attendant sophistication of vocabulary and description, there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content the testimony.

577 So.2d at 960. Caselaw and logic support the *Kopko* decision and underlie the trial court's decision in this case. The Third District was incorrect in reversing the trial judge's decision.

CONCLUSION

Based on the foregoing argument and citations of authority, the Third District's decision should be reversed and the Order of the trial judge should be affirmed and the cause remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida this 22nd day of August, 1991.

CLAYTON R. KAEISER
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