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JUN 24 1992
CLERK, SUPREME COURT
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7/20

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,135

GERALD BRUCE DOWLING,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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ON DISCRETIONARY REVIEW

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# BRIEF OF PETITIONER


BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Room 800
Miami, Florida 33125
(305) 545-3005

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

Counsel for Petitioner

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## INTR

The petitioner, Gerald Bruce Dowling, was the appellant in the Third District Court of Appeal, and the defendant in the trial court. The respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the trial court. This brief refers to the parties as the "defendant" and the "state." The symbol "T." denotes the transcript of the proceedings in the trial court. The symbol "R." denotes the remainder of the record on appeal.

## STATEMENT OF THE CASE

Mr. Dowling was arrested on July 29, 1988 (T. 2148), and subsequently charged by information with one count of sexual battery upon H.M., a person less than twelve years of age, by digital penetration of her vagina (count 1), and with four counts of sexual battery upon E.M., a person less than twelve years of age, by oral union with her vagina (counts 2 and 4), and by digital penetration of her vagina (counts 3, 4 and 5). (R. 1-6). He pled not guilty. (R. 15, 21, 22).

### Introduction of child hearsay

The state filed a notice of intent to introduce hearsay statements made by H.M. and E.M., pursuant to section 90.803(23), Florida Statutes. (R. 18, 55-64). The state's motion to introduce hearsay was heard on September 11 and 12, 1989. (T. 1-391). The following day, the court granted the motion, and dictated its order into the record. (T. 394-400). No written order was filed.

The court found that the hearsay Statements "set forth in the Notice insofar as the time, content, and circumstances of each

statement are concerned provides sufficient safeguards of reliability;" that E.M.'s chronological age at the time of making the statements was either eight or nine years old, and "her present mental and developmental age are consistent with her chronological age;" and that H.M. was five-years old when the statements were made, and her mental and developmental age was consistent with her chronological age, although only marginally. (T. 394-98). The court recited fourteen factors drawn from the state's notice which it had considered in evaluating E.M.'s reliability (T. 395-7), and thirteen factors it had considered in evaluating H.M.'s reliability (T. 398-400).[1] The court also found that both E.M. and H.M. were competent to testify, but that H.M. was unavailable to testify in that her participation in the trial would result in a substantial likelihood of severe emotional or mental harm. (T. 397, 400).

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[1]Twelve of the factors were the same for both children: the nature and duration of the abuse or offenses, the relationship of the declarant to the defendant, the competency of the declarant, the consistent quality of each of the statements, the declarant's lack of motive to fabricate the statements, the declarant's ability to recount accurate details, the independent nature of the statements, the lack of knowledge of "intimate" details independent of the incidents disclosed, the lack of coercion or reward as a motivating factor in making the statements, the declarant's ability to perceive the defendant and his acts, the corroboration of each declarant's statements by statements made by the other declarant, and the times at which the disclosures were made by declarant, as well as the reasons for delayed reporting, (T. 395-400).

With respect to E.M.'s statements, the court also considered that the statements were corroborated by the physical evidence, by certain Statements made by the defendant, and by certain testimony of adults. (T. 396-97).

With respect to H.M., the court noted: "From my personal observation of the declarant I find that although she is competent to testify as to her declarations, it is highly unlikely that she possesses the maturity to fabricate the statements attributed to her." (T. 400).

The defense requested, and obtained, a standing objection to all hearsay testimony (T. 465), and also objected on the ground that the court's findings were not sufficiently specific, and that some of the statements, namely those made to Dr. Bild-Libbin, had not been included in the state's notice to introduce hearsay. (T. 467-9).

Motion to admit polygraph test results

The defendant moved in limine to introduce evidence that he had passed a polygraph examination in which he denied the allegations. (R. 92-94; T. 448). The examination had been administered by George B. Slattery, Sr., a licensed polygrapher. (R. 92-93). The defendant had denied touching H.M.'s vagina, denied that his fingers had ever been in E.M.'s vagina, and denied that his mouth or tongue had ever been in contact with E.M.'s vagina. (T. 93). According to his motion, "it was Mr. Slattery's expert opinion that 'there were no significant or consistent psycho-physiological reactions indicative of deception in the area of his responses' to the allegations against him ..., and therefore, it was the opinion of Mr. Slattery that the defendant did truthfully answer the questions asked.'' (R. 93).

The defense requested that the court conduct a "Frye hearing" to determine the present-day opinion in the scientific community as to the reliability of the proposed scientific evidence. (T. 448-450). The defense was willing to have the defendant re-examined by a qualified polygrapher of the state's choosing. (T. 456).

The court denied the defendant's motion, and granted the state's motion to preclude any reference to the polygraph

examination. (R. 92, 95; T. 456, 458). The court refused to allow the defense to proffer to the court expert testimony as to the present-day state of polygraphy, because "Florida has never recognized that a polygraph is of such expertise, and I am not willing to listen to a polygraph operator testify and tell me it is of such expertise and change Florida law." (T. 456).

First trial

A jury trial was held on January 8, 9, 10, 11, 12, and 16, 1990. (R. 23-36). The jury acquitted the defendant of one of the charges involving E.M. (count 4), but could not reach a verdict on the remaining counts. (R. 35-36).

Second trial

A new information, charging the four remaining counts was filed, and the defendant again pled not guilty. (R. 8-13, 38). A second trial was held on March 12, 13, 14, and 15, 1990. (R. 40-49). Before trial, the defense renewed all its previous motions. (T. 1404).

The state presented the testimony of the same thirteen witnesses it had called at the first trial, including E.M. and H.M. H.M. testifiedthrough closed circuit television at the first trial. At the second trial, a videotape of her prior testimony was presented by stipulation, in lieu of live testimony. (T. 1415, 1956-82).

The defendant's motion for judgment of acquittal was denied. (T. 2200-20).

The jury returned a verdict of guilty on counts 1, 2, and 3, and found the defendant not guilty of count 4 (which had been count

5 in the original information). (R. 166-70). The court adjudicated the defendant accordingly. (R. 50, 171-72).

The defendant moved for a new trial arguing, primarily, that it was error to allow the testimony of hearsay witnesses inferentially validating the children's testimony, while precluding the defense from introducing the testimony of the polygraph expert. (R. 173-5; T. 2391). The motion was denied. (T. 2393).

On April 23, 1990, Mr. Dowling was sentenced to three terms of life imprisonment, each with a corresponding minimum mandatory term of twenty-five years. (R. 51, 176-79). The life sentence and mandatory term of count 3 (involving E.M. ) were to run consecutive to those of count 2 (also involving E.M. ), and the sentence on count 1 (involving H.M.) was to be concurrent with those of counts 2 and 3.

Appeal

The defendant appealed from the judgment and sentence. On November 26, 1991, the Third District Court of Appeal affirmed, in a per curiam decision without written opinion which cited to section 90.803(23), Florida Statutes, and, among other cases, to State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991), which was then pending before this Court. This Court granted discretionary review.

## STATEMENT OF THE FACTS

E.M. and her sister, H.M., were respectively six and four years old when the alleged offenses were reported; nine and six at the time of the second trial. (T. 1755, 1876). The defendant, Gerald Dowling, was a close friend of the children's parents, and

lived in an efficiency apartment located in the back yard of their house. (T. 1758, 1877-78). He was considered part of the family. (T. 1910-11). The two children called him "Uncle Gerry." (T. 1758, 1911). He often took care of them and was allowed to discipline them, (T. 1879, 1935). They would visit his apartment almost daily. (T. 1933-34). He had no prior criminal record. (T. 1898).

On Tuesday, July 26, 1988, E.M. told her friend Summer Warren that somebody was molesting her. (T. 1727-28). Summer testified that she and E.M. were watching a movie when E.M. "just started talking in the middle of the movie, because she told me she was bored, and then she started asking me what to do if someone was touching her in the wrong ways." (T. 1727). E.M. asked "what to do if someone was licking in the private parts.'' (T. 1728). E.M. did not say who was molesting her; she did say it was a relative. (T. 1728). Summer's sister, Amber, testified that, about the same time, E.M. told her that her uncle "was doing bad things to her" and "was licking her on her private parts." (T. 1736-7). Summer and Amber reported this to their mother, Maryann Padron. (T. 1728-29, 1740).

The following morning, Wednesday, July 27, 1988, Mrs. Padron contacted E.M.'s teacher, Linda Taylor. (T. 1742). Taylor spoke to E.M., and then phoned E.M.'s mother, to tell her that "it's possible that something had been done to her daughter." (T. 1743-45, 1912). Although Taylor had not stated the nature of the problem E.M. was having (T. 1748-49), E.M.'s mother assumed it involved sexual abuse, and called the police to determine how to handle the situation. (T. 1912-13, 1939). She then called the

school and arranged to meet her daughter there. (T. 1913).

At the school, the mother told E.M. that she had been told that "an uncle in the back was doing something that she did not like." (T. 1916). E.M. told her that "it was Uncle Gerry who was playing with her twinkie and sticking his finger up her." (T. 1917). The word "twinkie" referred to the vaginal area. (T. 1917). The mother returned home, told her husband what she had learned, and the two parents phoned the police. (T. 1879, 1918). Detective Cullen told them to bring E.M. to the police station for an interview. (T. 1880). E.M. was interviewed by Cullen, then taken to the Rape Treatment Center, where she was examined by Dr. Valerie Rao. (T. 1833-41, 1881, 1919-20). On Friday, July 29, 1998, she was interviewed by Joan Kahn, a social worker employed by the State Attorney's Office. (T. 2079).

On the Thursday night before E.M. was taken to the State Attorney's Office, E.M. told her mother that H.M. said that Something had happened to her as well. (T. 1924). The mother asked H.M. if Uncle Gerry had also touched her. (T. 1924). H.M. said yes, and said that the defendant had once "stuck his finger up her twinkie." (T. 1924). The mother told Detective Cullen. (T. 1924). H.M. was interviewed by Cullen on August 3, 1988 (T. 2149), was examined at the Rape Treatment Center by Dr. Dorothy Hicks on August 16, 1988 (T. 1859), and was interviewed by Joan Kahn at the State Attorney's Office on August 16, 1988. (T. 2979-80).

E.M.'s Testimony

E.M. testified that the defendant began to molest her when she was in the first grade (T. 1759). The incidents occurred at his

apartment. (T. 1759). No clothing was removed. (T. 1761, 1777). He would pull her underwear to the side and touch her private area with his fingers or with his tongue. (T. 1761, 1772).

It hurt when he touched her with his fingers, but she did not know whether he touched her in or on her vagina. (T. 1761, 1772, 1821). Although at one point during the direct examination, E.M. stated that the defendant touched hex "[i]n my vagina" (1760), and that he "stuck [his fingers] in my vagina" (T. 1761), when specifically asked by the prosecutor whether the defendant touched her in or on her vagina, E.M. testified: "Um, 1 don't -- I can't tell you that. I don't know." (T. 1772).

Sometimes when he touched her with his tongue she could not see what he was doing because he would put a pillow over her head. (T. 1773). "It felt like a wet worm, and it felt really slimy." (T. 1773). His tongue "would go in circles." (T. 1773).

The defendant would give hew a watch with a timer and tell her to time him; she would have to give him a certain amount of time when he gave her something to eat or drink or allowed her to play with his video games. (T. 1778-79). He had once given her a pair of shorts belonging to his adult daughter because E.M. 's shorts did not fit her and were too tight. (T. 1776-77).

These incidents happened several times over the next two years, perhaps fifteen or twenty times. (T. 1762, 1772). They became more frequent as she got older. (T. 1780). The last time it happened was the Tuesday that E.M. told Summer that the defendant was doing this to her. (T. 1762-63).

Summer was the first person she told. (T. 1763). She did not

tell anybody before because she was afraid, although the defendant had never threatened her. (T. 1762-63). Once, at dinner, E.M. was about to disclose the abuse to her mother, but the defendant became upset and she did not do so. (T. 1770-71). She finally told Summer because she was "fed up." (T. 1786). Even then, E.M. did not tell her mother everything, because she "didn't ask." (T. 1766).

Other than the abuse she had described, the defendant had not done anything to her to make her angry with him. (T. 1786). She had never stuck a finger or anything else inside her vagina. (T. 1822). She had not seen any pictures, videos or movies of someone touching somebody in the manner that she described, nor had she talked to anyone about that sort of thing. (T. 1785-6).

Over defense objection, E.M. testified that she had bad dreams about this, and told Dolnick and Bild-Libbin so. (T. 1782-85).

After the abuse had been disclosed, E.M. told her sister H.M. about what had happened, and H.M then told her that something had also happened between H.M. and the defendant. (T. 1806-7). H.M. had not said anything to E.M. until then. (T. 1806-7).

H.M.'s Testimony

The parties stipulated that, in lieu of live testimony, a video tape of H.M.'s testimony at the first trial would be played to the jury. (T. 1953-54). H.M. stated that one time the defendant had pulled her underwear to the side and "touched" her twinkie. (T. 1963-64). She demonstrated on an anatomically correct doll. (T. 1964-65). This happened when H.M. and the defendant were alone at his apartment. (T. 1966). She was lying on the floor, and the defendant was sitting in a chair. (T. 1966, 1975). Neither of them

took their clothes off. (T. 1966). This happened when she was three years old. (T. 1965). She knew it happened on a weekend because she was watching T.V. (T. 1967). She did not know why she was in court or why the defendant was in court. (T. 1971).

Hearsay testimony

The story related by H.M. and E.M. was retold for the jury by numerous witnesses. The girls' mother, their friends Amber and Summer, Linda Taylor, Detective Steve Cullen, Dr. Valerie Rao, Paul Dolnick, Joan Kahn, and Dr. Raquel Bild-Libbin, eachtestifiedthat E.M. had told them that she had been abused.

The most extensive recapitulation of the stories told by H.M. and E.M. was elicited through the testimony of the mother, and of Detective Cullen, Dr. Bild-Libbin, and Joan Kahn. Bild-Libbin was a psychologist who was hired by the prosecutor to evaluate the girls before the first trial. (T. 212, 1995-96). Kahn was a social worker employed by the Child Assessment Center of the State Attorney's Office. (T. 2079). These witnesses testified that E.M. told them that the defendant had touched her "twinkie" or "private area" with his fingers, and with his tongue (T. 1917, 1920, 1924, 1926, 1998-2001, 2085-6, 2089, 2098, 2133); that no clothes would be removed, but that the defendant would push her underwear aside (T. 1926, 1998, 2000, 2088, 2093, 2133-4); that it happened at his apartment (T. 1929, 1998, 2083, 2133); that he would give her a watch to time him, and demand time in exchange for cookies, candy, or an opportunity to play with his video games (T. 1925, 2001, 2092, 2095-6, 2134-5); that when he touched her with his fingers, it would hurt, and afterwards she would sometimes have difficulty

urinating (T. 1931, 2000-1, 2088, 2099-2100, 2135); and that she did not tell because he was a good friend of the family and she was afraid he would become angry with her (T. 2002, 2090, 2137). They further testified that H.M. said that the defendant had once pushed her underwear to the side touched her "twinkie" one time, and that it hurt (T. 1923-24, 1935-37, 2005-7, 2102-7, 2152-3).

E.M.'s mother added that she had asked E.M. why she had not told before, and E.M. replied that she was scared, and "she thought I would love her less if I knew." (T. 1931).

The hearsay witnesses differed with respect to whether the girl's statements had indicated that there had been penetration. Detective Cullen testified on direct examination that E.M. told him that the defendant would "touch her in her private area," (T. 2136), and that H.M. told him that the defendant "touched me in my twinkie." (T. 2152). During cross-examination, the detective clarified that neither girl actually knew whether there had been penetration. E.M. was not sure whether there had been penetration, but she "described how it hurt, which would be consistent with penetration." (T. 2173). He had asked H.M. if the defendant's finger "went inside, but she was unable to tell me, which is not uncommon for a four year old." (T. 2172). He added that, based on his experience and training, it was his view that "a child that young is not going to know the difference of whether a finger was inside her or outside." (T. 2172).

Similarly, Paul Dolnick, a mental health counselor who had interviewed the girls because of E.M.'s post-disclosure emotional problems, testified that E.M. said that she had been touched "in

her private area," and H.M. said that she was touched "on her private parts which she described as her twinkie," but that he did not inquire as to whether there had been penetration. (T. 2063-64, 2067-68).

However, the girls' mother, Dr. Bild-Libbin, and Kahn all testified that each girl told them that the defendant inserted his fingers into the vagina or private part. (T. 1917, 1920, 1923-4, 1998, 2007, 2083, 2086, 2105).

Post-traumatic stress syndrome

After the disclosure and interviews, E.M. began to have emotional problems. (T. 1882-86). According to her mother, E.M. was afraid of the dark, was having nightmares, could not sleep, would pull out her hair, and scratch and yell. (T. 1925). E.M. had not acted this way before. (T. 1925). Both girls were sent to Paul Dolnick for mental health counselling. (T. 2061). The girls were also interviewed by Dr. Bild-Libbin at the state's request. (T. 212, 1995-96).

Over defense objection, Dr. Bild-Libbin and Dolnick, were qualified as experts and allowed to testify that E.M. suffered from post-traumatic stress syndrome. (T. 1995, 2010, 2066). Bild-Libbin began her testimony by describing the sexual abuse which E.M. and H.M. told her they had suffered at the hands of the defendant. (T. 1996-2007). Bild-Libbin then testified, over defense objection, that, based upon what the mother had told her, she had diagnosed E.M. as suffering from post-traumatic stress syndrome. (T. 2010-12). As explained by Bild-Libbin, post-traumatic stress syndrome is a mental illness which presents itself

"when someone has gone through a traumatic event and are having symptoms related to the event that happened." (T. 2013).

Dolnick, who was a mental health counselor with a masters degree in clinical psychology (T. 1990, 2054), testified that the girls were sent to him because of "behavioral problems they were having at home subsequent to allegations of sexual abuse." (T. 2061). He diagnosed E.M.'s behavior as symptomatic of post-traumatic stress syndrome. (T. 2010, 2066). Although in cross-examination Dolnick testified that it was "within the realm of possibility" that some of E.M.'s post-disclosure symptoms could be due to the repetitive questioning which followed disclosure, he testified on redirect examination that other symptoms, such as hair pulling, "were more likely due to the incidents that allegedly occurred, rather than questioning." (T. 2069).

Child sexual abuse accommodation syndrome

Over defense objection, the state was also allowed to present, through Bild-Libbin, testimony regarding the child sexual abuse accommodation syndrome. (2009, 2014-25).[2] This syndrome is not an

[2]During the first trial, defense counsel requested that the court conduct a Frye hearing to determine whether the child sexual abuse accommodation syndrome met with the general approval of the scientific community. (T. 963-64). (T. 965). Defense counsel urged that the "syndrome" was a circular argument intended to impliedly assert that E.M. had in fact been sexually abused, and that it was irrelevant unless it was generally accepted in the scientific community. (T. 965-66). The court agreed to conduct the hearing, but stated that in its view the syndrome was "just common sense," and "no big deal." The court also noted that it had "heard something about Summit's displeasure about the Country Walk case, about him being cited there; that he did not originally mean for the syndrome to be used in that kind of way or whatever." (T. 966-67). Based on Bild-Libbin's testimony, the court found that the syndrome was generally accepted by the scientific community. (T. 987).

illness or diagnosis, and is not included in the reference book used by mental health professionals for diagnostic purposes. (T. 974-75, 2033-34). Bild-Libbin defined it as "a group of symptoms, and a way of explaining the behaviors that we commonly see in children who have been sexually abused." (T. 2014). It was developed by a California psychiatrist, Dr. Roland Summit, to explain why sexually abused children behave in seemingly illogical ways, for example, by allowing the abuse to continue, and not reporting it, or reporting it in an unconvincing way. (T. 974-75, 2014-25, 2052). It was intended to be used in the treatment of sexually abused children, and, according to Dr. Bild-Libbin, is accepted for that purpose by mental health professionals. (T. 2016).

The syndrome is a therapeutic, not a diagnostic tool. It assumes the presence of abuse, and merely seeks to explain a child's reaction to it. (T. 975, 984, 2016, 2033-34). It was developed based exclusively on studies of children who had in fact been abused, in the opinion of doctors and prosecutors. (T. 976, 981, 985-86). Cases where sexual abuse had been reported, but had not been confirmed, were not included. (T. 986).

According to Bild-Libbin, sexually abused children generally go through five stages:

1) The secrecy stage. "Children typically do not tell." (T. 2017). Children "don't say anything the first time," because "[t]ypically children are sexually abused by either somebody very close to them or somebody who they are entrusted in their care," and fear that they may not be believed by adults. (T. 2018).

2) The helplessness stage. Children do not feel they can "take on" an adult, particularly when the adult is "so much a part of the loving family," and therefore go along with the situation rather than disclose the abuse. (T. 2019-20).

3) The entrapment and accommodation stage. The child accommodates instead of telling "[b]ecause children always fear that adults are not going to believe them. Children always fear that maybe they will lose their parents' love. That they may be blamed for what happened, especially after the secrecy stage in which they did not say it to begin with, so they would be punished by what is happening." (T. 2020-21). Sometimes they do not tell because they like the person, or because they fear retaliation. (T. 2021). It does not make any difference whether the perpetrator threatened the child or not, because, the very fact that the perpetrator is not telling indicates to the child that it is a secret. (T. 2022).

4) The "delayed, conflicting, and sometimes unconvincing disclosure" stage. (T. 2022). Because of the way the questions are asked, or because they are not supported by the family, or because they forget, children may initially disclose only part of the abuse. (T. 2023-24). For example "they are willing to say that someone touched them in their private parts, but they are not willing to say that the person licked them," and they may subsequently change their story. (T. 2023).

5) The retraction stage. When parents do not believe the disclosure, or do not support the child, the child will go through the "retraction phase," and take back the story. (T. 2024-25).

The court sustained defense counsel's objection to eliciting an opinion from Bild-Libbin regarding whether E.M. "was involved in any of these stages." (T. 2025).

During cross-examination, Bild-Libbin testified that seven years ago, the feeling in the field was that children never lie in these types of cases. (T. 2034-35). That feeling has changed to the extent that it is recognized that children will lie in custody cases. (T. 2047). However, children do not lie "about a family friend or someone else doing something to them." (T. 2047).

Phvsical evidence

Dr. Valerie Rao, an associate medical examiner, examined E.M. at the Rape Treatment Center. (T. 1832-3). Rao testified that the hymenal opening was dilated, and presented four healed tears. (T. 1837). Because the tears were healed, they could not be dated, but were older than twenty-four hours. (T. 1839). Rao testified that she did not know what caused the tears, but that E.M. was not born with them. (T. 1840). The injuries were consistent with a finger penetrating the hymen. (T. 1840). They were also consistent with penetration by atongue. (T. 1841). On cross-examination, Dr. Rao admitted that the injuries could have been caused by other objects, such as E.M.'s finger. (T. 1851).

E.M. was later re-examined by Dx. Dorothy Hicks. (1862). Over defense objection that the state was improperly bolstering Rao's testimony (T. 1855-6), Hicks testified that she had checked Dr. Rao's report and agreed with it. (T. 1863). The tears were consistent with finger penetration. (T. 1868). Hicks thought it would be difficult for a tongue to cause a tear, but was not sure

that it could not. (T. 1872). The border of the hymen was "a little bit" thickened, a result which was usually secondary to some kind of irritation, usually from repeated manipulation. (T. 1865-66). Painful urination can also be consistent with digital manipulation (T. 1868-69), but it can have other causes as well (T. 1872-73).[3]

Hicks examined H.M. on August 16, 1988. (T. 1859). H.M. would not speak to her. (T. 1860). H.M. was not quite five-years old at the time. (T. 1860). The genitalia and rectum were normal. (T. 1861). There were two notches in the hymen. (T. 1861). A notch is about half the depth of a tear. (T. 1861). Hicks testified that it was consistent with digital manipulation of the vaginal area. (T. 1862).[4] Hicks was not sure, but thought that the notches would be less than a year old. (T. 1874).

Closing Argument

During closing argument the prosecutor explained that because it was the end of the case the defendant was no longer to be presumed innocent, and that "every person convicted of a crime started with that presumption." (T. 2270). The prosecutor stated:

> We talked about that presumption of innocence, and it has been mentioned that the defendant sits here now presumed innocent. I suggest to you that that is incorrect and a

[3]E.M.'s mother testified that E.M. had complained "a couple of times" about painful urination, but she thought it was probably due to E.M. playing in sand. (T. 1930).

[4]During the pretrial hearing on the state's motion to introduce hearsay, Dr. Hicks testified that the hymen was not dilated for a child of that age, and that, as far as the meaning of the notches, they "mean some irregularity in the hymen. Little, minimal tears. Irregularities, but I don't know why they are there really." (T. 282-3).

misstatement.

> He starts the trial presumed innocent, as any person ever charged with a crime in this country is. But as any person ever convicted of a crime, now at the conclusion of the case he is no longer presumed innocent. Every person ever convicted of a crime started with that presumption.

(T. 2270).

The court sustained defense counsel's objection, but denied his motion for mistrial. (T. 2270, 2347-8).

## QUESTIONS I

I

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO UNFAIRLY BOLSTER THE TESTIMONY OF THE TWO ALLEGED VICTIMS BY INTRODUCING THROUGH NUMEROUS OTHER WITNESSES, MULTIPLE, NEEDLESSLY REPETITIVE, RECITATIONS OF THEIR PRIOR STATEMENTS.

11

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EXPERT OPINION TESTIMONY REGARDING THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME, WHERE THAT TESTIMONY WAS UNHELPFUL, SCIENTIFICALLY UNRELIABLE, MISLEADING, UNFAIRLY PREJUDICIAL AND IMPERMISSIBLY VOUCHED FOR THE CREDIBILITY OF THE ALLEGED VICTIMS.

III

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT THE OPPORTUNITY TO PRESENT EVIDENCE TO THE COURT IN SUPPORT OF HIS MOTION TO ADMIT THE RESULTS OF A POLYGRAPH EXAMINATION.

IV

WHETHER THE TRIAL COURT ERRED IN ADJUDICATING THE DEFENDANT GUILTY OF SEXUAL BATTERY UPON H.M. (COUNT 1), WHERE THERE WAS INSUFFICIENT EVIDENCE OF THE ESSENTIAL ELEMENT OF PENETRATION.

## SUMMARY OF ARGUMENT

I. The state paraded into court nine hearsay witnesses to testify to prior statements made by E.M., and five hearsay witnesses to testify to prior statements made by H.M. Three of the hearsay witnesses worked for either the police or the State Attorney's Office at the time that they interviewed the two alleged victims, and gave the most lengthy and complete hearsay accounts. This extensive, repetitive, hearsay testimony, much of it by witnesses who had gathered the statements they testified-to with an eye to presenting them in court, was nonprobative and unnecessary, and unfairly bolstered the credibility of the state's key witnesses. Because whatever probative value it had was manifestly outweighed by the resulting unfair prejudice, the extensive and completely unnecessary repetition of the childrens' accusations against the defendant denied him a fair trial.

II. Bild-Libbin's testimony on the subject of the child sexual abuse accommodation syndrome presented an unreliable, misleading, and unfairly prejudicial theory under which accusations of child sexual abuse should always be believed, and every circumstance which might undermine the credibility of a report of abuse should be viewed as an indication of its veracity. This testimony should have been excluded because the syndrome is not generally accepted in the scientific community as a reliable indicator of sexual abuse, or as a reliable means fox distinguishing between true and false reports of abuse, and because the subject matter was not beyond the ordinary understanding of the jury. Moreover, Bild-Libbin's testimony on this subject exceeded

all permissible limits by in effect vouching for the credibility of the accusers and expressing an opinion as to the guilt of the accused. As presented to this jury, the "syndrome" represents a scientific consensus that those accused of child sexual abuse are always guilty, and that the presumption of innocence should not apply in this type of case. This testimony was incompatible with due process and denied the defendant a fair trial.

III. The court summarily denied the defendant's proffered expert testimony offered in support of the admissibility of a polygraph examination he had successfully passed. This denial of an opportunity to make his case before the court was fundamentally unfair, particularly in a trial where the state was allowed to extensively, and repeatedly, bolster the testimony of its key witnesses through numerous hearsay witness and through unreliable expert opinion testimony.

IV. The defendant's conviction for sexual battery under count 1 of the information, which specifically charged him with the offense of digital penetration of H.M.'s vagina, must be reversed because these was insufficient evidence to show that H.M.'s vagina was penetrated.

## ARGUMENT

### I

**THE TRIAL COURT ERRED IN PERMITTING THE STATE TO UNFAIRLY BOLSTER THE TESTIMONY OF THE TWO ALLEGED VICTIMS BY INTRODUCING THROUGH NUMEROUS OTHER WITNESSES, MULTIPLE, NEEDLESSLY REPETITIVE, RECITATIONS OF THEIR PRIOR STATEMENTS.**

In Pardo v. State, 17 F.L.W. 194 (Fla. March 26, 1992), this Court held that a child victim's hearsay statement which qualifies for the statutory exception in section 90.803(23), Florida Statutes, may be admissible in evidence when the child is able to testify fully at trial notwithstanding its characterization as a prior consistent statement. Pardo, 17 F.L.W. at 195. This Court further held that the admission of the statement is subject to the balancing test found in section 90.403, which embodies the same concerns that underlie the common law rule against prior consistent statements. Pardo, 17 F.L.W. at 195.

"Consequently, a trial court must weigh the reliability and the probative value of a child victim's hearsay statement against the danger that the statement will unfairly prejudice the defendant, confuse the issues at trial, mislead the jury, or result in the presentation of needlessly cumulative evidence. In weighing these concerns, the courts will be able to balance the rights of criminal defendants with those of the child victims that the statute seeks to protect." Pardo, 17 F.L.W. at 196.

In this case, the alleged victims' version of events was presented through their own testimony and through the hearsay testimony of numerous additional witnesses. The prosecution introduced various statements made to friends, a parent, a doctor,

a teacher, and a mental health counselor. In addition, the prosecution presented three extensive, and repetitive, hearsay accounts of interviews conducted by three professional witnesses (a detective, a psychologist, and a social worker), who were working for the state at the time of the interviews, and who conducted those interviews in the course of preparing for the litigation of this case.

As set forth below, this avalanche of repetitive, nonprobative, and unnecessary hearsay testimony could nat satisfy the test established by this Court in Pardo, abused the procedural advantage accorded to the state by section 90.803(23), and denied the defendant a fair trial. The district court of appeal's decision affirming the conviction and sentence must be quashed, and the cause remanded for a new trial.

The hearsay testimony was nonprobative and unnecessary.

The story related by H.M. on videotape, and by E.M. from the stand, was retold for the jury by numerous witnesses. E.M.'s testimony (T. 1755-1822) was restated in the form of prior consistent statements introduced through nine state witnesses to whom E.M. had related more or less complete accounts of the offenses allegedly perpetrated upon her. Four of these witnesses--E.M.'s mother (T. 1916-26), Detective Steve Cullen (T. 2131-8), Dr. Raquel Bild-Libbin (T. 1998-2005), and social worker Joan Kahn (T. 2081-2100)--retold fully and in detail the story told by E.M. on the stand. The other five witnesses--E.M.'s friends Summer and Amber Warren (1727-8, 1736-7), her teacher Linda Taylor (T. 1745), Dr. Valerie Rao (T. 1834-6), mental health counselor Paul Dolnick

(T. 2062-3)--had more limited, but equally repetitive, hearsay statements to add. Thus, the jury heard at least four times, and, with respect to some matters, as many as nine times, the story narrated by E.M. at trial.[5] H.M.'s testimony that the defendant had once pushed her underwear to the side and touched her "twinkie" one time (1963-64), was retold through the hearsay testimony of five witnesses: her mother (T, 1924, 1935-7), Detective Cullen (T. 2148-54), Dr. Bild-Libbin (T. 2005-7), Dolnick (T. 2063-64), and Kahn (T. 2100-7).

With the exception of E.M.'s statements to her friend Summer (T. 1727-28), all of the hearsay statements had been made after the initial disclosure of the abuse, and even the initial disclosure to Summer was related to the jury by E.M. herself (T. 1762-63). Accordingly, all of this testimony of prior consistent statements was "unnecessary and valueless," 4 J. H. Wigmore, Evidence § 1124 (Chadbourn rev. 1972) (quoted with approval in Pardo v. State, 17 F.L.W. at 195), and lacked probative value even for purposes of rehabilitation. "Evidence which merely shows that the witness said the same thing on other occasions where his motive was the same does not have much probative force for the simple reason that mere repetition does not imply veracity." 4 J. Weinstein & M. Berger, Evidence § 801(d)(1)(b)[01] at 801-150 to 801-151 (1991).

In one material respect, namely, regarding whether there had been penetration of the vagina by the defendant's finger, the hearsay testimony of some of the witnesses did go beyond that of the children. That testimony, however, could not be considered

[5]See pages 7-11 of the statement of the facts.

probative with respect to that issue, because it was inconsistent with that of the children themselves, and with that of other hearsay witnesses. All it really showed was the unreliability of the investigatory interviews in which the hearsay was created.

From the children's testimony (T. 1760, 1772, 1821, 1956-82), and from the testimony of Detective Cullen and mental health counselor Paul Dolnick, whose interviews yielded essentially the same results as the prosecutor's questioning at trial (T. 2063-64, 2067-68, 2136, 2152, 2172-73), it was clear that neither girl knew whether the defendant's finger had penetrated the vagina.

When specifically asked by the prosecutor whether the defendant touched her in or on her vagina, E.M. testified: "Um, I don't -- I can't tell you that. I don't know." (T. 1772). She gave the same testimony on cross-examination. (T. 1821).[6] The younger girl, H.M., testified that the defendant had touched her "twinkie" or "private" with his finger, but no attempt was made by either side to elicit more specific testimony. (T. 1956-82).

Detective Cullen's interviews produced the same results: neither girl knew whether there had been penetration (T. 2152, 2172). Moreover, referring to H.M., Cullen added that based on his experience and training it was his view that "a child that young is not going to know the difference of whether a finger was inside

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[6]Earlier in direct examination, when the question of penetration was not put directly, E.M. had stated that the defendant touched her "[i]n my vagina" (1760), and that he "stuck [his fingers] in my vagina" (T. 1761).

her or outside." (T. 2172).[7]

Similarly, Paul Dolnick, a mental health counselor who had interviewed the girls because of E.M.'s post-disclosure emotional problems, testified that E.M. said that she was touched "in her private area," and H.M. said that she was touched on her "twinkie," but that he did not inquire as to whether there had been penetration. (T. 2063-64, 2067-68).

On the other hand, Dr. Bild-Libbin, Joan Kahn, and the girls' mother all testified emphatically that each girl told them that the defendant inserted his fingers inside the vagina. (T. 1917, 1920, 1923-4, 1998, 2007, 2083, 2086, 2105). Because penetration, and not merely contact or union, must be proved to establish sexual battery with an object other than a sexual organ, Firkey v. State, 557 So.2d 582, 586 (Fla. 4th DCA 1989) (on rehearing, Feb. 14, 1990), this additional hearsay information provided by the mother, by Bild-Libbin, and by Kahn, was material. However, in view of the other testimony presented by the state in its case in chief, establishing that the children in fact did not know whether there had been penetration (T. 1772, 1821, 1956-82, 2063-64, 2067-68, 2136, 2152, 2172-73), that additional hearsay information, which implied such knowledge, could not be considered reliable or

[7]Cullen testified on direct examination that E.M. told him that the defendant would "touch her in her private area," (T. 2136), and that H.M. told him that the defendant "touched me in my twinkie," (T. 2152). During cross-examination, Cullen clarified that neither girl actually knewwhether there had been penetration. He had asked H.M. if the defendant's finger "went inside, but she was unable to tell me, which is not uncommon for a four year old." (T. 2172). E.M. was not sure whether there had been penetration, although she "described how it hurt, which would be consistent with penetration." (T. 2173).

probative. See Jaggers v. State, 536 So.2d 321, 322 (Fla. 2d DCA 1988) (children's prior statements indicating digital penetration of vagina were inconsistent with their testimony that defendant touched them in vaginal area but did not penetrate the vagina with his finger, and were therefore not sufficiently reliable to warrant admission into evidence, or to support a conviction); Williams v. State, 560 So.2d 1304 (Fla. 1st DCA 1990). But see Glendening v. State, 536 So.2d 212 (Fla. 1988).[8]

Accordingly, all of the repetitive hearsay was nonprobative, and, because it added nothing of legitimate value, it was unnecessary to introduce this hearsay testimony even once.

There was certainly no evidentiary need to repeat it over and

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[8]In Glendening this Court upheld the introduction of inculpatory hearsay statements made by a child victim to various interviewers, even though the child's videotaped testimony exculpated the defendant. Although, as noted in Jassers at 326, the issue of whether it was proper to introduce inconsistent statements was apparently present in Glendening, it was not discussed.

To the extent that the Glendening decision may have been influenced by the existence of extrinsic corroborating evidence of abuse (medical testimony, and admissions af the defendant) as adequate guarantees of trustworthiness of even such inconsistent Statements, id. at 219, it may be in conflict with Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 3139 (1990), where the Court held that, "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." Idaho v. Wright, 110 S.Ct. at 3150.

In any event, in this case there were no admissions of guilt, the girls were not subject to cross-examination regarding the prior statements they had made because they could not remember what had been said in the interviews which produced those out-of-court declarations, and, although there was physical evidence consistent with sexual abuse of E.M., the physical evidence was insufficient to establish penetration of H.M. (see Argument IV, below).

over and over again. In particular, there was no legitimate need to present to the jury all three of the extensive, parallel, hearsay accounts generated by the state's agents (Cullen, Bild-Libbin, and Kahn). The purpose of the child hearsay exception is to protect victimized children "from emotional harm and trauma occasioned by judicial proceedings," Chapter 85-53, Laws of Florida, and "to salvage potentially valuable evidence of abuse from children who may, for many reasons, be unable or unwilling to give their evidence at trial to a jury in the same way an adult would be expected to do," Kopko v. State, 577 So.2d 956, 962 (Fla. 5th DCA 1991). These purposes might be served, in an appropriate case, by having a professional witness interview the child and relate the results at trial. However, to multiply such professional witnesses is to abuse this procedural advantage, and to transform what is supposed to be a truth-finding process into a propaganda exercise. One professional hearsay witness, might be countenanced. There could be no justification for having three such witnesses repeat to the jury the same hearsay story, which the jury was able to hear from the girls' themselves. No legitimate purpose was served by having the hearsay witnesses echo one another.

The unnecessary and extensive repetition of hearsay testimony denied the defendant a fair trial.

Although legally "unnecessary and valueless," 4 J. H. Wigmore, Evidence § 1124 (Chadbourn rev. 1972), such repetitive hearsay, presented through numerous, respected adult witnesses, with the attendant sophistication of vocabulary and description, and with

the attendant variety of emphasis and perspective, has a well-recagnized practical persuasive power. It can have the effect of overwhelming the jury's sense of proportion and of giving a factitious weight and credibility to the repeated testimony. See Pardo v. State, 17 F.L.W. at 195-96, quoting with approval Allison v. State, 162 So.2d 922, 924 (Fla. 1st DCA 1964), and Kopko v. State, 577 So.2d 956, 960 (Fla. 5th DCA 1991).

The unfairness of bolstering a witness's credibility through repeated introduction of prior statements, and the resulting unfair prejudice when, as here, the out-of-court statements are those of a key witness, has been recognized in numerous cases. E.g. Van Gallon v. State, 50 So.2d 882 (Fla. 1951); Allison; Reves v. State, 580 So.2d 309 (Fla. 3d DCA 1991). The danger of improperly influencing the jury's assessment of credibility is especially great when the hearsay testimony is presented through a professional, and seemingly disinterested and objective witness. See, e.g., Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979) ("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.") Where, as here, the hearsay testimony is also presented through a witness, such as Dr. Bild-Libbin, who is called to explain why behavior which might seem to detract from the credibility of an accusation in fact establishes its veracity (see Argument II below), the credibility-bolstering effect and purpose of that testimony can hardly be doubted.

Repetition unfairly bolstered the credibility, not only of the

declarants, but of the hearsay witnesses themselves. The fact that the first detailed disclosure, and the most extensive and detailed of the hearsay accounts, were obtained through investigatory interviews conducted by the police or persons employed by the State Attorney's Office, might tend to produce skepticism. Unsworn statements made out-af-court during the course of interviews conducted by a litigant with an eye to their use at trial, and outside the presence of the other party, or of a judge, would not usually be thought particularly trustworthy. See C.W. Ehrhardt, Florida Evidence § 803.6, p. 581 (1992 ed.) (stating, in the context of discussing the business records exception to the hearsay rule, that "[w]henever a record is made for the purpose of preparing for litigation, its trustworthiness is suspect and should be closely scrutinized"). Repeating the process did not remove the reasons for considering it suspect, but it did give the results an air of objectivity that they might otherwise not have, and it also tended to obscure the fact that the different accounts were not entirely consistent.[9]

Moreover, merely repeating the same thing in different ways and from different viewpoints, has a persuasive effect whose value is not lost upon trial lawyers. See, e.g., J.W. McElhaney, Say It Again, ABA Journal, July 1991, at 76. The fact that the narrative

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[9]Even material inconsistencies--such as the inconsistency with respect to the girls' knowledge of whether there had been penetration--could be buried through this process, particularly where the hearsay witnesses were permitted to testify in the form of conclusions, summaries, and opinions of what the girls' meant, thus adding to the state's arsenal the weapon of spin control.

of the accusations against the defendant was repeated not merely once, but over half-a-dozen times, and through different witnesses, could not fail to have a psychological impact upon the jury. In other contexts, where prosecutors have sought this trial advantage by means not generally contemplated by the procedural rules, courts have recognized both the prejudicial effect and unfairness of extensively recapitulating through different witnesses the testimony of a prosecution's key witness. See Gonzalez v. State, 450 So.2d 585, 586-87 (Fla. 3d DCA 1984) (Pearson, J., concurring) (condemning as a "midtrial closing argument masquerading as cross-examination" the prosecution tactic of recapitulating testimony by the device of asking defense witnesses whether they had heard the testimony of the prosecution's witnesses); State v. Scott, 55 Utah 553, 188 P. 860, 866 (1920).

Because whatever probative value it had was manifestly outweighed by the resulting unfair prejudice, the extensive and completely unnecessary repetition of the childrens' accusations against the defendant denied him a fair trial. See Pardo.

## II

**THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EXPERT OPINION TESTIMONY REGARDING THE CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME, WHERE THAT TESTIMONY WAS UNHELPFUL, SCIENTIFICALLY UNRELIABLE, MISLEADING, UNFAIRLY PREJUDICIAL AND IMPERMISSIBLY VOUCHED FOR THE CREDIBILITY OF THE ALLEGED VICTIMS.**

In its case-in-chief, and over defense objection (T. 1995, 2008-10), the state called Dr. Raquel Bild-Libbin to present expert testimony regarding the child sexual abuse accommodation syndrome (T. 2014-25). Dr. Bild-Libbin was a psychologist, and had been hired by the state attorney's office to evaluate the children before the first trial. (T. 212, 1995-96). She began her testimony by describing the sexual abuse which E.M. and H.M. told her they had experienced at the hands of the defendant. (T. 1996-2007). Bild-Libbin then testified, over defense objection, that, based upon what the mother had told her about various emotional troubles E.M. developed after disclosure, she had diagnosed E.M. as suffering from post-traumatic stress syndrome. (T. 2010-12). As explained by Bild-Libbin, poat-traumatic stress syndrome is a mental illness which presents itself "when someone has gone through a traumatic event and are having symptoms related to the event that happened." (T. 2013).

After this introduction, Bild-Libbin launched into an extensive discussion of the child sexual abuse accommodation syndrome, which she defined for the jury as "a group of symptoms, and a way of explaining the behaviors that we commonly see in children who have been sexually abused." (T. 2014). Bild-Libbin told the jury that the syndrome is generally accepted by

professionals and that she did not know of anyone who did not endorse its use in dealing with sexually abused children. (T. 2016).

The "syndrome" seeks to explain, as symptomatic of sexual abuse, behavior which might seem to detract from the credibility of a report of abuse. The jurors were told that behavior such as failure to disclose, late disclosure, unconvincing disclosure, and retraction, are "typical" of sexually abused children and exemplify various stages of the "syndrome." (T. 2015-25). They were also told that each of these typical behaviors is the result of circumstances which are typically present where sexual abuse occurs, and which just happened to be the circumstances of this case. Thus,

"Children typically do not tell," because "[t]ypically children are sexually abused by either somebody very close to them or somebody who they are entrusted in their care." (T. 2017). "[T]ypically they would think adults are not going to believe" such a story, and they fear what the consequences of telling might be. (T. 2018). Children accept the abuse because they do not feel they can take on an adult who is viewed favorably by the family. "If a family, for example, has, let's say, an uncle, a brother, somebody who is part of a family, how could anybody believe that this person would do something bad when this person is so good and is so much part of a loving family." (T. 2019). Challenging such a person would only "disrupt what was a very good relationship in the eyes of the children." (T. 2019-20). The child accommodates instead of telling "[b]ecause children always fear that adults are

not going to believe them. Children always fear that maybe they will lose their parents' love. That they may be blamed for what happened, especially after the secrecy stage ...." (T. 2020-21). Sometimes they do not tell because they like the person, or because they fear retaliation. (T. 2021). It does not make any difference whether the perpetrator threatened the child or not, because the fact that the adult is not telling, and "nobody ever talks about it," indicates to the child that it is something which should not be disclosed. (T. 2022).[10] In the "delayed, conflicting, and sometimes unconvincing disclosure'' stage, children may make only a partial disclosure. (T. 2022-24). For example, "they are willing to say that someone touched them in their private pasts, but they are not willing to say that the person licked them," and they may

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[10]All of this was foreshadowed by Bild-Libbin's hearsay testimony. According to Bild-Libbin, E.M. told her that she had been molested by "Uncle Gerry" (T. 1998); that he was a person whom "she really cared for and viewed as an uncle" (T. 1998); and that she had not disclosed the abuse because,

> Even though she was not threatened, she expressed that she was scared that he could hurt her or that her parents may not believe her if she were to say what happened.
>
> Since this was a very special friend of the family, almost like family, she was scared that somehow it would be her fault or it would be her responsibility to sort of damage, to bring about something that would be negative about him and it would disrupt the relationship that everybody had.

(T. 2002).

subsequently change their story. (T. 2023).[11]

The jury should never have heard this testimony. As presented to the jury, the "syndrome" is not only a reliable indicator of sexual abuse, but in effect a scientific consensus that accusations of child sexual abuse should always be believed, and that every circumstance which might undermine the credibility of a report of abuse is in fact an indication that the report is true. The jurors were told categorically that there is a "syndrome," endorsed by all professionals in the field, which describes as typical and symptomatic of sexual abuse such things as late disclosure, conflicting disclosure, partial disclosure, and unconvincing disclosure, and which explains these symptoms as the typical result of circumstances just like those of this case. Allowing this testimony was prejudicial error. As the defense pointed out in the course of attempting to exclude this testimony (T. 963-86, 2009), whatever value the purported syndrome might have in the therapeutic context, it is not generally accepted in the scientific community as a reliable indicator of sexual abuse, or as a reliable means for distinguishing between true and false reports of abuse. To present it as if it were was both unhelpful and misleading.

Testimony of a qualified expert is admissible if it is helpful to the tries of fact, if it is capable of being applied to evidence at trial, and if its probative value is not substantially outweighed by the danger of unfair prejudice. Glendenins v. State, 536 So.2d 212, 220 (Fla. 1988); §§ 90.403, 90.702, 90.703, Fla.

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[11]The state had introduced through E.M.'s mother the information that E.M. had told her mother about the finger touching, but not about the oral contact. (T. 1924).

Stat. (1991). For the expert testimony to be helpful to the trier of fact, and of sufficient probative value to outweigh the danger of unfair prejudice which is inherent in such testimony, it must be based on a reliable body of scientific knowledge. See Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989); Page v. Zordan, 564 So.2d 500, 502 (Fla. 2d DCA 1990); Kruse v. State, 483 So.2d 1383, 1386 (Fla. 4th DCA 1986). A new scientific theory must be shown to be "'sufficiently established to have gained general acceptance in the field in which it belongs.'" Stokes v. State, 548 So.2d 188, 193 (Fla. 1989), quoting Frye v. United States, 293 Fed. 1013, 1014 (D.C. Cir. 1923).[12]

The child sexual abuse accommodation syndrome is not generally accepted as a means for determining whether sexual abuse actually occurred, or for ascertaining the credibility of reports of sexual abuse. It has no reliability as an indicator of abuse or of veracity, was not developed for that sort of use, and is not used that way by specialists in the field.

Despite its name, and despite its definition as a "group of symptoms" (T. 2014), the child sexual abuse accommodation syndrome is not an illness, or a diagnosis. It is, rather, a "hypothetical explanation" of certain behaviors commonly observed in children who have been sexually abused. (T. 974-75, 2014). This theory was

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[12]Because the syndrome has no reliability as a detector of abuse or of veracity, it should be inadmissible regardless of whether the applicable standard is that of Frye, or the lesser relevancy standard set forth in Kruse at 1386, and applied in Ward v. State, 519 So.2d 1082 (Fla. 1st DCA 1988). Nevertheless, it appears that in Stokes this Court laid to rest any doubt as to which standard should apply to novel scientific techniques and theories.

developed in the 1980s by a California psychiatrist, Dr. Roland Summit, for the purpose of providing a "common language" for the professionals working to protect sexually abused children. Myers, et al., Expert Testimony in Child Sexual Abuse Litigation, 68 Neb. L. Rev. 1, 66-67 (1989). Unlike other sorts of syndromes, such as post-traumatic stress syndrome, or battered child syndrome, the child sexual abuse accommodation syndrome, is not, and was never intended to be, a diagnostic tool. It assumes the existence of abuse, and merely seeks to explain a child's reaction to it. (T. 975, 984, 2016, 2034). Myers, supra at 67. It was developed based exclusively on studies of children who--in the opinion of doctors and prosecutors--had in fact been abused. (T. 976, 981, 985-86). Cases where sexual abuse had been reported, but had not been confirmed, were not included. (T. 986).

Accordingly, neither its intended purpose, nor the evidentiary base on which it was developed, much less its assumed premise that abuse in fact exists, would permit the syndrome's use as a detector of sexual abuse, or as a reliable device for distinguishing between true and false reports of abuse. Its use for that purpose is also negated by the fact that researchers have thus far been unable to isolate a behavior pattern which is unique to sexually abused children, and which would differentiate them from children who suffer other sorts of psychological abuse or trauma. See Commonwealth v. Dunkle, 602 A.2d 830, 832-33 (Pa. 1992). Because it lacks the requisite scientific reliability, its use as substantive evidence has been prohibited in several jurisdictions. E.g., Dunkle, supra; People v. Bowker, 203 Cal. App. 3d 385, 249

Cal. Rptr. 886 (Cal. Ct. App. 1988); People v. Beckley, 434 Mich. 691, 456 N.W. 2d 391, 405 (Mich. 1990); State v. Davis, 64 Ohio App. 3d 334, 581 N.E.2d 604 (Ohio Ct. App. 1989). See also People v. Bledsoe, 36 Cal.3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (Cal. 1984) (rape trauma syndrome). It should be inadmissible in Florida as well.[13]

In addition to the unreliability of the theory it advanced, the expert testimony was unnecessary. Its subject matter was well within the ordinary understanding of the jury. Indeed, in the trial court's view, the syndrome was just "common sense," and "just about any parent can sit down and figure out what Dr. Summit figured out and codified." (T. 966). The jury could not be helped by such a theory, and should have been permitted to make its own assessment of the credibility of the witnesses. Dunkle, 602 A.2d at 836-38. See Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980) ("expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts"), cert. denied, 454 U.S. 882 (1981).

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[13]In Florida, expert testimony regarding patterns of consistency in the stories of sexual abuse victims may be admissible to aid the jury in assessing the veracity of the victim's story. Tingle v. State, 536 So.2d 202, 205 (Fla. 1988), quoting United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986). A qualified expert may also express an opinion as to whether a child has been the victim of sexual abuse. Glendening v. State, 536 So.2d 212, 220 (Fla. 1988). However, the admissibility of that testimony is subject to the same requirements applicable to any other expert testimony. See Glendening at 220; Tingle at 205 n. 4. Nothing in Glendening or Tingle suggests that the state can use a scientific theory to prove that the complaining witness has been abused, or is telling the truth, when the theory is not accepted ok used by the scientific community for those purposes, and is generally recognized to have no reliability for those purposes.

Certain jurisdictions would permit this type of syndrome testimony for the purposes of rehabilitation and for the purpose of rebutting "commonly held misconceptions" about child sexual abuse and the behavior of its victims. See, e.g., Bledsoe, 203 Cal. Rptr. at 457. It is not clear why those purposes would excuse the presentation of a theory which is so inherently misleading, and why those purposes could not be served just as well by expert testimony that the behavior in question is not inconsistent with sexual abuse. See Bowker, 249 Cal. Rptr. at 891-92. Dispelling misconceptions does not require that the jury be misled with testimony that the failure to report abuse, the unconvincing and conflicting disclosure of abuse, and even the retraction of an accusation of abuse, are all in fact symptomatic of abuse.

In any event, here, the syndrome testimony was presented in the state's case-in-chief and its purpose clearly was not rehabilitation of impeached testimony. Virtually all of the seemingly self-impeaching characteristics of the childrens' behavior were brought out by the prosecutor,[14] and the detailed and dogmatic discussion of the "syndrome" could have no other purpose

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[14]E.M. testified during direct examination that she had not told anyone of the abuse during the two-year period that it allegedly occurred, and continued to go to the defendant's apartment to play with his video games (T. 1759, 1763, 1778-79); that the defendant never threatened her (T. 1762-63); that although she told Detective Cullen, Dr. Raquel Bild-Libbin, Joan Kahn, and the prosecutor everything or mostly everything that had happened, she did nat remember what she had said. (T. 1764-70); that she only told her mother part of it (T. 1766). During cross-examination, the defense went over essentially the same ground, and also brought out that E.M. had been told by her teachers, and by her mother to report any bad touching. (T. 1748, 1751, 1789, 1793). Direct examination of the mother had revealed that H.M. did not disclose that she had been abused until after E.M.'s disclosure. (T. 1924, 1935-36).

and effect than to present to the jury an expert opinion that the alleged abuse had occurred, and that the childrens' stories were to be believed. See Bowker, 249 Cal. Rptr. at 892. Bild-Libbin's testimony in effect vouched for the credibility of the victims and expressed an opinion as to the guilt of the accused. It thereby went well beyond the permissible limits of expert testimony.

Certain general expert testimony may be admissible to assist the jury in determining the veracity of a child victim, Tingle v. State, 536 So.2d 202, 205 (Fla. 1988), and a qualified witness may express an opinion as to whether a child has been the victim of sexual abuse, Glendening v. State, 536 So.2d 212, 220 (Fla. 1988). However, an expert may neither express an opinion as to the guilt of the accused, Glendening at 221, nor directly vouch for the credibility of a witness, or place a stamp of truthfulness on a witness's story, Tingle at 205; Weatherford v. State, 561 So.2d 629, 634 (Fla. 1st DCA 1990); Norris v. State, 525 So.2d 998 (Fla. 5th DCA 1988). Expert testimony which clearly implies an opinion as to the credibility of the victim's testimony, or an opinion as to the culpability of the accused, runs afoul of these rules, even when the opinion is not directly elicited. See Page v. Zordan, 564 So.2d 500, 501-2 (Fla. 2d DCA 1990).

Although Bild-Libbin was not allowed to express an opinion as to whether the childrens' behavior in this case was consistent with the syndrome (T. 2025-6), that was hardly necessary. The nature of the "syndrome" which she described, and the way she described it, made it abundantly clear that in her opinion the girls' behavior was symptomatic of sexual abuse, that their story was

true, and that the abuser was the defendant. Bild-Libbin described as typical of sexual abuse situations virtually all of the circumstances present in this case (e.g. perpetrator is typically someone very close to the victim, "let's say, an uncle,'' somebody who "is so much part of a loving family" (T. 2019)), and explained that each of the circumstances which might raise a doubt (e.g. late disclosure, continuing to go back to the defendant's apartment, partial disclosure) were in fact typical indicators, or symptoms, of abuse. Before expounding upon the child sexual abuse accommodation syndrome, Bild-Libbin had given a detailed description of the abuse which the girls said they had experienced at the defendant's hands. She had also stated her diagnosis that E.M. was suffering from post-traumatic stress syndrome, which Bild-Libbin said appears "when someone has gone through a traumatic event and are having symptoms related to the event that happened." (T. 2013). If there was any doubt at all in the jurors' minds as to the nature of the "traumatic event" that Bild-Libbin believed had "happened," that doubt could not have survived her subsequent discussion of a second "syndrome" which is specifically predicated upon the existence of sexual abuse. After all this, it was superfluous to directly assert that in her opinion E.M. was behaving in a manner typical of sexually abused children, that the abuser was the accused, and that the children were telling the truth. See Pase; Bowkex, 249 Cal. Rptr. at 892 (expert testimony exceeded all permissible limits where, although the expert was precluded from using CSAAS as a predictor of child abuse, "by delineating each stage of the CSAAS theory, [the expert]

constructed a 'scientific' framework into which the jury could pigeonhole the facts of the case" and conclude that abuse had occurred). This testimony impermissibly vouched for the credibility of the state's key witnesses, and expressed an opinion of the defendant's guilt. See Glendening at 220; Tingle at 205.

The effect of Bild-Libbin's testimony was accurately, although improperly, expressed by the prosecutor during closing argument: After the presentation of this evidence the defendant was "no longer presumed innocent'' (T. 2270). To tell a jury that, viewed in the light of science, any behavior which might detract from the credibility of an accusation of abuse in fact indicates that the accusation is true, and is in fact symptomatic of abuse, is to tell them that in the opinion of the scientific community those accused of capital sexual battery are guilty. This expert refutation of the presumption of innocence was incompatible with due process and denied the defendant a fair trial.

## III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT THE OPPORTUNITY TO PRESENT EVIDENCE TO THE COURT IN SUPPORT OF HIS MOTION TO ADMIT THE RESULTS OF A POLYGRAPH EXAMINATION.

The defendant moved to introduce into evidence the fact that he had passed a polygraph examination in which he denied the allegations against him. He requested the court to allow him to proffer to the court expert testimony regarding the reliability of the proposed evidence and the present-day acceptance of polygraphy among the scientific community. (R. 92-94; T. 448-50). The court summarily refused to allow the defense to proffer any testimony in support of the motion, and precluded all mention of the polygraph examination. (T. 456). This was error.

It is true that polygraph examinations have long been inadmissible in Florida. However, that is only so because, thus far, the necessary predicate of scientific reliability has not been established to the satisfaction of the Florida courts. See Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989); Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983); Farmer v. City of Fort Lauderdale, 427 So.2d 187, 190 (Fla. 1983). Florida courts will accept new scientific methods of establishing evidentiary facts if a proper predicate is established that the reliability of the scientific method is recognized and accepted by scientists. See Delap at 1247; Ramirez at 255. This standard is equally applicable to polygraphy, see Delas, and if it is met, polygraph tests should be admissible. As this Court noted in Fanner, polygraph testing "may someday meet that burden ...." The defendant in this case should not have been

summarily precluded from attempting to demonstrate that that day has come.

In United States v. Piccinona, 885 F.2d 1529 (11th Cir. 1989), the Eleventh Circuit Court of Appeals modified its per se rule against the admissibility of polygraph evidence and held that such evidence may be admitted when used to impeach or to corroborate the testimony of a witness. Id. at 1536. In arriving at this decision, the court surveyed the literature and judicial opinions on the subject, id. at 1531-5, noted that such tests are used extensively by government agencies, id. at 1532, and found that evidence is lacking that juries are unduly swayed by polygraphs, id. at 1536. The court concluded that recent advances in polygraph testing had resulted in its increasingly widespread acceptance as a useful and reliable scientific tool. Id. at 1535.

Here, relying on Piccinona, the defense asked to be allowed to proffer to the court expert testimony regarding recent advances in polygraphy and ite acceptance in the scientific community, and thus establish the necessary predicate for the admissibility of the test results. (T. 448-56). Defense counsel explained that the only possible defense was to deny the accusations, and that he planned to put the defendant on the stand and use the polygraph to corroborate his testimony if the state impeached him. (T. 455-56). The court summarily refused to allow the proffer for the wholly insufficient reason that it was "not willing to listen to a polygraph operator testify and tell me it is of such expertise and change Florida law." (T. 456). By thus foreclosing the issue without a hearing, the court abused its discretion and denied the

defendant due process, his right to present evidence in his defense, and his constitutionally-guaranteed right to have access to courts, including appellate courts. "A trial court should not refuse to allow a proffer of testimony. This is necessary to insure full appellate review." Hawthorne v. State, 408 So.2d 801, 804 (Fla. 1st DCA 1982); Piccirrillo v. State, 329 So.2d 46 (Fla 1st DCA 1976). Particularly in a case where the state was allowed to extensively bolster the testimony of its two key witnesses by repetitive evidence of out-of-court statements, and by expert opinion testimony which would be inadmissible under the standards applied to the evidence proffered by the defense, it was manifestly unfair not to permit the defendant even to attempt to persuade the court that evidence which corroborated his denial of the charges might be admissible.

## IV

**THE TRIAL COURT ERRED IN ADJUDICATING THE DEFENDANT GUILTY OF SEXUAL BATTERY UPON H.M. (COUNT 1), WHERE THERE WAS INSUFFICIENT EVIDENCE OF THE ESSENTIAL ELEMENT OF PENETRATION.**

Count 1 of the information specifically alleged that the defendant committed the offense of sexual battery upon H.M., by penetrating H.M.'s vagina with his fingers. (R. 2, 8). The conviction obtained under that count must be reversed because, although there was evidence of digital manipulation of H.M.'s vaginal area, there was insufficient evidence that the defendant's fingers ever penetrated the vagina.

Not only was penetration of the vagina specifically alleged, such penetration is an essential element of the crime of sexual battery with an object other than a sexual organ. Firkey v. State, 557 So.2d 582, 586 (Fla. 4th DCA 1989) (on rehearing, Feb. 14, 1990); Wallis v. State, 548 So.2d 808 (Fla. 5th DCA 1989); Furlow v. State, 529 So.2d 804 (Fla. 1st DCA 1988). Section 794.011(1)(h), Florida Statutes (1987), provides:

> The term "sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

Penetration of the external genitalia, or even union (i.e. contact) with the vagina, does not constitute sexual battery. See Firkey; Wallis; Furlow. The term "vagina" is not synonymous with the female private parts, and does not include either the labia majora or the labia minora. Firkey at 584-85, citing Taber's

Cyclopedic Medical Dictionary 783, 1534 (14th ed. 1982). Thus, manipulation, or penetration, of the female private parts, without actual penetration of the vagina, is not sexual battery, although it may be lewd and lascivious assault, see Firkey at 585-6; § 800.04, Fla. Stat. (1987).

Here, there was insufficient evidence of penetration of the vagina. The non-hearsay evidence consisted of the following: (1) The expert testimony of Dr. Dorothy Hicks that H.M.'s external and internal genitalia were "normal for this age group;" that the hymen measured three to four millimeter from left to right and four to five millimeters from up to down (T. 1861),; and that the hymen presented two "notches" which were "consistent with digital manipulation of the vaginal area." (T. 1861-2).[15] (T. 1861). (2) H.M.'s videotaped testimony that the defendant had "touched" her "twinkie," or "private," with his finger one time. (T. 1963-4, 1966, 1982). H.M. demonstrated the touching on an anatomically correct doll. (T. 1964-5).

The hearsay testimony was as follows: (1) Detective Cullen testified that H.M. told him that the defendant had touched her in her "twinkie," and that it hurt, but that he was unable to ascertain whether she was touched on the inside or outside (T. 2152-3), and that, based on his training and experience, it was his opinion that "a child that young is not going to know the

[15]During the pretrial hearing on the state's motion to introduce hearsay, Dr. Hicks testified that the hymen was not dilated far a child of that age, and that, as far as the meaning of the notches, they "mean some irregularity in the hymen. Little, minimal tears. Irregularities, but I don't know why they are there really." (T. 282-3).

difference of whether a finger was inside her or outside" (T. 2172); (2) Paul Dolnick testified that H.M. told him "that she was touched by her Uncle Gerry on her private parts which she described as her twinkie" (T. 2063), but had not said whether the defendant had touched her inside or up her twinkie (T. 2068); (3) H.M.'s mother testified that when questioned, H.M. stated that the defendant "stuck his finger up her twinkie," which, according to the mother referred, to the vagina (T. 1923); (4) Bild-Libbin testified that H.M. told her that the defendant had once touched her "[i]nside," and that H.M. "showed in the anatomically correct doll of the vagina/vulva area" (T. 2007); (5) Joan Kahn testified that H.M. touched her "twinkie" on the "inside" (T. 2101, 2105).

The nonhearsay evidence, and that portion of the hearsay testimony which consisted of purported direct quotes of what H.M. said, indicated touching of the external genitalia, but did not prove penetration of the vagina, and therefore could not support a conviction for capital sexual battery. Firkey. The only evidence indicating penetration of the vagina was hearsay which was inconsistent with H.M.'s own testimony, and with the testimony of other witnesses. Such inconsistent hearsay is not reliable and cannot support a conviction. See Jassers v. State, 536 So.2d 321, 322 (Fla. 2d DCA 1988); Williams v. State, 560 So.2d 1304 (Fla. 1st DCA 1990). Accordingly, the conviction under count 1 must be reversed.

## CONCLUSION

Based on the foregoing argument and authorities the defendant requests this Court to quash the decision of the district court of appeal, and to direct that the offense charged in count 1 be reduced to lewd and lascivious assault, and that the cause be remanded for a new trial.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Room 800
Miami, Florida 33125
(305) 545-3005

BY: Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, Criminal Division, ANGELICA D. ZAYAS, 401 N.W. Second Avenue, Post Office Box 013241, Miami, Florida 33101 this 23rd day of June, 1992.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

# APPENDIX

**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.**

IN THE DISTRICT **COURT** OF APPEAL

OF FMRIDA

THIRD DISTRICT

**JULY TERM, 1991**

GERALD BRUCE **DOWLING,** **

**Appellant,** **

**vs.** ** **CASE** NO. **90-1306**

THE **STATE OF** FLORIDA, **

**Appellee.** **

**Opinion filed** November *26,* 1991.

**An Appeal from the Circuit Court for** Dade **County,** Henry L. oppenborn, Judge.

Bennett H. Brummer, **Public Defender,** and **Louis Campbell,** Assistant Public **Defender, for** appellant.

Robert **A. Butterworth, Attorney** General, and **Angelica** D. Zayas, **Assistant Attorney** General, for **appellee.**

**Before** HUBBART, BASKIN, and GERSTEN, **JJ.**

**PER CURIAM.**

**Affirmed.** § 90.803(23), **Fla. Stat. (1990);** Glendening **v. State, 536** So.2d **212 (Fla.** 1988), cert. **denied,** 492 **U.S.** 907, **109** S.Ct. 3219, 106 L.Ed.2d 569 (1989); Duest v. State, 462 So.2d 446

(Fla. 1985); Delap v State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984); Farmer v. City of Ft. Lauderdale, 427 So.2d 187 (Fla.), cert. denied, 464 U.S. 816, 104 S.Ct. 74, 78 L.Ed.2d 86 (1983); Ferguson v. State, 417 So.2d 639 (Fla. 1982); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); State v. Pardo, 16 F.L.W. D1791 (Fla. 3d DCA 1991); Davis v. State, 569 So.2d 1317 (Fla. 1st DCA 1990); Gonzalez v. State, 511 So.2d 703 (Fla. 3d DCA 1987); Marshall v. State, 439 So.2d 973 (Fla. 3d DCA 1983).