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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,135

GERALD BRUCE DOWLING,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT

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INTRODUCTION

Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. Petitioner was the defendant in the trial court and the appellant below.

In this brief, the parties will be referred as they appear before this Honorable Court except that Petitioner may also be referred to as the defendant; Respondent may also be referred to as the state.

The following symbols will be used:

"R" Record on Appeal

"T" Trial Transcript

"PB" Petitioner's Brief.

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement *of* Case and Facts as found on pages one (1) through eighteen (18) of Petitioner's initial brief as a generally correct overview of the trial below. Respondent has set forth other facts relevant to the issues raised herein, which may be found in the argument section of the Answer Brief.

QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT HEARSAY STATEMENTS OF THE CHILD VICTIMS PURSUANT TO SECTION 90.803(23) OF THE FLORIDA STATUTES? (RESTATED).

II.

WHETHER THE TRIAL COURT PROPERLY ALLOWED EXPERT TESTIMONY CONCERNING CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME? (RESTATED).

III.

WHETHER THE TRIAL COURT PROPERLY DENIED PETITIONER'S REQUEST TO ADMIT THE RESULT OF A POLYGRAPH EXAMINATION INTO EVIDENCE? (RESTATED).

IV.

WHETHER THE TRIAL COURT PROPERLY ADJUDICATED PETITIONER GUILTY IN ACCORDANCE WITH THE JURY VERDICT? (RESTATED).

SUMMARY OF THE ARGUMENT

I.

The issues presented by Petitioner were resolved in the state's favor by this court's decision in Pardo v. State, 596 So.2d 665 (Fla. 1992). Jurisdictional conflict in the instant case was conceded by the state because State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991), relied upon by the Third District Court of Appeal, was pending before this court at the time jurisdictional briefs were written. See e.g. State v. Lofton, 534 So.2d 1148 (Fla. 1988). Review on the merits is unnecessary as no conflict remains.

Furthermore, the statements complained of were properly admitted pursuant to the hearsay exception founded in §90.803(23) of the Florida Statutes. Section 90.803(23) does not limit the number of witnesses that may be used to present the hearsay statements of a child victim. Nor does §90.803(23) limit presentation of hearsay statements to cases where the child does not take the stand. Implicit in the trial court's ruling that the hearsay testimony of the children would be admitted pursuant to §90.803(23) despite claims of unfair bolstering was a finding that the testimony was more probative than prejudicial. Thus Appellant's point on appeal is without merit.

II.

Because Dr. Bild-Libbin did not expert actually state that the victims were in fact telling the truth nor that Petitioner was in fact the one who abused the children, the expert testimony was properly admitted. Petitioner failed to demonstrate an abuse of discretion in admitting the testimony in the Third District Court, thus reversal on this ground is unwarranted.

III.

Polygraph evidence is not admissible in Florida courts, absent a written stipulation from bath parties, because of the inherent unreliability of polygraph examinations. Thus the trial court properly denied Petitioner's motion to admit polygraph evidence. This is especially true since Petitioner took two exams; once with "inconclusive" results and once with more favorable results.

IV.

Because there was evidence that Petitioner placed his finger "inside" H.M.'s vagina, the jury properly found that Petitioner committed sexual battery upon **H.M.**. The trial court properly adjudicated Petitioner guilty in accordance with the jury verdict.

ARGUMENT

1.

THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT HEARSAY STATEMENTS OF THE CHILD VICTIM PURSUANT TO SECTION 90.803(23) OF THE FLORIDA STATUTES. (RESTATED).

In his brief an jurisdiction, Petitioner alleged that the opinion of the Third District Court in the instant case was in conflict with Kopko v. State, **577 So.2d 956** (Fla. 5th **DCA** 1991). Petitioner relied on the fact that the Third District cited State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991), which had been certified by the Third District to be in direct and express conflict with Kopko and was then pending before this Court, as prima facie evidence of express conflict in the instant **case. At** the time the state's brief on jurisdiction was filed, State v. Pardo, was still pending before this Court. Accordingly, the State agreed that conflict existed pursuant to the controlling authority of State v. Lofton, 534 So.2d 1148 (Fla. 1988), and Jollie v. State, 405 So.2d 418 (Fla. 1981). However, Pardo v. State, **596** So.2d **665 (Fla. 1992),** having been decided on March **26, 1992,** is **no** longer pending before this Court. Respondent submits that the issue to be decided by review in the instant **case**, i.e., conflict between the Third and Fifth District Courts of Appeal, has been settled in favor of the state by the March 26th decision in Pardo v. State.

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Implicit in the trial court's ruling that the hearsay testimony would be admitted pursuant to §90.803(23) and the Third District's affirmance of this ruling on direct appeal despite claims of prejudicial bolstering is a finding that the hearsay testimony **was** more probative than prejudicial. Therefore the Third District Court's opinion in the instant case is in accord with this court's opinion in Pardo. Respondent submits that the instant petition for review based on conflict of decision, **should** be dismissed. See, Stephens v. State, 549 So.2d 187 (Fla. 1989).

Assuming for the sake of argument only, that review of the merits is proper in light of the foregoing, Respondent submits that the trial court properly **allowed** the hearsay testimony into evidence.

On direct appeal, Petitioner argued that the trial court erred in allowing the state to present the **hearsay** statements of the two child victims through numerous witnesses, alleging that such repetitive testimony amounted to impermissible bolstering. Respondent argued that the testimony was properly allowed pursuant to §90.023(23) of the Florida Statutes.

On May 19, 1989, the state filed notice of its intent to rely on hearsay testimony as required by §90.803(23). (R. 55-64). A hearing was held on September 11 and 12, 1989, pursuant to §90.803(23). (T. 1-393). Following **the hearing,** the trial

court ruled that the hearsay testimony proffered by the state fell within the exception created by §90.803(23). (T. 394-400).

Petitioner did not challenge the fact that trial court found the hearsay statements made by the children to the state witnesses to be reliable. Instead, Petitioner complained that the admission of the testimony constituted "unfair bolstering."

Section 90.803(23) provides:

> (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 or neglect, any act of sexual abuse against a child, the offense of child 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, in admissible in evidence in any civil or criminal proceeding if:
>
> > 1. The court finds in a hearing conduct 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 **ox** 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 sever emotional or mental harm, in addition to findings pursuant to s. **90.804(1).**

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

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

Thus, once the trial court finds that the statements are trustworthy or reliable **and** that the criteria of **§90.803(23)** have been satisfied, there is no error in the admission of the statements over a hearsay objection. Pardo v. State, 596 **So.2d** 665 (Fla. **1992); State v. Pardo,** 582 **So.2d 1225** (Fla. **3d DCA** 1991).

In State v. Pardo, the trial court found the child victim's statement to be admissible under §90.803(23), made the requisite findings under the statute, which were not challenged in the appellate court, found that the state intended to call the child victim and found that the child had the ability to testify fully concerning all of the alleged crimes. 582 So.2d at 1226. The trial court, however, found that it was bound to exclude the statements by the authority of Kopka v. State, 577 So.2d 956 (Fla. 5th DCA 1991). 582 So.2d at 1226. The state filed a petition for a writ of certiorari in the Third District Court of Appeal challenging the trial court's ruling. The Third District Court quashed the trial court's order, certified conflict with the Fifth District Court of Appeal, and certified the following question to be of great public importance:

> WHERE A CHILD VICTIM'S HEARSAY STATEMENTS SATISFY SUBSECTION 90.803(23), FLORIDA STATUTES (1989), AND THE CHILD WAS ABLE TO TESTIFY FULLY AT TRIAL, MUST THE STATEMENTS BE EXCLUDED SOLELY BECAUSE THEY ARE PRIOR CONSISTENT STATEMENTS BY THE CHILD, OR IS THE TEST FOR EXCLUSION THAT (SIC) FOUND IN SECTION 90.403, FLORIDA STATUTES (1989)?

State v. Pardo, 582 So.2d at 1228.

On March 26, 1992, this Honorable Court approved the Third District court's ruling that the child victim's hearsay testimony was admissible pursuant to §90.803(23) even though the

child was available to testify at trial as long as the probative value of the testimony outweighed the danger of unfair prejudice. 596 So.2d at 667.

The facts in the instant case are indistinguishable with reference to E.M.'s statements, thus Pardo v. State is controlling. The only difference between Pardo v. State and the instant case with regards to the statements made by H.M. is that the trial court in the instant case found that H.M. was not available to testify inasmuch as her participation in the trial would result in "substantial likelihood of severe emotional or mental harm." (T. 394-400). However, because H.M. testified through close-circuit television, Respondent submits that the facts are nearly indistinguishable and that Pardo v. State is controlling.

Respondent further submits that the statements complained of did provide additional information to the jury since E.M. testified that Petitioner stuck his fingers in her vagina and also that she did not know whether it was in or on her vagina. (T. 1761, 1772, 1821). H.M. testified only that Petitioner touched or tickled her "twinkie." (T. 1963, 1975). The children's mother testified that both children had said that Petitioner had stuck his fingers inside their vaginas. (T. 1920, 1924, 1931, 1946). Dr. Bild-Libbin testified that E.M. told her that Petitioner put his fingers into her vagina and that H.M.

told her that Petitioner put his finger inside her "twinkie." (T. 1999, 2007). Joan Kahn testified that E.M. told her that Petitioner stuck his fingers in her vagina and demonstrated with an anatomically correct doll. (T. 2085-2086). H.M. told Kahn that Petitioner touched her once inside her "twinkie." (T. 2104-2105).

Accordingly, the trial court properly allowed the testimony complained of by Petitioner.

II.

THE TRIAL COURT PROPERLY ALLOWED EXPERT TESTIMONY CONCERNING CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME. (RESTATED).

Petitioner contends that the trial court erred in allowing Dr. Bild-Libbin to testify about the post-traumatic stress and child sexual abuse accommodation syndromes in relation to the instant case because in so doing, the witness expressed an opinion as to Petitioner's guilt and vouched for the victims' credibility. Respondent submits that this contention is without merit.

Dr. Bild-Libbin, an expert in child psychology and child sex abuse cases, testified that she interviewed both children and recounted the allegations of abuse as told by the children. (T. 198-2007). Dr. Bild-Libbin went on to testify that she diagnosed E.M. as having post traumatic stress syndrome, "meaning that she was reported to have a lot of symptomatology such as being scared of the dark, being much more aggressive ..." (T. 2010). After defense counsel objected an the ground that Dr. Bild-Libbin was testifying to facts not in evidence, the doctor explained that the children's mother told her that E.M. "was having symptoms that she was not having before. She was very aggressive. She was having a lot of problems sleeping, nightmares, scratching, like a nervous scratch in head. She was having some problems

with friends relating and that she was going through like a stage that was not typical [E.M.] from before." (T. 2012). Dr. Bild-Libbin further qualified her testimony with an explanation of the syndrome and the DSM III-R, a diagnostic book used by the American Psychiatric Association and by the American Psychological Association. (T. 2012-2013).

Dr. Bild-Libbin explained the child sexual abuse accommodation syndrome to the jury as a "syndrome, meaning a group of symptoms, and a way of explaining the behaviors that we commonly see in children who have been sexually abused". (T. 2014). Dr. Bild-Libbin went on to describe the various stages of the syndrome which children who have been abused may go through. (T. 2016-2025). When Dr. Bild-Libbin was asked if E.M. was in any stage of this syndrome, defense counsel objected, arguing that the jury, having been told about the syndrome, "can put two and two together if they want to." The trial court sustained defense counsel's objection and Dr. Bild-Libbin was not allowed to testify about the syndrome in relation to the victims in the instant case. (T. 2026-2027).

Defense counsel objected to Dr. Bild-Libbin's testimony about the child sexual abuse accommodation syndrome and this objection was sustained. (T. 2026-2027). No curative instruction was requested and, therefore, none was given. A curative instruction is generally sufficient to dissipate the prejudicial

effect of objectionable testimony and absent such a request a defendant may not later complain on appeal. Marshall v. State, 439 So.2d 973 (Fla. 3d DCA 1983); Gonzalez v. State, 511 So.2d 703 (Fla. 3d DCA 1987). Because Petitioner objected to Dr. Bild-Libbin's testimony and the trial court sustained his objection he has already received the relief requested.

A trial court has broad discretion in passing upon the qualifications of an expert and the range of subjects on which an expert may be allowed to testify. Glendening v. State, 536 So.2d 212 (Fla. 1988); Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1982); cert. denied, 436 So.2d 100 (Fla. 1983). A trial court also has broad discretion concerning the admission of evidence generally and a ruling will not be disturbed on appeal absent an abuse of discretion. Jent v. State, 408 So.2d 1024 (Fla. 1981). Although an expert may not vouch for a victim's credibility, an expert opinion as to whether the child was a victim of child abuse. Glendening, 536 So.2d at 220.

To the extent that the testimony complained of expresses the opinion that the children were in fact abused, the testimony is not improper based upon the foregoing authorities. This conclusion is further supported by 890.702 and 890.703. Section 90.702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the

> evidence or in determining a fact in issue a witness qualified as an expert by knowledge, skill experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Section 90.703 adds that expert "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier or fact."

Opinion testimony on the post-traumatic stress syndrome is helpful to the jury in providing mare information from which to decide whether the children, particularly E.M., had been the victims of sexual abuse. The testimony connected E.M.'s change in behavior, described by her parents, to the trauma of the abuse, described by E.M. in court and to various investigators and health care workers. See Terry v. State, 467 So.2d 761 (Fla. 4th DCA 1985) (evidence relating to the battered women's syndrome relevant to claim of self defense in manslaughter prasecution and helpful to jury in interpreting circumstances surrounding the incident). See also Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986).

The testimony of Dr. Bild-Libbin was more in the nature of an expert opinion that trauma was a reasonable explanation for E.M.'s behavioral problems, than a legal canclusion that

Petitioner in fact abused E.M.. See North v. State, 65 So.2d 77, 87 (Fla. 1952); Kruse v. State, 483 So.2d at 1383; Ferradus v. State, 434 So.2d 24 (Fla. 3d DCA 1983).

Because Petitioner has failed to demonstrate an abuse of discretion in the admission of the testimony on the two syndromes, and because neither witness actually stated that Petitioner in fact abused the children OK that the children were in fact telling the truth, this point on appeal is without merit.

III.

THE TRIAL COURT PROPERLY DENIED PETITIONER'S REQUEST TO ADMIT THE RESULT OF A POLYGRAPH EXAMINATION INTO EVIDENCE. (Restated).

Petitioner contends that the trial court erred in not allowing him to present evidence of a polygraph examination allegedly passed by him. Respondent submits that this contention is without merit.

During the hearing on the state's motion to admit hearsay statements of the child victims, defense counsel mentioned the fact that he had listed a George Slattery as a witness for the defense. (T. 339-340). Defense counsel informed the court that Slattery was a polygraph examiner and security consultant and that Appellant took a test with Slattery and "passed it." (T. 340). Defense counsel acknowledged that the results of the test were inadmissible over objection by the state, but asked the court to "find him more reliable at this stage of the game and at this date so you can admit his testimony." (T. 341).

The matter was raised again nearly two months later when defense counsel filed a motion to admit polygraph evidence. (R. 92-94). At a hearing on the matter, defense counsel argued that the trial court should conduct "a Frye hearing" as suggested by a then recently decided federal case, United States v. Piccinonna,

885 F.2d 1529 (11th Cir. 1989). (T. 449-450). The State objected to defense counsel's request for a hearing, arguing that this Court had found polygraph evidence to be unreliable and inadmissible absent the written stipulation of both parties. (T. 451). The State also argued that inasmuch as the testimony would be presented merely to corroborate Petitioner's denials and bolster Petitioner's testimony, Petitioner could not satisfy the three part test set out in United States v. Piccinonna, (T. 451-454). *See* United States v. Piccinonna, 885 F.2d at 536.

In response to the foregoing arguments, the trial court stated:

> I would like to listen, I do not like to cut anyone off. But as far as your proffer is concerned, I do not think it would make any difference if I follow the Florida law and say we are not going to admit polygraph evidence
>
> . . .
>
> Florida has never recognized that a polygraph is of such expertise, and I'm not willing to listen to a polygraph operator testify and tell me it is of such expertise and change Florida law.

(T. 455-456). Defense counsel's motion to admit polygraph evidence was denied and the State's motion to prohibit mention of the polygraph was granted. (T. 456-457; R. 92-96).

Petitioner acknowledges that the results of polygraph examinations are held inadmissible in the State of Florida absent the written stipulation of both parties. (PB. **43**). This is so because polygraph examinations are considered unreliable. Delap v. State, **440 So.2d 1242** (Fla. **1983);** Farmer v. City of Fort Lauderdale, 427 So.2d 187 (Fla. 1983); Davis **v.** State, **516 So.2d** 953 (Fla. 4th **DCA** 1986).

Petitioner argues that he was deprived of an opportunity to present testimony in support of his contention that polygraph examinations are more scientifically reliable than they once were in accordance with United States v. Piccinonna, **885** F.2d at 1529. Respondent submits that Piccinonna is not controlling and that the trial court properly followed Florida law in excluding the proffered testimony and mention of the fact that Petitioner "passed" **a** polygraph examination. This is especially true since Petitioner by his own admission, took two tests; once with "inconclusive" results and the other with more favorable results. (R. 92-94). This fact alone demonstrates the inherent unreliability in polygraph examinations. Thus, assuming only for the sake of argument that the trial court erred in refusing to conduct a "Frye hearing," the error was harmless.

XV.

THE TRIAL COURT PROPERLY ADJUDICATED PETITIONER GUILTY IN ACCORDANCE WITH THE JURY VERDICT. (Restated).

Petitioner contends that the trial court erred in adjudicating him guilty of committing a sexual battery on H.M. as charged in Count I of the information, arguing that the state failed to prove penetration as required. Respondent submits that this argument is without merit.

Petitioner correctly asserts that penetration is an essential element of sexual battery with an object other than a sexual organ. (PB. 46). However, even the slightest evidence of penetration, even "partial" penetration, is sufficient to sustain a conviction for sexual battery. See JWC v. State, 573 So.2d 1064 (Fla. 5th DCA 1991); Pride v. State, 511 So.2d 1068 (Fla. 1st DCA 1987).

Petitioner contends that the hearsay statements made by H.M. to her mother, Paul Dolnick, Dr. Bild-Libbin and Joan Kahn together with Dr. Dorothy Hicks' testimony that H.M.'s hymen "presented two 'notches'" which were "consistent with digital manipulation of the vagina area" and H.M.'s testimony that Petitioner touched her "twinkie" is insufficient to establish a sexual battery on H.M. Respondent submits that the physical

evidence together with H.M.'s statements to her mother, et. al.,
are in fact sufficient. See Davis v. State, 569 So.2d 1317 (Fla.
1st DCA 1990).

Accordingly, the Third District Court properly found that
the trial court did not err in adjudicating Petitioner guilty in
accordance with the jury's verdict.

CONCLUSION

WHEREFORE based upon the foregoing reasons and authorities cited herein, Respondent **respectfully** requests that Petitioner's judgment **and** sentence below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF **RESPONDENT was** furnished by mail to **LOUIS** CAMPBELL, Assistant Public Defender, **OFFICE** OF **THE PUBLIC** DEFENDER, 1351 N. W. 12th Street, Miami, Florida 33125 on this 15th **day of July, 1992.**

per phone call to Zayas

ANGELICA D. ZAYAS
Assistant Attorney General

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