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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,162

RAFAEL JOSE PUERTAS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This is a petition for discretionary review of the decision of the District Court of Appeal, Third District, in Puertas v. State, decided on December 24, 1991, and in express and direct conflict with Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991). "R" refers to the record on appeal, "T" to the transcript of proceedings. The petitioner will be referred to herein as "the defendant", and the respondent as "the State."

QUESTIONS PRESENTED

(Restated)

I.

WHETHER THE TRIAL COURT ERRED IN ADMITTING CHILD HEARSAY STATEMENTS IN A PROSECUTION FOR SEXUAL BATTERY OF THE CHILD AND IN ALLOWING VIDEOTAPED, AS WELL AS LIVE, TESTIMONY OF THE CHILD.

II.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON TWO COUNTS OF SEXUAL BATTERY USING THE HANDS OR FINGERS.

STATEMENT OF THE CASE AND FACTS

The defendant was charged by information on March 20, 1990, with four counts of sexual battery and two counts of lewd assault against Y.P., a then-8-year-old child. (R. 1-6). Three of the sexual battery charges involved penetration of the vagina with finger or hand. (R. 2-4).

Prior to trial on the charges, the Honorable Arthur Rothenberg entered an order finding hearsay testimony of the child's statements admissible even though the child would testify at trial via television.[1] (T. 3-4). The matter came on for trial before the Honorable Thomas M. Carney on October 15, 1990. (T. 1). At trial, the State presented testimony by Anna Torrance, Y.P.'s third grade teacher (T. 158); Anelle Wilson, her school counselor at Royal Green Elementary (T. 209); Ellen Christopher, a Miami-Dade sexual battery unit detective (T. 237); Valerie Rao, a forensic pathologist with the Rape Treatment Center (T. 269); the child's mother, Daisy Polo (T. 303); and Mercy Restani, an interviewer with the State Attorney's Children's Center (T. 331). All of these witnesses testified as to their personal knowledge of the facts synopsized below.

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[1] The record on appeal contains neither the motion in limine filed regarding the child hearsay matter, nor a transcript of the hearing held on the motion, nor the order entered by Judge Rothenberg. However, there appears to be no issue as to whether or not these events occurred; the issue on appeal involves only the propriety vel non of the order.

On February 16, 1990, Y.P.'s teacher read a story to the students titled "Maggie and the Monster," in which a child struggles every night in her room with a monster that her mother will not believe exists. (T. 164-166). Noticing hysterical tears from Y.P., the teacher took her and her very concerned best friend aside and was able to determine from Y.P. that a close friend of Y.P.'s father, Rafael Puertas, had raped her. (T. 166-177). The school counselor, called in to help, questioned Y.P. in order to determine whether sexual abuse had occurred, thus requiring a report to HRS. (T. 215). The child said that the advances by the family friend had continued over a period of time. (T. 214). The counselor reported to HRS, summarizing what Y.P. had told her. (T. 226, 231).

A detective with the sexual battery section of Miami-Dade Police Department got a call from HRS about 9:00 that evening and arranged for Y.P. and her mother to go to Jackson Memorial Hospital's Rape Treatment Center for examination. (T. 237-239). Y.P. told the detective that Rafael lived in her apartment complex, had a wife and two children, and had placed his hand in her vaginal area. (T. 243-244). Other times, he had put his penis on her vagina in a closet and had placed his hand on her vagina in the swimming pool. (T. 244-245). A forensic pathologist at Jackson's Rape Treatment Center testified that Y.P. said that Rafael "touched her pee-pee with his pee-pee" several times. (T. 277). Her medical examination determined

that Y.P. exhibited healed tears of the hymen consistent with an insertion or attempted insertion of penis or fingers. (T. 277-280). The injuries she observed were "inside, not outside" and could not happen without anyone touching the labia. (T. 281-282). On cross examination, the doctor stated that there was no evidence of penile penetration (T. 290) and that a child's own fingers could break the hymen. (T. 294-295).

An interviewer for the State Attorney's Children's Center videotaped her interview with Y.P. (T. 338). Y.P. told her that the man's name was Rafael Puertas, that he had touched her vagina four times with his hand, finger and/or penis inside her clothes or with her panties and shorts lowered. (T. 341-346). The jury was shown the videotape and provided with a transcript. (T. 341; R. 56-67). The defendant showed the tape a second time during cross examination of the interviewer. (T. 362). Also during cross examination, the defense asked for a clarification of questions asked the child by the interviewer as to whether the defendant had touched her "outside" or "inside" on an occasion at her apartment:

> Q. What was it you meant, then, when you were talking to the child and you were suggesting was it inside or outside?
>
> A. I gave her an option. I said, was it on the inside or outside? And she said inside on several occasions.
>
> On another occasion when she was talking about the other situation she was talking

about on the inside. So she clarified it when I asked inside or outside touching.

(T. 353-354).

Y.P. testified live by television from another room; she told her story as she had told it to the others. (T. 377-392). Included in her testimony were the following statements or exchanges:

Q. When you say touched you on your pee-pee, was that with his hands?

A. Yes.

Q. Was it on the outside or inside?

A. Inside.

(T. 386).

A. He put his thing inside my pee-pee.

(T. 387).

Q. When he put his hand inside your bathing suit and touched you, was it inside or outside your pee-pee?

A. Inside.

(T. 389).

A. He touched me in my pee-pee with his hands [in the Florida room near the television set].

(T. 391).

When the State rested, the defense moved for judgment of acquittal on all counts; the trial court denied the motion.

(T. 474, 478). The guilty verdict on two of the sexual battery charges resulted in this appeal.

SUMMARY OF THE ARGUMENT

The question presented here regarding child hearsay statements is identical to that recently decided by this court in Pardo v. State, 17 F.L.W. S194 (Fla. Mar. 26, 1992). On virtually identical facts, this court disapproved the holding of the Fifth District in Kopko v. State and concluded that if, as here, the criteria of section 90.803(23), Florida Statutes, are met, the child victim's statements cannot be excluded as hearsay. Pardo governs the issue here and must result in affirmance of the decision of the Third District in the instant case.

A trial court should not grant a motion for judgment of acquittal unless the evidence is such that no view which the fact finder may lawfully take of it favorable to the non-moving party can be sustained under the law. The specific, unequivocal testimony of the victim that the defendant touched her inside her vagina was amply sufficient to survive such a motion. Affirmance is thus also required on this issue.

ARGUMENT

I.

THE TRIAL COURT WAS CORRECT IN ADMITTING CHILD HEARSAY STATEMENTS IN A PROSECUTION FOR SEXUAL BATTERY OF THE CHILD AND IN ALLOWING VIDEOTAPED, AS WELL AS LIVE, TESTIMONY OF THE CHILD.

The question presented here is identical to that presented to the District Court of Appeal, Third District, in State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991), and very recently decided by this court in Pardo v. State, 17 F.L.W. S194 (Fla. Mar. 26, 1992). That question is "[w]here a child victim's hearsay statements satisfy subsection 90.803(23), Florida Statutes (1989), and the child is able to testify fully at trial, must the hearsay statements be excluded solely because they are prior consistent statement [sic] by the child, or is the test for exclusion that found in section 90.403, Florida Statutes 1989?" Pardo, 17 F.L.W. at S195. Section 90.803(23) provides the procedure by which a trial court shall determine that out-of-court statements by a child victim aged 11 or less are sufficiently reliable to be admitted whether the child testifies or is unavailable.[2]

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[2] (23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM OF SEXUAL ABUSE OR SEXUAL OFFENSE AGAINST CHILD-

> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement

made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing an act of child abuse, sexual abuse or any other offense involving an unlawful sexual act, contact, intrusion or penetration performed in the presence of, with, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if

1. The court finds in a hearing conducted outside the presence of the jury that time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(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

In Pardo, the State, following the statutory procedures set out in the margin, filed notices to rely on child hearsay statements made to several individuals, including a counselor, the rape treatment center physician, and the state attorney children's center interviewer. The trial court held the required hearing, made the requisite findings regarding reliability, and further determined that the child herself was competent to testify fully as to the offenses. Id. at 1791. Having made these determinations, however, the trial court excluded the hearsay statements under the erroneous belief that it was required to do so by the holding of a Fifth District Court of Appeal decision. See Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991).

The Third District reviewed the trial court's decision in Pardo first by observing that decisions of other district courts of appeal "are deserving of careful consideration by trial courts in this district, but are not binding on them." Pardo, 582 So.2d at 1227. Thus, the Third District found that, although the Pardo trial court properly fulfilled its obligation to consider all pertinent authority, "there were sound reasons to disagree with the Kopko decision, and the trial court was entitled to do so."

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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.

§90.803(23), Fla. Stat. (1989).

Id. In reviewing the Third District's decision, this court held that the Third District had erred in such a finding, stating that "in the absence of interdistrict conflict, a district court's decisions bind all Florida trial courts." Pardo, 17 F.L.W. at S195.

On the merits of the issue, however, the Third District observed that the plain language of subsection 90.803(23), as well as its placement within section 90.803 finding hearsay exceptions invocable whether or not the declarant is available to testify, demands that if the criteria of subsection (23) are met, the child victim's statements cannot be excluded as hearsay. Holding that it was error then to exclude the statement on the basis of Kopko and observing that the danger of unfair prejudice could be weighed more properly upon a motion under section 90.403, the Third District certified express and direct conflict with Kopko. That holding was upheld by this court in its review of Pardo, approving the Third District's reasoning and result and disapproving the conflicting decision of the Fifth District in Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991). Pardo, 17 F.L.W. at S196.

There is no appreciable distinction between the instant case and Pardo. The trial court below determined that the child's statements to her teacher, school counselor, rape treatment center physician, and state attorney children's center

interviewer met the criteria of subsection 90.803(23). The trial court was correct in concluding as it did, and as did both this court and the Third District, from the plain statutory language and scheme, that Y.P.'s statements were not excludable on hearsay grounds. No other motion was before the trial court upon which exclusion could be based. See Pardo, 582 So.2d at 1228 (suggesting that motion under section 90.403 is the appropriate mechanism).

As he did in the Third District below, the defendant raises as a sub-issue in this court the admission of a videotaped interview of the victim. Other than the hearsay objections dealt with above, the record fails to reveal any instance prior to this appeal in which the defendant challenged the admissibility of the videotaped evidence. He cannot, then, be heard to complain of same for the first time on appeal. See Tillman v. State, 471 So.2d 32 (Fla. 1985). Moreover, it is important to note that the defendant not only failed to object on that ground at trial but also went so far as to play the tape a second time for the jury during his cross-examination of the witness. Finally, the cases that he cites in apparent support of his appellate objection to the videotape evidence fail to provide even a modicum of support: none relates to live testimony following videotape and none is governed by the hearsay exception of section 90.803(23), relevant here. See Van Gallon v. State, 50 So.2d 882 (Fla. 1951)(prior to adoption of statute); Keller v. State, 16 F.L.W. 2009 (Fla. 5th

DCA August 1, 1991)(child victim older than eleven); Allison v. State, 162 So.2d 922 (Fla. 1st DCA 1964)(prior to adoption of statute).

Thus, this court's recent decision in Pardo governs the issue here and must result in affirmance of the decision of the Third District.

II.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON TWO COUNTS OF SEXUAL BATTERY USING THE HANDS OR FINGERS.

The defendant claims that the State failed to meet its burden of proof to show that the defendant penetrated the victim's vagina with his finger or hand as charged in Counts Two and Three of the information. It is well settled that a trial court should not grant a motion for judgment of acquittal unless the evidence is such that no view which the fact finder may lawfully take of it favorable to the opposite party can be sustained under the law. Lynch v. State, 293 So.2d 44 (Fla. 1974); Mitchell v. State, 493 So.2d 1058 (Fla. 1st DCA 1986). On appeal of the denial of such a motion, all facts in evidence are deemed admitted by the defendant and every conclusion favorable to the State must be drawn. Jones v. State, 446 So.2d 301 (Fla. 3d DCA 1985).

It is difficult to imagine more specific testimony to the fact of the defendant's digital penetration of his victim than that given by Y.P. herself:

> Q. What was it you meant, then, when you were talking to the child and you were suggesting was it inside or outside?
>
> A. I gave her an option. I said, was it on the inside or outside? And she said inside on several occasions.

> On another occasion when she was talking about the other situation she was talking about on the inside. So she clarified it when I asked inside or outside touching.

(T. 353-354)[hearsay statement].

> Q. When you say touched you on your pee-pee, was that with his hands?
>
> A. Yes.
>
> Q. Was it on the outside or inside?
>
> A. Inside.

(T. 386).

> A. [by Y.P.] He put his thing inside my pee-pee.

(T. 387).

> Q. When he put his hand inside your bathing suit and touched you, was it inside or outside your pee-pee?
>
> A. [by Y.P.] Inside.

(T. 389).

> A. [by Y.P.] He touched me in my pee-pee with his hands [in the Florida room near the television set].

(T. 391).

This unequivocal testimony alone was amply sufficient to survive a motion for judgment of acquittal in order to take the case to the jury. Thus, the Third District's refusal to reverse on this issue was correct and must be affirmed by this court.

CONCLUSION

Based on the foregoing analysis and citation of authority, the State respectfully submits that the decision of the Third District below should 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 ON THE MERITS** was furnished by mail to **MIGUEL SAN PEDRO, ESQ.**, Law Offices of Miguel San Pedro, P.A., Four Ambassadors, Tower IV, Suite 566, 801 South Bayshore Drive, Miami, Florida 33131, on this 13th day of May, 1992.

JOAN L. GREENBERG
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