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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

VS. CASE NO. 79,233

CHARLES R. PHILLIPS, SR.,

Respondent.
_____/

RESPONDENT'S
AMENDED BRIEF ON THE MERITS

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TABLE OF AUTHORITIES

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

The parties will be referred to herein as they stand before this Court. Charles R. Phillips, Sr. was the defendant in the trial court, the appellant in the First District Court of Appeal and is the Respondent in this appeal; the State of Florida was the plaintiff in the trial court, the appellee in the First District Court of Appeal and is the Petitioner in this appeal.

References to the transcript of the record on appeal will be designated "(TR___)" followed by the appropriate page number.

References to Petitioner's Brief on the Merits will be designated "(PB___)" followed by the appropriate page number.

CORRECTED STATEMENT OF THE CASE AND FACTS

Pursuant to the state's motion for certification, the First District Court of Appeal certified to this Court the following two questions:

1. IS EXPERT SCIENTIFIC TESTIMONY WHICH DOES NOT MEET THE TEST OF FRYE V. UNITED STATES, 293 F. 1013 (D.C. CIR. 1923) FOR ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE OTHERWISE ADMISSIBLE AS BACKGROUND INFORMATION IN A CRIMINAL TRIAL?

2. IS PEDOPHILE/CHILD SEX OFFENDER PROFILE EVIDENCE ADMISSIBLE IN A CRIMINAL TRIAL?

Respondent was originally charged with two counts of sexual battery upon a child under the age of 12, NM, contrary to Fla. Stat. 794.0112 and one count of committing a lewd and lascivious act in the presence of child under 16, NM, contrary to Fla. Stat. 800.04 in Case No. 90-400; Respondent was also charged with committing a lewd and lascivious assault upon a child under the age of 16, HG, contrary to Fla. Stat. 800.04, under Case No. 90-401; Respondent was further charged with committing a lewd and lascivious assault upon a child under the age of 16, CM, contrary to Fla. Stat. 800.04, under Case No. 90-402. Respondent was found not guilty of the charges in Case Nos. 90-401 and 90-402 but was found guilty under Counts I, II and III of Case No. 90-400 (TR 470-471) however his motion for judgment of acquittal as to Count III was granted by the trial court (TR 675).

On appeal, Respondent argued that the trial court erred in not granting a judgment of acquittal as to Count II of the Information and although not addressed by the district court of

appeal because of its ruling on Point I, that court did state, under fn. 1, p. 2 of the opinion:

> "The victim's testimony established the commission of one sexual battery, but not the other." Phillips v. State, ____ So.2d. ____ (_____),16 FLW 2786, fn. 1 (Fla. 1st DCA, November 4, 1991)

In addition to the two questions certified by the First District Court of Appeal, Petitioner raised two other issues in his brief and accordingly this amended brief will address not only the two questions certified by the First District Court of Appeal but also the two issues added by Petitioner.

Respondent accepts Petitioner's statement of the facts.

SUMMARY OF ARGUMENT

ISSUE I

RESPONDENT PROPERLY PRESERVED THE ISSUE OF THE ADMISSIBILITY OF PEDOPHILE PROFILE EVIDENCE FOR APPELLATE REVIEW.

Pedophile profile testimony is improper evidence of a defendant's character and an objection based on relevance is clearly the proper objection and suffices to preserve the issue for appellate review.

ISSUE II

CERTIFIED QUESTION NO.1: IS EXPERT SCIENTIFIC TESTIMONY WHICH DOES NOT MEET THE TEST OF FRYE V. UNITED STATES, 293 F. 1013 (D.C. Cir. 1923), FOR ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE OTHERWISE ADMISSIBLE AS BACKGROUND INFORMATION IN A CRIMINAL TRIAL?

The court should answer Certified Question No. 1 in the negative and continue to prohibit expert scientific testimony which does not meet the Frye test from being introduced in a criminal trial. To do otherwise would create confusion and uncertainty among the district courts of appeal and trial courts regarding the admissibility of expert scientific testimony. Furthermore, it will create a new exception to the evidence code: the background information exception, which will have no parameters.

ISSUE III

CERTIFIED QUESTION NO.2: IS PEDOPHILE/CHILD SEX OFFENDER PROFILE EVIDENCE ADMISSIBLE IN A CRIMINAL TRIAL?

The court should also answer Certified Question No. 2 in the negative. To do otherwise would violate Sections 90.403 And 90.404, Florida Evidence Code. Petitioner's position that this testimony is admissible as anticipatory rehabilitation of the victim is untenable and clearly not supported by any legal reasoning. Anticipatory rehabilitation only permits a departure from the order in which admissible evidence may be presented at trial and does not permit the use of evidence in violation of the evidence code.

ISSUE IV

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE STATE'S MOTION IN LIMINE.

Petitioner attempted to prohibit Respondent from introducing testimony the child victim had been molested by a third party around the time she complained of Respondent's misconduct which led to these charges. The trial court did not abuse its discretion in denying the state's motion in limine.

ISSUE I

RESPONDENT PROPERLY PRESERVED THE ISSUE OF THE ADMISSIBILITY OF PEDOPHILE PROFILE EVIDENCE FOR APPELLATE REVIEW.

Petitioner's contention that the objection based on relevance was not specific enough cannot pass muster. In point of fact, pedophile profile testimony is evidence of a defendant's character[1] and the proper objection to make is one based on relevance. For example, in Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965), a police officer testified that the defendant told him he had been on probation, which testimony, of course, would serve "...only to impeach the character of the accused,..." (at p. 422). The Court there noted as follows:

> "So the question confronting the trial judge was that of the relevancy of the testimony of the officer as to the statements made by the defendant..." (p. 422, emp. sup.)

Clearly then improper character evidence is irrelevant and the objection was sufficient to preserve the issue for appeal.

This same claim on nonspecificity was made by the state in Anderson v. State, 546 So.2d 65 (Fla. 5th DCA 1989), when the defense attorney objected to the prosecutor asking the defendant, on cross examination, if he would ever possess cocaine. On appeal the state claimed that the objection should have been on the grounds of improper impeachment rather than relevance but the court there noted

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[1] Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), rev. den., 576 So.2d 286 (Fla. 1991); Francis v. State, 512 So.2d 280 (Fla. 2nd DCA 1987).

that the question was improper "...because the propensity of the witness to possess cocaine is not proper impeachment under Rule [sic] 90.610 and is therefore irrelevant." (p. 67; emp sup.).

See also, Jackson v. State, 451 So.2d 458 (Fla. 1984), where an objection on the grounds of relevance was held sufficient to preserve for review the issue of the admissibility of improper character evidence of the defendant.

Glendening v. State, 536 So.2d 212 (Fla. 1988), cert. den., 492 U.S. 907 (1989), may be instructive, as Petitioner claims, but it certainly is not applicable to the instant case. In Glendening, the testimony of a psychologist that in his expert opinion a child victim's allegation was based upon independent recall rather than improper prompting and to this, defense counsel objected on relevance grounds rather than improper vouching for the credibility of a hearsay declarant (at p. 221). That is not the case here. That is, Dr. DeMaria's testimony below was not an opinion of the child victim's "truthfulness" but rather, with the prosecutor as a conduit[2], was a character attack upon Respondent.

In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), also relied upon by Petitioner, the objection in the trial court was to the trial court's prohibition of cross examination of a state witness

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[2] See the prosecutor's closing argument below where after reviewing the many factors of a pedofile she stated:

> "And the defendant had that combination of factors, and it's clear from all the evidence that has been presented that the defendant did cross that line, did fool with those children." (TR 402)

based on its relevance to the witness' credibility, as argued by defense counsel. On appeal, the defendant argued that the question went to the defendant's theory of defense - the state witness was protecting the real murderer. Although this Court there stated that an objection should be specific, it did go on to say that even if the "newly raised" argument were considered, it had no merit (at p. 318).

The test for specificity of an objection was set out by this Court in Castor v. State, 365 So.2d 701 (Fla. 1978):

> "To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." (p. 703; cites omitted)

Williams v. State, 414 So.2d 509 (Fla. 1982), is truly instructive. There, this Court reversed the decision of the First District Court of Appeal, who had opined that the defendant had failed to preserve for appeal the issue of the constitutionality of a statute because there was no definite constitutional issue asserted nor was there a ruling by the trial court[3]. After holding that the objection passed the "Castor test", even though specificity was lacking, this Court there noted:

> "...magic words are not needed to make a proper objection,..." (at. p. 512)

Accordingly, the grounds of relevance are in fact the proper and specific legal basis for the objection and, most

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[3] Williams v. State, 378 So.2d 837, 838 (Fla. 1st DCA 1979)

certainly, was sufficient to apprise the trial judge and to preserve the issue for intelligent appellate review.

ISSUE II

CERTIFIED QUESTION NO.1: IS EXPERT SCIENTIFIC TESTIMONY WHICH DOES NOT MEET THE TEST OF FRYE V. UNITED STATES, 293 F. 1013 (D.C. Cir. 1923), FOR ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE OTHERWISE ADMISSIBLE AS BACKGROUND INFORMATION IN A CRIMINAL TRIAL?

Petitioner refuses to address the certified question as worded because it is clear that pedophile profile testimony cannot pass muster under the Frye Test and wants this Court to carve out an exception which it labels "background information" and that should not be done.

Since 1952, this Court has adhered to the Frye Test for admissibility of novel scientific evidence in a criminal trial.[4] While there has been some uncertainty by the District Courts of Appeal over the years regarding the application of the Frye Test, they were laid to rest in Stokes v. State, 548 So.2d 188 (Fla. 1989), where this Court applied the Frye Test to the question of admissibility of post-hypnotic testimony. If this Court answers certified question no. 1 in the affirmative, it will not only revive the uncertainty prior to Stokes, but will add to the confusion by permitting a "background information exception" to the Frye Test. This exception would be without guidelines or restrictions, except for the broad discretion of each and every trial judge, to then be reviewed by the appellate courts.

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[4] Kaminski v. State, 63 So.2d 339 (Fla. 1952).

The real problem with creating such an exception would be the blurring of the distinction between true background information and "background information" that clearly suggests a defendant is guilty. For example, in United States v. Hall, 653 F.2d 1002 (5th Cir. 1981), a DEA agent offered reasons why, in a drug conspiracy case, it is difficult to make controlled buys and seizures of drugs from drug dealers insulated in the higher echelons of drug conspiracies. The court there noted that the "expert testimony" improperly suggested to the jury that the defendant was a high-ranking conspirator. In reversing, the court stated:

> "The risk of unfair prejudice inherent in such damning generalities--alone enough to warrant reversal, see Fed.R.Ev. 403--is exacerbated by the nature of the testimony itself." (p. 1007.)

Fed.R.Ev. 403 is the counterpart to Sect.90.403, Fla.Evid.Code.

Consider also the case of Cal v. Renfro, Cal.Ct.App. 3d Dist., (Opinion January 29, 1992, 50 Crl 1469), where the court held that the introduction of a hypothetical child molester profile that "strikingly" resembled the defendant was egregious error.

On the other hand, true background information (which does not suggest guilt) does not invoke the Frye Test, e.g., United States v. Carson, 702 F.2d. 351, 369 (2d Cir.1983) (clandestine manner in which drugs are bought and sold; United States v. Johnson, 575 F.2d. 1347, 1360-1361 (5th Cir.1978), cert.denied, 99 S.Ct. 1213 (1979) (source of marijuana); United States v. Clark, 498 F.2d. 535, 536-37 (2d Cir.1974) (street value of heroin); United States v. Feldman, 788 F.2d. 544, 554 (9th Cir.1986) (percentage of bank robberies

wherein surveillance cameras do not work; percentage of bank robberies wherein fingerprints are recovered).

True background information does not in and of itself condemn the person on trial. What could be more damning than to have an expert witness explain "for educational purposes" the workings of a child molester? Clearly that would be more prejudicial than an expert explaining the battering parent syndrome in a non-sexual child abuse case and here is what one analyst said of that type of testimony:

> "By identifying the defendant as one who manifests characteristics of battering parents, the expert places the defendant in a most loathsome class. Theoretically, the evidence is irrelevant because it does no more than associate the defendant with a class of persons who, in the expert's opinion, often abuse children. Realistically, however, the evidence simple stamps the defendant with the scientific community's imprimatur of guilt. The expert's opinion forces into a statistical framework the collected character traits upon which lay persons commonly base their character judgments. Unfortunately, a jury confronted with such evidence may be dazzled by the expert and forget the impossibility of predicting human behavior a reasonable doubt.
>
> * * *
>
> As such evidence places the defendant within a class of typical child abusers, however, it provides the quintessential example of trying defendants for who they are, rather than for what they have done. The expert can add nothing positive to the jury's understanding of defendants' character traits, but can tremendously prejudice these defendants by statistically declaring them child abusers.
>
> In their laudable fervor to punish child abuse, courts still must adhere to fundamental rules of

> evidence. The rules exist to guarantee fair results based on objective standards. The odium with which the public views certain offenses cannot justify deviating from evidentiary norms." Battered Child Syndrome: Evidence of Prior Acts in Disguise, 41 U.Fla.L.Rev. 345, 366-367 (1989)

If this court creates an exception to the Frye Test for admissibility of novel scientific evidence, it will only cause confusion and uncertainty in the lower courts, not to mention the additional time and cost. In Lamazares v. Valdez, 353 So.2d 1257 (Fla. 3d DCA 1978), an automobile accident case, the trial judge permitted a psychiatrist and psychologist to testify that the plaintiff was untruthful and he was liable to make a mistake or misjudgment in his driving ability to react to accident circumstances. On appeal, the defendant claimed the trial judge was correct because ". . . the science of psychology has advanced far enough to allow its use in litigation when the trial court determines in its broad discretion that such testimony is competent and relevant." (P. 1258; cites omitted). The court first noted that it was not ". . . yet ready to accept the conclusion reached in the scholarly articles cited by appellee." (Id.) The court then went on to comment:

> To allow such evidence would open a new area of speculation in the search for the truth, complicate the issues now and historically entrusted to the triers of fact, and add great costs to litigation which is already approaching prohibitive figures. (Id.)

The same analysis applies in this case if the court creates a background information exception to the Frye test. Accordingly, this Court should answer certified question no. 1 in the negative.

ISSUE III

CERTIFIED QUESTION NO.2: IS PEDOPHILE/CHILD SEX OFFENDER PROFILE EVIDENCE ADMISSIBLE IN A CRIMINAL TRIAL?

The State claims pedophile/profile testimony was admissible to "anticipatorally rehabilitate the victim's testimony." (PB 16) - a novel approach! Rather than offer evidence to explain a prior inconsistency or a prior conviction, the State suggests that this Court should approve a new method of anticipatory rehabilitation without consideration of the Evidence Code.

For example, profile or syndrome evidence may be admissible to explain inconsistent conduct by a victim of sexual abuse, i.e., delay in reporting abuse. Here the State attempts to introduce it to explain the defendant's conduct.

In Bell v. State, 491 So.2d 537 (Fla. 1986), this Court approved the use of anticipatory rehabilitation ". . . to take the wind out of the sails of a defense attack on the witness's credibility" (at p. 538) and permitted the prosecutor to elicit from a state witness that he initially lied to protect the defendant. In so approving, this Court noted that there was "no violation to the Evidence Code . . ." (Id.)

In Lawhorne v. State, 500 So.2d 519 (Fla. 1986), this Court held that it was error for the trial judge to prevent defense counsel from asking the defendant, during direct examination, if he had gone to trial in the cases in which he had been convicted. This Court there noted: "We do not find that the proffered testimony was

impermissible under the Evidence Code as an attempt to establish credibility on the ground of truthfulness on previous occasions. . . . nor do the provisions on evidence of character or traits of character appear to pertain to the testimony here in question" (at p. 523, cites omitted).

The principle of anticipatory rehabilitation does not provide for an exception to the rules of evidence:

> What Bell permitted was a departure from the order in which admissible evidence may be presented according to the Evidence Code. Bell does not sanction the use for anticipatory rehabilitation of evidence which is inadmissible because of constitutional violations of due process. Johnson v. State, 566 So.2d 888, 890 (Fla. 4th DCA 1990).

Sections 90.403 and 90.404, Florida Statutes, clearly prohibit the introduction of this testimony.

For the State to contend that Dr. DeMaria's testimony ". . . in no way pointed to Respondent as the perpetrator" (PB 16) completely overlooks the record below. The First District Court of Appeal noted as follows:

> "While Dr. DeMaria in his testimony did not directly link the pedophile profile to appellant, the state unmistakably did. In closing argument, the prosecuting attorney stated:"
>
> 'Going back to what Dr. DeMaria said, you heard he was an expert in his field, particular[sic] dealing with sexual victims and their perpetrators. He told you about the two types of pedophiles that there were. There were aggressive pedophiles and fixated pedophiles. The defense will probably tell you that there is no way that this man can do this to these children because he's married. Well, you heard Dr. DeMaria say that one of the pedophiles is

the regressed pedophile, and the regressed pedophile is often married. Just because you're married does not mean you're a pedophile -- that you're not a pedophile, excuse me, as the defense would probably have you believe. Then he told you about some of the things that pedophiles do or some of the things they think about. He told you they fantasize about having sex with children. Its constantly on their mind. He told you that they read books about sex with children, they watch movies or videos and that sometimes they need a release for that. Sometimes it can be masturbation and sometimes it can go further, which is the actual touching of the children. He told you that when pedophiles are playing with children, they get sexual feelings from playing with children. He told you that they try to deny their feelings so that they think hey, I'm normal, everybody thinks like this. And he told you they put themselves in situations where they have ready access to children, which is exactly what Mr. Phillips did, opened his home for baby-sitting so he could have ready access to children. And then, once again, as Dr. DeMaria told you with pedophiles it starts out with love, but it crosses the line, and the State submits that's exactly what happened here.'

"And again, the prosecutor argued:"

'As Dr. DeMaria said, they try to generalize their feelings and believe that everybody thinks things like that. And when he [appellant] was talking about the sexual feelings, he [appellant] said I imagine they go through anybody's mind. The State submits they don't go through anybody's mind . . .'

"Significantly, during the state's rebuttal closing argument the prosecutor said:"

'And lastly, the defense talks about the fact that anybody -- the State is saying that anybody who just happens to like, have access to children must be pedophiles. That's not what the State said. The State told you that there is a whole set of factors that you look at to determine if a person is a pedophile, not just one, a whole set of factors, those factors being whether or not they fantasize about children, whether or

> not they read books with children, whether or not they see movies with children, whether or not they have sexual thoughts going through their mind when they are playing with children, whether or not they masturbate when they are thinking about children and fantasizing about children, and whether or not they put themselves in situations where they have access to children. Its not one factor that makes you a pedophile, its a combination of factors.'
>
> "And the defendant has that combination of factors. . .Phillips v. State, ____ So.2d, ____, 16 FLW 2786 (Fla. 1st DCA, November 4, 1991).

To date, every district court of appeal, to a judge, has held that the admission of pedophile profile evidence is inadmissible. In Francis v. State, 512 So.2d 280 (Fla. 2nd DCA 1987), the testimony of a psychologist that the defendant had a personality characteristic of "...being attracted to children." was harmful error (at p. 282).

In Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), rev. den. 576 So.2d 286 (Fla. 1991), it was again held that the testimony of a psychiatrist who had examined the defendant and testified that he was a pedophile was erroneously admitted but it was harmless because it was "to a large degree" cumulative to other admissible (unobjected to) evidence that revealed his sexual preference towards children.

In Wyatt v. State, 578 So.2d 811 (Fla. 3d DCA, 1991), rev. den. 587 So.2d 1331 (Fla., 1991), the Third District Court of Appeal held that the trial judge did not abuse his discretion by refusing to allow the defendant to introduce expert testimony that he did not

fit the pedophile profile notwithstanding the fact that the victim in the case fit the profile of a sexually abused child.

In Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991), certified, the plurality concluded that even if the judge abused his discretion in admitting the pedophile profile testimony, it was harmless error; five other judges also held it was harmless error; Judges Ervin and Zehmer held it was harmful error. It should be noted that in Flanagan, the testimony of the psychologist concerning the pedophile profile was limited to two (2) of forty-six (46) pages of her testimony and never again mentioned during the trial (at p. 1099). The psychologist also qualified her remarks by adding that one who possesses one or more of the characteristics was not necessarily a child abuser (Id.). That is a far cry from the testimony of Dr. DeMaria in this case which was linked to the Respondent by the prosecutor in her closing argument. When after reviewing the factors of a pedophile as testified to by Dr. DeMaria, she unequivocally stated:

> "And the defendant had that combination of factors." (TR 402)

What would happen if the court opened the doors to this type of testimony? Pedophiles have been described as "...immature, lonely, socially isolated, inept, shy and passive men who relate to children more comfortably than to adults, and who genuinely appear to care for their victims....They "...manifest anti-social behavior, including low impulse control and absence of guilt and remorse, objectification of others, transitory and shallow relationships, and

irresponsible behavior" and "...as many as 80 percent of [them] had been sexually abused as children." Adele Mayer. Sex Offenders: Approaches to Understanding and Management. Learning Publications, Inc. (1988). Since testimony would be admissible to confirm the behavior pattern exhibited by a pedophile, witnesses would be called to testify to all of the above. Then witnesses would be called to testify that the defendant in the past had read books depicting sex between children and adults and/or had watched movies with the same depictions and, of course, had solicited numerous other children to commit sexual acts with him. Then the psychiatrist would testify that the defendant's behavioral pattern fit the profile of a pedophile and, where applicable, the defendant would subpoena witnesses to counter the testimony of the state's witnesses. The defendant would then introduce expert testimony that he did not fit the pedophile profile, contrary to the ruling in Wyatt, supra. How will this type of evidence assist the trier in fact in arriving at the truth? As the United States Supreme Court has observed:

> "Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment..." Ake v. Oklahoma, 105 S.Ct. 1087, 1095 (1985).

Even in the field of pedophilia, there is disagreement. For example, in Page v. Zordan, 564 So.2d 500 (Fla. 2d DCA 1990), Dr. Merlin testified, on behalf of a minor plaintiff suing a former family member for molesting her when she was a child, that there were no identifiable traits indicative of a person being a child sexual

molester (at page 501). That is certainly at odds with the testimony of Dr. DeMaria, supra. Dr. Merlin did go on to testify that possession of a pornographic magazine by a man in his 50's or 60's, as distinguished from a "young" man, was certainly a "red flag", and other evidence was presented to show that the defendant possessed pornographic magazines in 1979, suffered from a sexual dysfunction, and peeked into the victim's bedroom 20 years earlier. On appeal, the court agreed that "...such evidence was inadmissible as entirely irrelevant to the issues and that such evidence was highly prejudicial to Page. Presenting that evidence through the testimony of an expert witness on behalf of the appellees was particularly unfair." (at page 501).

The contradictory testimony of mental health practitioners will in no way assist the trier of fact in arriving at the truth. Furthermore, coming from an expert witness labeling a defendant as a pedophile, whether directly or indirectly, is certainly harmful. As was noted by the Fourth District Court of Appeal, there is a

> "...danger that the trier of fact may place undue emphasis on evidence offered by an expert, simply because of the special gloss placed on that evidence by reason of the witness' status as an expert....[and] that the jury may infer that the expert, simply by virtue of his appearance for one party is vouching for the credibility of that party." Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986), cause dismissed, 507 So.2d 588 (Fla. 1987)

Nor may a balancing approach assist the trial judge in weighing the probative value against the danger of unfair prejudice to a defendant for there are no guidelines to assist the judge. This

was the same consideration voiced by this Court in Stokes v. State, supra, prohibiting any use of post-hypnotic testimony:

> . . . the balancing approach provides no guidelines for judges attempting to balance the probative value against the danger of unfair prejudice. . . . the balancing approach is impractical and difficult to apply (at p. 195).

The true reason for the State's attempt to introduce pedophile profile testimony is to convince the jury that because of the defendant's personality he acted in a certain manner and this type of testimony has unequivocally been held inadmissible. United States v. Pino, 606 F.2d 908, 918 (10th Cir 1979; cites omitted).

To permit the introduction of pedophile profile testimony in a criminal case would not only be counter-productive, confusing and prejudicial, it would increase the risk of a wrongful conviction.

> "The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern." Ake v. Oklahoma, supra, at p. 1093

Even if pedophile profile testimony were relevant, it should be prohibited by F.S. 90.403. "We conceive the rule to be that, if the introduction of the evidence tends in actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence--if it tends to obscure rather than illuminate the true issue before the jury--then such evidence should be excluded." Perper v. Edell, 44 So.2d 78, 80 (Fla. 1949). In this case, a contract dispute, the defendant introduced

into evidence testimony from a psychiatrist that the plaintiff was psychotic, suffered from severe agitated depression with a suicidal tendency. Even though the jury was instructed not to consider this evidence as it related to the existence or non-existence of the contract, this Court there wisely noted:

> "...it seems to us that the trial court required the jury to exercise a subtle discrimination beyond the compass of ordinary minds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. When the risk of confusion is so great as to upset the balance of advantage, the evidence should be excluded." (Id.)

The same is true here. No juror could be expected to believe that pedophile profile testimony was introduced at trial for any reason other than to suggest that the defendant is guilty of the crime charged and that is clearly improper. Accordingly, this Court should answer certified question no. 2 in the negative.

ISSUE IV

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE STATE'S MOTION IN LIMINE.

Aware that defense counsel was going to attempt to introduce evidence that the child victim, NM, claimed she was molested by a third party at or around the same time she claimed Respondent molested her, and in a similar manner, the state moved in limine to prohibit the introduction of that testimony, arguing to the trial court:

> "As the state indicated, the state has no intention whatsoever of showing any type of injury, either mental or physical, as a result of sexual abuse, and since we are foregoing that, I think they have no right to ask questions of Nichole absent any sexual abuse by David Hattenback under the rape shield statute." (TR 16)

Now that Petitioner has a second chance on appeal, he adds two new arguments that were not presented to the trial court, i.e., that the evidence was not relevant, and, it was improper reverse Williams' rule evidence (PB 21 fn 6). Since neither argument was presented to the trial court Petitioner should be prohibited from presenting them to this Court. State v. Smith, 477 So.2d 658 (Fla. 5th DCA 1985) (state could not argue abandonment by defendant or inevitable discovery theory when these theories were not presented to the trial court); State v. Adams, 378 So.2d 72 (Fla. 3rd DCA 1979) (state may not claim on appeal that police saw marijuana in plainview when defendants opened the door because state argued at suppression hearing that police had observed the marijuana in plainview when they

were standing on a chair looking through a window); Forrester v. State, 565 So.2d 391 (Fla. 1st DCA 1990) (defendant's claim that use of sniff dog violated his constitutional right to privacy not preserved for appeal where motion to suppress argued that the sniff dog violated his rights guaranteed by Fourth, Fifth and Fourteenth Amendments of United States Constitution and parallel provisions of the Florida Constitution); McCarthur v. State, 463 So.2d 546 (Fla. 5th DCA 1985) (defendant waived argument that police lacked justification to search his car and briefcase where he had argued below that police lacked probable cause for arrest, rev. den., 472 So.2d 1181 (Fla. 1985).

Petitioner then quotes the record out of context and claims that the trial court "acknowledged" the relevance problem of this evidence (PB 20) - not so. What the trial judge did was to ask defense counsel how the testimony was relevant and after listening to defense counsel's explanation stated:

> "Hattenback, which was the boyfriend of the mother who had babysat her and things of that nature, he basically had sexually abused her, and then she also says that [Respondent] had sexually abused her, and a lot of the descriptions from reading the deposition were fairly close, and for that reason I'm going to take...and deny the state's motion in limine." (TR 20)

In so doing, the trial court did not abuse his discretion. If under our constitutional scheme, the function of the district courts of appeal is primarily error-correcting, as opposed to the judicial policy making function of this Court of clarifying the law and

promulgating new rules of law[5], no further argument would be necessary. Petitioner was unable to show an abuse of discretion in the First District Court of Appeal and it cannot do so here.

In Petitioner's argument before the First District Court of Appeal he claimed "defense counsel never argued the evidence was relevant" (APP 39). The following is an excerpt of the argument made by defense counsel in the trial court:

> "Mr Johnson: Judge, when you start talking about the vaginal area, those are all relying upon the rape shield statute. And of course, that's one of the things that's specifically mentioned in the rape shield statute. This isn't dealing with a rape shield. This is dealing with a relevancy, evidence tending to disprove Mr. Phillips' guilt, evidence tending to show how this trial would become aware of all these acts through someone else and then be able to make a false allegation against him." (TR 19; emp. sup.)

Given a second opportunity, Petitioner shifts gears and now acknowledges that relevance was argued by the defense counsel below but claims the argument "strains the bounds of relevance" (PB 21). Petitioner continues on his merry-go-round argument by now claiming that State v. Savino, 567 So.2d 892 (Fla. 1990) does not apply (PB 20) yet before the First District Court of Appeal, he claimed that Savino was "particularly helpful" (APP 40).

Petitioner only cites a small portion of defense counsel's argument below in claiming that the argument strains the bounds of

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[5] Whipple v. State, 431 So.2d 1011 (Fla. 2nd DCA 1983); Harmon v. Barton, 894 F.2d 1268, 1273, fn 9 (11th Cir. 1990)

relevance and completely overlooks the remainder of the argument made to the trial court:

> "Mr. Johnson: Judge, under 90.401 any relevant evidence...that tends to prove or disprove any material fact is admissible. Also, the law in Florida now is very clear that a defendant may prove similar or introduce similar fact evidence that another person may, in fact, have committed the crime. In this case because of the age of this child, who is now about six years of age, it's going to be very important whether she's every been able to observe these types of sexual acts some other place or observed these types of the anatomy some other place. It's also important to go to the timing of the complaint in this case.
>
> Apparently what she would have one to think Mr. Phillips did occurred some substantial period of time ago. Sometime later while it's still ongoing, she reports that this David Hattenback is doing the exact same thing. She admits that David Hattenback has kissed her vaginal area, that she has kissed his penis, that she's held his penis, that he's laid on top of her and gone up and down, which are the same things that she now accuses Mr. Phillips of. So I think for that reason it's admissible.
>
> Also, the case that I supplied you was Rivera vs. State of Florida, which was decided by the Florida Supreme Court in April of this year. It relies upon a First District Court of Appeal's decision where cert was dismissed by the Florida Supreme Court, and also a Third District Court of Appeal case, Moreno. I have those two decisions if you would like to read them." (TR 16-17)
>
> * * *
>
> "Mr Johnson: Judge, when you start talking about the vaginal area, those are all relying upon the rape shield statute. And of course, that's one of the things that's specifically mentioned in the rape shield statute. This isn't dealing with a rape shield. This is dealing with a relevancy, evidence tending to disprove Mr. Phillips' guilt,

> evidence tending to show how this child would become aware of all these acts through someone else and then be able to make a false allegation against him." (TR 19)

Petitioner attempts to confuse the issue by discussing reverse William's rule evidence but the real issue is whether or not the testimony was relevant under Fla. Stat. 90.402. Reverse Williams' rule evidence is an attempt to show that a third party committed the subject crime by similar fact evidence and that is not the case here. In this case Respondent attempted to show that a third party committed the particular crime for which he stood accused by direct evidence not by reverse Williams' rule evidence and that is much different from the fact situation in Savino:

> "In this case the trial judge found that the wife's alleged abuse of a one month old child, in a different state, in a different marriage, and in a different manner was not sufficiently similar to be admissible in Savino's trial for the death of her six year old child. We see no abuse of discretion in this ruling." (p. 894; emp. sup.)

What Respondent urged below was that the evidence was admissible to show that a third party committed the subject crime, and that has long been the law in this state. Savino v. State, 567 So.2d 892 (Fla. 1990); Lindsay v. State, 68 So. 932 (Fla. 1915); Pahl v. State, 415 So.2d 42 (Fla. 2nd DCA 1982); Watts v. State, 354 So.2d 145 (Fla. 2nd DCA 1978); Corley v. State, 335 So.2d 849 (Fla. 2nd DCA 1976); Moreno v. State, 418 So.2d 1223 (Fla. 3rd DCA 1982).

The second basis urged for the admission of this testimony by Respondent below was that it was relevant to show the child's

familiarity with the private parts of a man's anatomy. At trial she described how she put her hands on his penis and how he put his penis in her mouth (TR 48); how she had to touch his thing (TR 57) and particularly, she drew a picture of what purported to be Respondent's penis (TR 58). Certainly how a 6 year old child could be familiar with these parts of a man's anatomy other than by seeing Respondent's penis is clearly relevant:

> "The trial judge enjoys wide discretion in areas concerning the admission of evidence. His ruling on the admissibility of evidence will not be disturbed unless an abuse of discretion is shown." Booker v. State, 397 So.2d 910, 914 (Fla. 1981; cites omitted)

Finally, it should be noted that there was no lurid description of any sexual acts between the 6 year old and the third party but only that she had "been messed with" by this third party (TR 45-50) and that this third party had done similar things to her that Respondent did (TR 74, 76). Certainly that cannot be said to have confused or prejudiced the issue and is highly relevant:

> "Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility." Moreno v. State, 418 So.2d 1223, 1225 (Fla. 3rd DCA 1982; cites omitted)

Accordingly, the trial court did not abuse his discretion in allowing this highly probative evidence of a third party's guilt for the crime for which Respondent stands accused. In the alternative, it is relevant to show the 6 year old child's familiarity with the private parts of a male's anatomy.

CONCLUSION

Respondent respectfully submits that this Court should answer both certified questions in the negative. In addition, should the Court consider the two ancillary issues raised by the state, it should hold that as to Issue I, Respondent did not waive the question of the admissibility of the pedophile profile testimony; as to Issue IV, that the trial court correctly denied the state's motion in limine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Gypsy Bailey, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050 by regular U.S. Mail on this the 27th day of March, 1992.

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CHARLES R. PHILLIPS, SR.,

Appellant/Cross-Appellee,

vs. Case No. 91-00659

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ANSWER BRIEF OF APPELLEE AND INITIAL BRIEF ON CROSS-APPEAL

On Appeal from the First Judicial Circuit of Florida, in and for Escambia County, Florida

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STATEMENT OF THE CASE

The State accepts Appellant's statement of the case. It notes, however, that the judgment of acquittal as to Count III was granted upon stipulation by the State. (R 675). Despite the order granting that judgment of acquittal, a written sentence of 22 years was entered for Count III. (R 633).

As to its issue on cross-appeal, the State verbally moved to preclude certain evidence. (T 480-1). The motion was renewed shortly before trial. (T 16). It was denied. (T 20).

STATEMENT OF THE FACTS

The State accepts Appellant's statement of the facts with the following additions and corrections:

1. Appellant admitted to kissing the victim "down there," indicating her vaginal area, and that the kiss scared the devil out of him. (T 87-88).

2. The State's expert (Dr. DeMaria), who testified to the "profile" of typical pedophile (T 134-42), did not offer an opinion as to whether Appellant fit that profile.

3. Contrary to statements in his initial brief (p. 18), Appellant did not make any objections to admission of the victim's hearsay statements at the time of introduction. Also, he made no objection on the grounds now argued before this court.

4. Appellant made no objection to the sufficiency of the trial court's findings when it ruled the victim's hearsay statements would be admitted. (T 554). He made no objection to the sufficiency of the trial court's findings when it ruled the victim could testify via closed-circuit television. (T 545).

5. Appellant did not object to the prosecutor's comments in closing that are now challenged.

6. The State announced before trial that it would not be adducing evidence of physical injury to the victim. (T 481).

SUMMARY OF THE ARGUMENT

ISSUE I: Propriety of "Profile" Testimony

Appellant argues different grounds on appeal (improper character evidence) than he did through his objection below. Therefore, the issue presented to this court is not preserved. The trial court did not abuse its discretion by admitting the profile testimony over an objection based only on relevance. Particularly since the State's expert did not give any opinion on whether Appellant fit the profile, any error is admission was harmless.

ISSUE II: Admissibility of the Victim's Prior Consistent Statements

The issue and the grounds argued are not preserved for review. If preserved, the statements were properly introduced to

rebut defense counsel's strong implications -- made in his opening -- that the victim's accounts were recently fabricated, or the product of improper motive or influence.

Equally important, the statements were properly admitted under the hearsay exception in §90.803(23), Florida Statutes. In the narrower context of prior consistent statements by victims of child sexual abuse, that statute controls over the older and broader statute [§90.801(2)(b)] declaring that prior consistent statement are generally inadmissible. Appellant's primary authority (Kopko) is wrong and should not be followed. However, even under Kopko, the statements were properly allowed to provide context and detail.

ISSUE III: Sufficiency of Evidence for Count II

Appellant's highly incriminating admissions to an investigating officer, and the victim's pretrial statements to medical workers, etc., constitute sufficient evidence for conviction under Count II (oral-vaginal "union"). The victim's hearsay statements were properly introduced; admissibility of Appellant's statements to the officer is not challenged.

Even if conviction under Count II is not based on sufficient evidence, it does not taint the conviction under Count I (penile-oral "union"). Appellant concedes sufficiency of the evidence as to Count I. Finally, Count II, alleging union between Appellant's mouth and the victim's vagina, did charge a crime under the sexual battery statute.

ISSUE IV: Victim Testimony via Closed-Circuit Television

This issue is not preserved, as defense counsel did not object to the sufficiency of the trial court's findings when they were announced. The trial court complied in substance with the statutory requirement for factual findings, when it concluded the requisite likelihood of emotional or mental harm was present. In light of the other evidence adduced, any error was harmless.

ISSUE V: Cumulative Error

None of the points raised by Appellant constitute error, assuming all were preserved for review. If any error was committed, it was harmless. The sum of several harmless errors is not harm.

[*issue on cross-appeal*]

ISSUE VI: Denial of State's Motion in Limine

By denying the State's motion in limine, the trial court permitted introduction of improper reverse Williams rule evidence. That evidence (of a different assailant) did not have the heightened similarity to the offense at issue to allow introduction. The State was prejudiced. If retrial is ordered, such evidence must not be admitted.

ARGUMENT

ISSUE I

WHETHER EXPERT TESTIMONY AS TO THE "PROFILE" OF A PEDOPHILE WAS CORRECTLY ADMITTED OVER OBJECTION BASED SOLELY ON RELEVANCE

Appellant maintains it was error to allow an expert to relate a generic "profile" of "sexual offenders of children." (T 134-42). This imprecise allegation of error is the flaw in his argument.

Referring to the profile, trial counsel said: "Objection, Your Honor, it's irrelevant." (T 133). Therefore, the only issue preserved is that of relevance. Glendening v. State, 536 So.2d 212 (Fla. 1988). Glendening is particularly on point. There, defense counsel objected to expert testimony only on the basis of relevance; not, as argued on appeal, that the expert was improperly vouching for the credibility of the child-victim of sexual battery. Declaring that the point was not preserved, the Glendening court stated that the issue argued "must be the specific contention asserted as the legal ground for the objection below." *Id.* at 221, *citing* Steinhorst v. State, 412 So.2d 332 (Fla. 1982)(except in cases of fundamental error, an issue will not be considered for the first time on appeal).

The source of the State's concern is this: Appellant cites (initial brief, p. 15) to earlier testimony by a different witness. That witness (Deputy Elswick) testified as to certain

statements made to him by Appellant. Defense counsel objected to those statements (T 92-4) as improper use of character evidence. However, the only ground for the objection to the profile testimony was, again, that of relevance.

Narrowing the issue, the question becomes whether the trial court abused its discretion in allowing the testimony over an objection based solely on relevance. *See* Jent v. State, 408 So.2d 1024, 1029 (Fla. 1981)(trial court has wide discretion concerning admissibility of evidence, and will not be overturned on appeal absent abuse of that discretion)(citations omitted).

Appellant relies on two cases. The first, Erickson v. State, 565 So.2d 328 (Fla. 4th DCA 1990), concerned the admission of wide-ranging testimony by two experts, including the psychiatrist who examined the defendant the day after his arrest. The challenged testimony included a diagnosis of defendant's post-arrest condition, and admissions by the defendant. *Id.* at 330. However, none of the challenged testimony included a profile of the typical pedophile. Moreover, Erickson held that it was error to admit the testimony because its sole purpose was to show the defendant's bad character or propensity to commit the crime. *Id.* at 331.

This case is readily distinguishable from Erickson. Obviously, the generic profile was not specific to Appellant. The witness (Dr. DeMaria) never was asked, and did not give, an opinion as to whether Appellant fit all or part of the profile.

The second case relied upon by Appellant, Francis v. Smith, 512 So.2d 280 (Fla. 2d DCA 1980), is similarly inapplicable. A child psychologist called by the prosecution gave an opinion that an "individual" -- factually similar to the defendant -- was attracted to adolescents. *Id.* at 281. That opinion was based upon the testimony of the victim's mother. The error in Francis was not committed here. Again, the State's expert never gave an opinion as to Appellant. The expert did not answer any hypothetical questions that were linked to Appellant.

Appellant has presented no persuasive authority indicating the trial court abused its discretion by admitting the expert's profile testimony over an objection based solely on relevance. Dr. DeMaria testified as to general facts for an educational purpose. Dr. DeMaria never testified that Appellant fit all or part of the profile. Thus, the testimony did not improperly invade the province of the jury, which was called upon to determine whether the alleged assault actually occurred. *See* Kruse v. State, 483 So.2d 1383, 1387 (Fla. 4th DCA 1986). Additionally, the jury was free to make logical inferences regarding the weight to give the profile and whether Appellant even fit the profile.

The challenged testimony was not an expert opinion based on scientific tests. Assuming such, the testimony would still be admissible. Appellant did not challenge Dr. DeMaria's qualifications (T 133); the profile evidence undoubtedly was

beyond the common knowledge of the ordinary juror. Dr. DeMaria indicated that such information was generally used in the course of treatment. *See* Ward v. State, 519 So.2d 1082, 1084-5 (Fla. 1st DCA 1988)(no abuse of discretion to admit expert testimony that child's symptoms were consistent with sexual abuse, when expert prohibited from commenting on the truthfulness of the child).

Any error in allowing the profile testimony was harmless. *See* Dudley v. State, 56 Md. App. 275, 467 A.2d 776 (1983)(where state introduced evidence of child battering profile, court deemed it "totally irrelevant" because it did not tend to prove that the defendant committed the crime; court held its admission to be harmless error in light of other significant evidence); State v. Loebach, 310 N.W.2d 58 (Minn. 1981)(state introduced evidence of battering parent profile even though the defendant had not placed his character in issue; court held its admission to be harmless, in light of the overwhelming evidence of defendant's guilt); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983)(where the court admitted evidence of the battering parent profile, admission was erroneous but harmless due to other overwhelming evidence and fact that it had been covered in other unchallenged evidence presented).

Here, the State's evidence was quite substantial as to the victim (N.M.)[1] for which convictions were obtained.

[1] The State has refrained from referring to the child-victim by

Appellant's admissions to Officer Elswick were quite incriminating. He admitted to knowing the victim for several years, and to having baby-sat her very often, occasionally alone. (T 84). He told Elswick that he could not think of any reason why the victim would want to get him in trouble. (T 84). Appellant wondered, if the victim's accusations were true, "what in the world" was happening to him. (T 85). He admitted to kissing the victim all over, including placing his tongue in her mouth. (T 86). He admitted to kissing the victim's genital area, and that it scared the devil out of him. (T 87-88). Appellant admitted to watching a movie depicting sexual relations between adults and children (T 91-2), and to reading books on the same subject. (T 92). He claimed to having fantasies about sexual relations with children. (T 92-4).

The State's first witness testified that the victim said Appellant put his penis in her mouth. (T 48). An HRS worker (Deborah Cannon) related the victim's statements to her. The victim said Appellant put his mouth on her "front private part"; that his pants were down and he forced the victim to touch his "thing." (T 57). The victim said these things happened more than once (T 58), at Appellant's house. The victim reenacted oral sexual activity with dolls. (T 59). She told another

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name, but is using her initials as needed for clarity. The State requests that the court also preserve the victim's anonymity should an opinion be issued.

witness (Wilson) from the Children's Medical Services the same thing. (T 76).

The victim testified through closed circuit television. She stated, without hesitation, that Appellant touched her "on her private"; and that Appellant made her put her mouth on his private. (T 190-1). She described where and how Appellant kissed her, and that he taught her the word "French" [kissing]. (T 193).

In light of Appellant's admissions to Officer Elswick, the victim's testimony at trial, and the victim's corroborating statements recounted by other witnesses, admission of the profile testimony could not have affected the verdict. Any error was harmless, and does not require reversal. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE II

WHETHER ADMISSION OF THE VICTIM'S PRIOR CONSISTENT STATEMENTS WAS PROPER

Appellant objects to admission of the victim's prior consistent statements -- all to the effect that Appellant made the victim place his penis in or on her mouth (T 48, 58, 76). Three times in his initial brief (p. 18), he emphasizes that admission was over objection.

Appellant is wrong. No objection was made at the time of introduction to any of the statements. There were objections to

different questions or testimony before the statements at issue. (*See* T 47, where defense counsel objected to earlier questioning on hearsay grounds.) In the absence of objections below, this issue is simply not preserved for review. *See* Clark v. State, 363 So.2d 331, 332 (Fla. 1978)(contemporaneous objection necessary to preserve review of alleged improper comment on defendant's right to silence).

Alternatively, the grounds for objection below were hearsay and relevance. No mention is made of "character" evidence or misuse of prior consistent statements. In contrast, unchallenged testimony by Officer Elswick as to statements made by Appellant was objected to below as "improper character evidence." (T 85). Defense counsel was clearly aware of this ground to object, but chose not to raise it as to the three statements made by the victim to others. Having failed to raise this ground below, Appellant cannot do so now. Glendening, *supra*; Jackson v. State, 456 So.2d 916 (Fla. 1st DCA 1984)(objection based on failure to lay predicate for admission of blood test results not sufficiently specific to preserve ground that person analyzing specimen did not have permit).

As early as his opening statement, defense counsel strongly implied the victim's testimony was the product of an improper influence or motive, or recent fabrication. Counsel declared:

> In later interviews at different points in time she [victim] says Phil Phillips did all of these same things to her. I can't tell you what she's going to tell you today, and the prosecutor can't either, because every time she tells a story, it's told different. But what we submit to you is that she's not telling the truth about Phil Phillips. (T 40).

Defendant's counsel's opening strongly implied improper motive or influence, or recent fabrication. Moreover, it called into question whether the victim would testify truthfully at trial, before the victim had testified. Therefore, the challenged statements all occurred earlier than the event (i.e., trial testimony) that defense counsel prospectively impugned. The statements were properly admitted. Anderson v. State, 574 So.2d 84 (Fla. 1991)(prior consistent statement by defendant's girlfriend properly admitted to rebut defense counsel's attempted impeachment based on fabrication of trial testimony after negotiating favorable plea, when statement was made before plea bargain reached).

The State recognizes that the credibility of any witness is implicitly at issue in any trial. However, defense counsel's opening goes beyond anticipatory comment on other evidence that could impeach the victim. Counsel expressly stated the victim told a different story every time, and that she was not telling the truth about Appellant. In light of defense counsel's opening, the challenged statements were properly admitted. *See* Smith v. State, 538 So.2d 66 (Fla. 1989)(prior consistent

statements by victim of child sexual abuse properly admitted when defense alleged improper influence by the state and others); Barnes v. State, 477 So.2d 6 (Fla. 2d DCA 1985), *rev. denied*, 484 So.2d 7 (Fla. 1986)(same, when defense was based on child sexual abuse victim's credibility, and the victim's testimony was attacked as the product of influence of others). *See,* in contrast, Wise v. State, 546 So.2d 1068 (Fla. 2d DCA 1989)(mere indication in defense counsel's opening that victim's credibility was to be attacked not sufficient predicate to admit prior consistent statements).

Section 90.802, Florida Statutes, declares hearsay inadmissible. Prior consistent statements, when offered for the purposes noted in §90.801(2)(b) are admissible. More significantly, such statements are declared not to be hearsay at all. *See* §90.801(2)("A statement is not hearsay . . . " [e.s.]).

The obvious inference is that the restrictions placed on admissibility of all prior consistent statements arises from their hearsay nature. In marked contrast, when prior consistent statements are made by the child-victim of sexual abuse, the Legislature has declared -- as a matter of public policy necessitated by rising incidence of child sexual abuse -- that the statements are admissible as excepted hearsay. Therefore, admission of the challenged statements was proper under §90.803(23), Florida Statutes. Under that statute, the victim's statements were properly allowed into evidence. Consequently,

any error in admitting the statements under §908.801(2) is harmless.

A quick glance at the history notes following §90.801 indicates that the statute has been codified since 1976. It has not been amended since 1981. *See* §90.801, Florida Statutes (1990 Supp.). In contrast, §90.803(23) was not enacted until 1985, as §4 of ch. 85-53, Laws of Florida. Moreover, the 1990 Legislature substantially amended §90.803(23). In ch. 90-174, Laws of Florida, the Legislature clarified this statute to make it expressly applicable to "any act" of child sexual abuse, child abuse, or aggravated child abuse. *See* §3, ch. 90-174, Laws of Florida (effective October 1, 1990).

While not applicable to Appellant, the 1990 changes indicate that §90.803(23) is a matter of ongoing concern. More important, the changes clearly show legislative intent that the hearsay exception extend to more crimes involving child abuse. In light of this, it is unreasonable and absurd to construe older §90.801(2) -- applicable to prior consistent statements generally -- in a manner defeating newer §90.803(23). *See* State v. Parsons, 569 So.2d 437, 438 (Fla. 1990)(narrower 1975 statute must prevail over earlier inconsistent statute enacted in 1971); and City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950)(courts must interpret statutes in manner avoiding absurd results).

For these reasons, the cases cited by Appellant are wrong and should not be followed. Specifically, he relies heavily on Kopko v. State, 16 F.L.W. D508 (Fla. 5th DCA Feb. 14, 1991), *question certified on rehearing*, 16 F.L.W. D1058 (April 18, 1991).[2]

There are several problems with Kopko. Rather than recognize the strong public policy[3] underlying §90.803(23), the Fourth District characterized the statute as "an invitation to repetitive testimony." *Id.* at D509. This, and the court's observations immediately following, indicate that the Fifth District merely disagrees with the wisdom of the statute. Thus, in addition to being *dicta*, the court's observations ignore the fact that trial courts can restrict or prohibit admission of testimony that is cumulative or unduly prejudicial.

More to the point, the Fifth District has "overridden" the Legislature without having constitutional grounds to do so. The Kopko court states: "We cannot say that the trial court erred in ruling the child's out-of-court statements were admissible." *Id.* at D510. Incredibly, and in the absence of authority, Kopko finds §90.801 controlling over §90.803(23), yet declares that victim hearsay statements may be admitted "once -- unless the defense opens the door to more." [e.s.] *Id.* Under such logic,

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[2] The Florida Supreme Court accepted jurisdiction on May 9, 1991 (case no. 77,887).

[3] *See* Ehrhardt, Florida Evidence, §803.23(a), at 193 (Supp. 1989)("As part of a legislative package . . . the Florida Legislature attempted to balance the need for reliable out-of-court statements of child abuse victims against the right of the accused. . . .").

"bolstering" a testifying victim's credibility but once is acceptable; more is not.

Kopko also ignores the plain meaning of §90.803(23), which -- under certain conditions not at issue here -- declares child victim hearsay statements admissible. The "plain meaning" of the statute is to declare child-victim statements admissible without regard to the number of such statements. Consequently, §90.803(23) has overruled case law on prior consistent statements and repetitive testimony in one narrow context: when the hearsay-excepted statements have been made by a child, under eleven years of age, who is a victim of sexual abuse; and the other conditions of the statute are met.

Restated, §90.801 treats any prior consistent statements as hearsay, unless they are offered for the purposes in §90.801(2)(b). Then, the statements are not hearsay at all. In contrast, §90.803(23) addresses child-victim hearsay that happens to be prior consistent statements. Under the narrow confines of the statute, the child's statements -- still considered hearsay -- are excepted from general inadmissibility of hearsay under §90.802. As a recent and specific, carefully tailored statute enacted in response to an alarming trend in society (i.e., increased child abuse),[4] §90.803(23) controls over the broad-brush treatment of all prior consistent statements in the

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[4] *See* Speights v. State, 414 So.2d 574, 576 (Fla. 1st DCA 1982)("One method to ascertain the legislative intent is by tracing the legislative history of an act, the evil to be corrected, and the purpose of an enactment." [e.s.]).

older statute, §90.801(2)(b). *See* Jenkins v. State, 533 So.2d 297, 298 at note 1 (Fla. 1st DCA 1988), *rev. denied*, 542 So.2d 1334 (Fla. 1989)(express exception to downgrading of main offense, when conspiracy charged, controls over general statute); and State v. Parsons, *supra* at 438 (statute containing specific grant of authority to Marine Patrol controls over general statutory grant of authority to make arrests).

Although confined to certain child-victim statements, §90.803(23) reaches further within its field of operation. Section 90.801(2) is grounded on the traditional problems with hearsay. Section 90.803(23) is designed to ensure that the "stories" of child-victims are heard, especially in cases where the child-victim is the sole eyewitness, "corroborative evidence is scant," and "[c]redibility becomes the focal issue." Heuring v. State, 513 So.2d 122, 134-25 (Fla. 1987). In Heuring, the Florida Supreme Court recognized these special concerns in the similar fact evidence context, observing that courts had understandably "relaxed the strict standard normally applicable to similar fact evidence." *Id.* *See also* Calloway v. State, 520 So.2d 665 (Fla. 1st DCA), *rev. denied*, 529 So.2d 693 (Fla. 1988)(rigidity of similarity requirement for collateral crime evidence not necessary when evidence is used to corroborate victim's testimony).

Despite this widespread recognition of the special context of child sexual abuse, the Kopko court posited that

child-victims should not be allowed to corroborate their testimony:

> By having the child victim testify and then by routing the child's words through respected adult witnesses, such as doctors, psychologist, CPT specialists, police and the like, with the attendant sophistication of vocabulary and description, there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony. It is worrying to see, in a case such as this one, with virtually no evidence to corroborate the testimony of either the alleged victim or the alleged abuser, that only the victim's version of events is allowed to be repeated through different (professional) witnesses.

16 F.L.W. at D509. However, it is precisely because there is little corroborative evidence in so many child sexual abuse cases that the victim's statements to others should be admitted under §90.803(23).

None of the witnesses whose statements are challenged gave an opinion on whether the victim was sexually assaulted or who did it. They merely recounted the victim's statements. There were no express or implied observations on the victim's credibility, a matter obviously left to the jury. The victim testified (T 187-96, 207-8), and was cross-examined (T 196-207, 208-9). The jurors had ample opportunity to assess her credibility, and the credibility of the challenged statements. Kopko's concern that the victim's testimony might gain an "imprimatur of truth" is not a factor here.

In footnote five, the Fifth District declared, because the child-victim testified, it was:

> [N]ot entirely clear that admission of a prior consistent out-of-court statement by a testifying witness under one of these child abuse exceptions to the hearsay rule meets the requirements of the confrontation clause or of constitutional due process . . . [under] *California v. Green*, 399 U.S. 149 . . . (1970).

16 F.L.W. at D510. The Fifth is simply wrong. In Jones v. Dugger, 888 F.2d 1340, 1343 (11th Cir. 1989), the Eleventh Circuit unequivocally held, when the child-victim testified, a defendant's Sixth Amendment right to confrontation was "fully preserved." *See also* Cook v. State, 531 So.2d 1369, 1371 (Fla. 1st DCA 1988)(admission of child-victim hearsay statements does not violate confrontation clause); and Chambers v. State, 504 So.2d 476, 478 (Fla. 1st DCA 1987)(allowing child-victims to testify by videotape while defendant viewed through two-way mirror did not violate confrontation clause). Here, the child-victim testified and defense counsel subjected her to rigorous cross-examination. (T 187-209).

Even under Kopko, the challenged statements would be admissible. Kopko declared that the child's out-of-court statements are "available pursuant to §90.803(23)" when they are needed to provide evidence the "testifying or unavailable child cannot adequately supply." *Id.* at D510. Here, all the witnesses provided detail and context that the victim could not. The first

witness (Norred) described how she learned of Appellant's molesting the victim, almost inadvertently (T 47), thereby suggesting no opportunity for fabrication. The second witness (Cannon) described the incident in greater detail (T 57-60), including how the victim readily portrayed the incident with dolls; and how the victim drew a picture of Appellant's penis. The third witness (Wilson) described how the victim was the first to bring up Appellant's name, and described how Appellant pulled his pants down, etc. (T 76). The suggests the contact between Appellant and the victim was not accidental touching. All this information went beyond what the child-victim could supply (T 192-3) at trial.

By notice of supplemental authority served after his initial brief, Appellant relies on Reyes v. State, 16 F.L.W. D1443 (Fla. 3d DCA May 28, 1991). That case is not persuasive, since the victim was over eleven years old, making §90.803(23) facially inapplicable. *Id.* at D1444, note 3. Thus, §90.803(23) was not available to sustain the trial court's ruling. Reyes did not, and could not, answer the question of whether admissibility under §90.803(23) cures any error in admitting prior consistent statements under §90.801(2)(b). Reyes has no bearing on this case.

To sum its lengthy argument on this issue, the State first notes that no objections were made below to the challenged statements. Also, Appellant's arguments on appeal are based on

legal grounds not raised below. Therefore, the issue is not preserved. If preserved, the challenged statements are admissible under §90.801(2)(b), to rebut the inferences of improper influence or fabrication raised by defense counsel in his opening statement. The statements are also admissible under §90.803(23), which controls over §90.801(2)(b) in cases of hearsay statements by child-victims of sexual abuse. Even under the Kopko rationale, the statements were properly admitted to provide additional detail and context.

ISSUE III

WHETHER THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD CONVICT APPELLANT ON COUNT II

Under Count II of the information, Appellant was charged with committing sexual battery upon a child under 12 by "oral union of the mouth of the defendant with the vagina or vaginal area of [the victim]." (R 563). He was convicted as charged. (R 595).

Evidence of the criminal act came from two sources: (1) Appellant's admissions of kissing the victim to Officer Elswick (T 86-88), as well as his lengthier discussion of sexual fantasies involving children (T 90-94); and (2) the victim's hearsay statements to HRS workers, etc. (T 57, 76). [The State agrees that the victim, when she testified in court, denied that Appellant placed his mouth on her vagina or vaginal area. (T 193-4).]

The victim told HRS worker Deborah Cannon that Appellant, while his wife was gone, "put his mouth on her front private parts." (T 57). The victim told Susan Wilson, at the time a member of the Child Protection Team, that Appellant -- again while his wife was gone -- pulled her pants down and put his mouth "down there." The victim then pointed to her front private parts. (T 76).

In the interview with Officer Elswick, Appellant made the following admissions:

> that he would sometimes kiss her [victim] all over, including different parts of her body (T 86)
>
> * * *
>
> when they [Appellant and victim] were playing . . . [the victim] would point to various parts of her body . . . and say kiss me here, and he would do that (T 87)
>
> * * *
>
> one time I was kissing her [victim] on her belly, and she pulled her pants down and said kiss me there, and I did kiss her there . . . only that one time, and that scares the devil out of me. (T 87-88).

Appellant also discussed his fantasies of having sex with children, and his occasional sexual feelings toward the victim. (T 90-4). He also stated that having fantasies was "better than fooling with children." (T 94).

Defense counsel moved for judgment of acquittal as to Count II[5] upon the State's rest (T 23), and renewed at the close of all evidence, including surrebuttal. (T 337). Grounds for the motion were that "there's no evidence to substantiate that any crime occurred, and she specifically denied that he ever kissed her private parts." (T 230). In effect, defense challenged the legal sufficiency of the evidence as to the "union" alleged. (There is no dispute as to proof of Appellant and the victim's ages.)

By moving for judgment of acquittal, Appellant admitted the facts adduced, and every inference therefrom favorable to the State. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974); Williams v. State, 531 So.2d 212, 216 (Fla. 1st DCA 1986). The question narrows to whether Appellant's admissions, the victim's hearsay statements, and favorable inferences establish a *prima facie* case of sexual battery.

Preliminarily, contact between the victim's sexual organ and the assailant's mouth constitutes sexual battery. *See* Victor v. State, 566 So.2d 354, 355 (Fla. 4th DCA 1990)("A sexual battery under chapter 794 does not require penetration of a victim. Contact between the defendant's mouth and the victim's sexual organ is sufficient); *citing* Coleman v. State, 484 So.2d 624, 628 (Fla. 1st DCA 1986)("We hold that the statute [defining "sexual battery"] . . . is intended to be read from the

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[5] Counsel conceded sufficiency of the evidence as to Count I. (T 230).

standpoint of either one performing a sexual act upon the other.").

The victim told one child-abuse worker that Appellant put his mouth on her "front private parts." (T 57). She told a second that Appellant put his mouth "down there" and then demonstrated by pointing toward her "private parts." (T 76). Appellant admitted to kissing the victim "all over." (T 86-7). He specifically described one incident when the victim pulled her pants down and said kiss me there; and he did so. (T 87).

This was no innocent kiss to the belly button. Even Appellant admitted the one kiss scared the devil out of him. (T 88). An ill-advised, but innocent, kiss to the lower belly would not have scared Appellant so, and would not be described by the victim as involving her "front private parts." From this, the jurors could reasonably have inferred the type of contact or "union" specified in the statutory definition of sexual battery. The trial court correctly denied Appellant's motions for judgment of acquittal. *See* Chambers v. State, 504 So.2d 476 (Fla. 1st DCA 1987)(children's pretrial statements that they were sexually abused as corroborated by testimony of others sufficient to support convictions for capital sexual battery, despite fact that children recanted their testimony just prior to trial).

Appellant ignores both the substance and effect of his admissions to Officer Elswick. Substantively, the admissions comprise part of the State's case. Effectively, they undermine

Appellant's reliance on Bell v. State, 569 So.2d 1322 (Fla. 1st DCA 1990). There, the only evidence was a prior video statement by the victim, who testified to the opposite on the stand. Bell correctly stated that uncorroborated hearsay cannot be used as the sole evidence for conviction. However, Appellant's admissions to Officer Elswick are direct evidence,[6] corroborated by the victim's hearsay statements. Bell is not applicable.

Williams v. State, 560 So.2d 1304 (Fla. 1st DCA 1990), is factually unavailing for the same reason. There, the sole evidence of digital penetration was the five-year-old victim's prior hearsay, which was improperly admitted. Williams is no more applicable than Bell.

Relying on Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988), Appellant characterizes the victim's prior hearsay statements as inconsistent. The statements were consistent among themselves; the inconsistency arises only through the victim's in-court denial of oral-vaginal contact. Jaggers is not persuasive, as it too involved prior hearsay as the sole evidence of conviction. *Id.* at 325.

The State gave notice (R 578-85) of its intent to use the hearsay statements. A hearing was held; the court made verbal findings. (T 554). Defense counsel did not object on any grounds. Therefore, he cannot argue, for the first time on

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6 *See* Davis v. State, 90 So.2d 629 (Fla. 1956)(direct evidence is that to which witness testifies of his own knowledge as to the facts at issue).

appeal, that the findings are insufficient under the statutory requirements. Poukner v. State, 556 So.2d 1231 (Fla. 2d DCA 1990)(claim of error based on trial court's failure to make specific findings not preserved as no objection was made when court found statements admissible); Stone v. State, 547 So.2d 657 (Fla. 2d DCA 1989)(same, as specificity of findings does not involve fundamental error).

Even if preserved, the adequacy of the trial court's findings is raised only in the context of the sufficiency of evidence as to Count II. Appellant thereby concedes the findings are adequate -- and thus the hearsay statements properly admitted -- as to Count I. Since adequacy as to Count I is conceded, any error in the findings as to Count II is harmless. Alternatively, Appellant's implicit concession that the findings were adequate as to Count I waives any preserved objection as to Count II.

The facts adduced support the trial court's conclusion of admissibility. The victim's statements were given without prompting as to the identity of Appellant. (T 47-8, 56, 75). The statements were given close together in time, apparently on the same day. The victim first told Belinda Norred, over lunch, about the sexual abuse. (T 45-8). Norred then took the victim "straight to the HRS people." (R 48). The victim then told Deborah Cannon about the abuse (T 55-60), followed by her telling Susan Wilson. (T 74-6). This is not sufficient time for a

child, under stress, to fabricate and rehearse a story; despite the fact that the interviews occurred about 5 months after the incident. (T 38, 71). For the most part, the victim's story never changed, however difficult it was for her to relate. Nothing indicates the victim was not telling the truth. Appellant belittles all of this. Nevertheless, the trial court complied in substance with §90.803(23)(1)(a) and (c). *See* Glendening v. State, 503 So.2d 335 (Fla. 2d DCA 1987)(trial court complied in substance with statute, when defense argued relevance only and did not object to procedure being followed), *aff'd with opinion*, 536 So.2d 212 (Fla. 1989).

Almost gratuitously, Appellant states that his "confession" (initial brief, p. 18) was not admissible to prove identity. There was no objection on this ground below. Also, Appellant's wife testified in a manner placing Appellant at the scene of the abuse, and with the opportunity to do so. (T 302-3). The victim's hearsay statements (and her open-court testimony as to Count I) were not refuted. The State's proof of identity was sufficient. *See* State v. Ochoa, 16 F.L.W. D757 (Fla. 3d DCA March 19, 1991)(medical diagnosis statements of child sexual abuse victim sufficient corroboration to introduce confession).

Appellant claims (initial brief, p. 29) the prosecution relied on "prior inconsistent statements" as substantive evidence in closing. Actually, the prosecutor merely summarized the

victim's hearsay statements that were admitted as substantive evidence. These statements were completely consistent with the victim's testimony as to Count I (alleging penile-oral contact). The victim's on-stand denial as to Count II (alleging vaginal-oral contact) presented, at most, an issue of the victim's credibility or weight-of-evidence for the jury. And, as Appellant concedes (initial brief, p. 29), there was no objection on these grounds below. He cites no authority that an objection on hearsay grounds at a pretrial hearing preserves an entirely different objection that should have been made during the prosecutor's closing. In contrast, Cox v. State, 563 So.2d 1116 (Fla. 1st DCA 1990), found an objection to collateral crime evidence, timely made and overruled, preserved that issue on appeal despite the absence of further objection on the same grounds. Similarly, Donaldson v. State, 369 So.2d 691 (Fla. 1st DCA 1979), involved proper objection that did not need repeating to be preserved. Bailey v. State, 224 So.2d 296 (Fla. 1st DCA 1969), held that an attorney was not required to pursue fruitless objections when the trial court announced it would not give requested jury instructions. Nothing indicates a timely objection on the grounds now argued would have been fruitless. Donaldson, Cox, and Bailey do not sustain Appellant's point.

Next, Appellant claims his "wrongful conviction" (initial brief, p. 29) under Count II tainted his conviction under Count I. He cites Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988). That case overturned a conviction despite a sufficient "minimum

of evidence" (*id.* at 326), when several errors occurred at trial. Among these was improper limitation of cross-examination of the state's key witness, when the witness would have been seriously impeached. Also, one aspect of the trial's procedure violated the defendant's right to confront witnesses. The Jaggers court was unable to separate the impact of this procedure on two convictions vacated for insufficient evidence from its impact on the other conviction. Here, no errors of such magnitude are present. The jury was able to separate the charges and the evidence thereof, to the extent it acquitted Appellant as to two of three victims. (*See* T 24-6, where court reads original charges, as to three victims, to the jury).

Appellant's final point in this amalgam in his claim that Count II did not charge a crime. (initial brief, p. 30). There are several flaws in this argument. First, Appellant waived objection to the form of the indictment by not timely attacking it pursuant to Fla.R.Crim.P. 3.190. Second, Count II does not charge penetration, but rather the "union" between Appellant's mouth and the victim's vagina or vaginal area. Assuming the use of those terms is vague does not help Appellant. With Florida's extensive criminal discovery and Appellant's (apparently unexercised) opportunity to obtain a statement of particulars under Fla.R.Crim.P. 3.140(n), he simply cannot claim prejudice. *See* Tingley v. State, 549 So.2d 649 (Fla. 1989)(no prejudice when time of sexual battery, as proven, was within statement of particulars but not within time frame of indictment; and noting

that criminal discovery rules have "eliminated the necessity for a number of prior common law rules developed to assure a fair trial when no discovery existed" [*id.* at 650-1]).

Third, Count II charged union between the Appellant's mouth and the victim's vagina, clearly a criminal act. Victor, Coleman, *supra*. *See* Dorch v. State, 458 So.2d 357 (Fla. 1st DCA 1984)(contact alone, between victim's mouth, anus, or vagina and defendant's sexual organ sufficient to convict for sexual battery). There is no merit to Appellant's contention that his act was not criminal, since his mouth contacted the victim's vagina.

ISSUE IV

WHETHER A FACTUAL BASIS FOR ALLOWING THE VICTIM TO TESTIFY VIA TELEVISION EXISTS IN THE RECORD

Before responding on the merits, the State must clarify the procedural aspects of this issue. Defense counsel objected to allowing the victim [N.M.] to testify by closed-circuit television. When the objection was overruled, counsel requested that the other victims also testify that way, so that the jury would not think there was "something mysterious" (T 21) about N.M.'s testimony. The State agreed to Appellant's request. (T 22). Therefore, Appellant cannot complain as to closed-circuit testimony by the two other victims. The propriety of allowing

N.M. to testify via television is the only issue;[7] Appellant's request waived any objection as to the others.

The court heard testimony by Dr. DeMaria (T 527-40), and the victim's mother (T 541-2); albeit "out of order" during the pretrial hearing as to the admissibility of the victim's hearsay statements. At the conclusion of their testimony, the trial court found that there was a "substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court." (T 545). [Note: Appellant's initial brief incorrectly cites to T 67.] This finding closely follows the statute [§92.54] authorizing the procedure.

Appellant concedes (initial brief, p. 34) that the trial court made the necessary conclusion to allow testimony via television. His complaint on appeal is that the trial court failed to make specific factual findings in support of that conclusion, as required by §92.53(7). Consequently, Appellant's situation is distinguishable from the defendant in Leggett v. State, 565 So.2d 315 (Fla. 1990). There, the trial court did not make the conclusion that at least moderate mental or emotional harm could result, and failed to make factual findings. *Id.* at 317. Also, sufficiency of compliance with §92.53 was at issue;

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[7] Appellant makes no objection to the procedure used, which was a closed-circuit link between the jury room (prosecutor, defense counsel, victim, judge, court reporter, and victim advocate present); and the courtroom (jury present), and another room (Appellant present). Appellant and his counsel could communicate privately. (T 154).

here, §92.54 is the operative statute. Similarly, the trial court failed to conclude the requisite harm could result, and failed to make factual findings, in Fricke v. State, 561 So.2d 597, 598 (Fla. 1st DCA 1990).

The trial court found there was a reasonable likelihood of at least moderate emotional or mental harm to the victim, if she were required to testify in open court. When this finding was announced (T 545), Appellant did not object to its specificity, or the lack of case-specific factual findings. In fact, no objection was made at all. This issue is not preserved for review. *See* Poukner and Stone, *supra* (claim of error through trial court's failure to make specific findings upon declaring victim hearsay statements admissible not preserved in absence of objection below).

Here, the trial court did not make any case-specific findings. (T 545). The question becomes whether the failure is harmful. In light of Appellant's admissions and testimony as to the possible effect on the victim, the error is harmless.

Again, Appellant admitted to criminal conduct, when interviewed by Officer Elswick. He admitted to kissing the victim "down there" in a manner that scared the devil out of him. These admissions came into evidence. All witnesses relating the victim's hearsay statements gave consistent accounts that varied only in minor detail. Consequently, any error in allowing the victim to testify via closed-circuit television was harmless.

See Poukner v. State, *supra* (failure to make case-specific factual findings as required by §92.53 harmless in light of defendant's confession).

ISSUE V

WHETHER THE CUMULATIVE EFFECT OF ANY ERROR DEPRIVED APPELLANT OF A FAIR TRIAL

A. Prosecutorial Comment

None of the prosecutor's comments challenged here were objected to below. In fact, only once during the State's entire closing (T 351-70, 393-403) did defense counsel object. That objection was overruled. (T 402).

In contrast, numerous objections by the State -- some based on grounds as blatant as "golden rule" argument or deliberate comment on matters not in evidence -- were sustained. (T 371, 376, 384, 386, 387). Appellant now argues cumulative error based on prosecutorial remarks not challenged below, when it was defense counsel that indulged in objectionable closing argument. Particularly ironic is Appellant's fourth claim of improper prosecutorial comment (initial brief, p. 37; T 399), which was made after defense counsel's closing. Defense counsel was directed not to make a "golden rule" argument (T 386); he was directed not to comment on matters not in evidence. (T 376, 384). Suddenly very sensitive, Appellant now complains about the prosecutor's comment that he invited.

The other comments, if improper, were not met with an objection or motion for mistrial. Reversal is not required. Richmond v. State, 387 So.2d 493 (Fla. 5th DCA 1980). Appellant does not, and cannot, argue that the prosecutor's comments deprived him of a fair trial. Any error was harmless. *See* Gibson v. State, 475 So.2d 1346 (Fla. 1st DCA 1985)(to extent prosecutor's comments were expressive of personal belief in defendant's guilt, the comments were not so prejudicial as to vitiate trial), *citing* State v. Murray, 443 So.2d 955 (Fla. 1984).

B. Appellant's Statement

Appellant claims that trial counsel proffered "various questions" (initial brief, p. 40) that were improperly excluded. Curiously, he cites to only one example, when Appellant told the investigating officer (Elswick) that "he had never been accused of anything like this." (T 109).

Not stated with any particularity, Appellant seems to argue that the rule of completeness (§90.108, Florida Statutes) required admission of all of the interview between Appellant and Elswick. He overlooks the fact that the proffered statement does nothing to explain or clarify the admitted portions. *See* Ehrhardt, Florida Evidence, § 108.1 (adverse party may require admission of omitted portions of document or conversation, when necessary to prevent admitted portion from being taken out of context). *See also* United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)("The completeness doctrine does not, however, require

introduction of portions of a statement that are neither explanatory or nor relevant to the admitted passages.").

Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1989), *rev. denied*, 560 So.2d 234 (Fla. 1990), is instructive. There, it was held error to deny the defendant opportunity to elicit testimony as to a conversation between himself and a police officer, when the state introduced portions of the conversation during its case-in-chief. The court stated: "[T]he rule of completeness generally allows admission of the balance of the conversation . . . necessary of the jury to accurately perceive the whole context." *Id.* at 105.

Significantly, Eberhardt attempted to elicit testimony that the defendant said he was high or intoxicated. *Id.* The court's ruling severely limited his ability to bring out the recognized defense of involuntary intoxication. Here, Appellant sought to elicit an uncorroborated stated of no exculpatory value. The statement had nothing to do with any recognized defense. In light of the general knowledge that the great bulk of child abuse goes unreported, the fact that Appellant could not elicit the self-serving statement that he had never been accused of such before, if error, was harmless.

C. Equating "Moral Certainty" to Beyond Reasonable Doubt

Appellant's attorney, relying only on a 1969 case from the Third District, sought to equate "moral curiosity" with a

reasonable doubt. Significantly, Florida Standard Jury Instruction (Criminal) 2.03 defines reasonable doubt without the phrase "moral curiosity."[8] Appellant's argument that the phrases are interchangeable is his undoing. By arguing moral certainty, he would be giving the jury a redundant term with quasi-religious connotations. It is a confusing term, placing undue emphasis on morality. A special jury instruction employing the term could be refused. *See* Johnson v. State, 484 So.2d 1347 (Fla. 4th DCA), *rev. denied*, 494 So.2d 1151 (Fla. 1986)(requested jury instruction may be denied when the instructions given cover the issue).

Appellant's argument, that "moral certainty" and "beyond reasonable doubt" are interchangeable, is self-defeating. If the two are interchangeable, no harm can result from restricting an attorney to the contemporary term. *See* Thomas v. State, 220 So.2d 650 (Fla. 3d DCA 1969)(failure to use phrase "moral certainty" in jury instruction not harmful when "reasonable doubt" was used, and the two phrases were equivalent).

Finally, Appellant studiously avoids the standard of review when closing argument is restricted. To obtain relief, he must show a "clear abuse of judicial discretion." [e.s] Henderson v. State, 113 So. 689, 696 (Fla. 1927). *See* Robinson v. State, 520 So.2d 1, 6 (Fla. 1988)("Conduct of counsel during the course of a trial is controllable in the discretion of the

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8 The jury was given the standard instruction on reasonable doubt. (T 422).

trial court, and a court's ruling will not be overturned absent a clear abuse of discretion.").

Appellant does not even argue, much less show, that the trial court clearly abused its discretion by limiting terminology in closing to one of two interchangeable (according to Appellant) terms. Appellant's point is without merit.

D. Impeachment of Appellant's Wife

Appellant's wife testified he never came home for lunch before 1989. (T 315-16). On rebuttal, the State introduced a contradictory statement Appellant made to Officer Elswick. (T 322).

Appellant maintains his wife was "impeached" through the inconsistent statement to Elswick. He goes even further, claiming his prior statement to Elswick was "inconsistent" with his wife's later testimony. He overlooks the fact that his statements to Elswick were highly incriminating admissions given after Miranda warnings.

The State simply rebutted Appellant's attempted inference -- through his wife's testimony -- that he had no access to the victim. The State used Appellant's admission to Elswick to do so. That the admission also helped to establish guilt is immaterial.

Taken to extreme, Appellant's argument would convert all rebuttal evidence into improper impeachment. Finally, there is no authority anywhere that confines rebuttal (or impeachment) of a witness to statements by that witness.

To sum: not one of the points (A through D) raised in this issue constitutes error. If any error occurred, it could not have affected the verdict, and was thus harmless. State v. DiGuilio, *supra*. Appellant cites no authority for the proposition -- implied by his statement of the issue -- that the cumulative effect of any harmless error is harmful.

INITIAL BRIEF ON CROSS-APPEAL

ISSUE VI

WHETHER DENIAL OF THE STATE'S MOTION IN LIMINE WAS AN ABUSE OF DISCRETION

The State verbally moved to restrict defense counsel from asking the victim whether she was sexually abused by anyone other than Appellant. (T 480-1). The prosecutor declared that the State would be offering no evidence of physical injury to the victim. (T 481). Appellant opposed the motion (T 481-2); the court took it under advisement. (T 483).

The State brought the issue back to the court's attention shortly before trial. (T 16). The court recognized the relevancy problem (T 18), but ultimately denied the motion. (T 20). Implicitly, the court accepted defense logic that the

victim's reports of two assailants were so similar that her credibility might be called into question. For the defense, this was true despite the total lack of evidence that the victim fabricated either "story." *See*, in contrast, Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988)(reversible error when trial court precluded cross-examination of crucial witness who had earlier charged her father with sexual abuse and later admitted the charge was false).

Again, none of the charges against Appellant involved physical injury to the victim. None alleged penetration. Therefore, it was Appellant's burden to show how evidence of the victim's possible abuse by a different person; that is, her mother's boyfriend, was relevant.

Defense counsel never argued the evidence was relevant. He intimated fabrication when he stated the victim's reports as to both men involved the "same things." (T 17, line 16). Of course, this is not true. Appellant was the baby-sitter's husband, apparently older than the boyfriend. The boyfriend lived with the mother and victim and -- in contrast to Appellant -- allegedly assaulted the victim by laying on top of her and simulating intercourse. (T 17).

In essence, defense sought to introduce dissimilar, reverse Williams rule evidence.[9] Counsel specifically cited the

[9] The interplay of relevancy and Williams rule criteria is largely underdeveloped. *See* Larraz, "The Reverse Williams Rule: Emerging Standards" [etc], Fla. Bar J. (June 1991) at 25, 29.

trial court to Rivera v. State, 561 So.2d 536 (Fla. 1990). Rivera involved an attempt to show that another homicide occurred in the same area and about the same time as the homicide at issue. The two crimes were superficially similar. Rivera was in jail at the time. He thus claimed the evidence was exculpatory, and that its exclusion was reversible error. *Id.* at 539-40. Reviewing the proffered evidence, the court found the two crimes were significantly different, precluding admissibility of evidence of the other homicide. Significantly, the Rivera court declared: "the admissibility of this evidence must be gauged by the same principle of relevance as any other evidence offered by the defendant." *Id.* at 539.

Applying Rivera, it was error for this trial court to deny the motion in limine. Assuming the victim here was also assaulted by her mother's boyfriend (David Hattenback), the two assaults were not sufficiently similar. One was committed by a live-in boyfriend with far more numerous opportunities, and apparently involved penetration or simulated intercourse. The crimes at issue involved the baby-sitter's husband, at his home, and began as kissing "all over." No penile-vaginal contact was alleged against Appellant; no penetration, physical injury, or simulated intercourse was either.

State v. Savino, 567 So.2d 892 (Fla. 1990), is particularly helpful here. First, it confirmed the pronouncement in Rivera, that a defendant can introduce evidence that another

person committed a similar crime by similar methods. (567 So.2d at 893). Then the Savino court turned to the more difficult question: whether the proffered evidence is sufficiently similar (i.e., relevant) to be admitted.

Savino was on trial for murder of his six-year-old stepson through injuries inflicted with a blunt instrument. He sought to introduce evidence that his wife (victim's mother) killed her one-month-old daughter with a blunt instrument seven years earlier. Noting the dissimilarities, the court held that the trial court did not abuse its discretion in excluding the evidence. *Id.* at 894.

Significantly, Savino expressly rejected the Fourth District's suggestion that a defendant's reverse Williams rule evidence should be subjected to a less stringent requirement of similarity, due to lesser possibility of prejudice. In so doing, the Supreme Court reiterated that relevancy must be established before prejudice is reached. *Id.*

Here, Appellant did not show relevancy. He proffered, at most, only the facts that the same victim was involved. The opportunity for assault, place of assault, and nature of assault were all different. Such evidence of another assault, if alleged to have been committed by Appellant, would not have been admissible at the State's behest to prove Appellant committed the crime at issue. Therefore, it was not admissible here. As stated in Savino:

> If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of another person should be of such a nature that it would be admissible if that person were on trial for the present offense. *Id.*

As a result of the trial court's error, the State was forced to anticipate defense use of this evidence. The risk was that the jury would be confused or misled, with resultant prejudice to the State. The purpose of a motion in limine is to prevent introduction of evidence, the mere mention of which would be prejudicial. King v. State, 468 So.2d 510 (Fla. 1st DCA 1985).

Finally, there is a strong public policy against introduction of the reverse Williams rule evidence admitted here. Section 794.022(2), Florida Statutes, prohibits introduction of past consensual sexual activity. Exceptions include allowing introduction when the evidence establishes a "pattern of conduct . . . so similar . . . it is relevant to the issue of consent." [e.s.]

Leaving aside the statute's concern for consensual activity only, the emphasized language of the quotation is doubly damaging to Appellant. It clearly requires that evidence of consensual sexual be "so similar" -- suggesting a heightened degree of similarity is necessary for admission. Moreover, introduction is limited to two purposes, one of which is issue of consent. Since the victim was only six years old, consent is not a defense available to Appellant.

It is unjust to prohibit evidence of past consensual sexual activity, absent heightened similarity, yet allow admission -- as here -- of past nonconsensual activity that is only superficially similar. The trial court erred in doing so, when it denied the State's motion in limine. If retrial is ordered, the evidence of the victim's assault by another must be excluded.

CONCLUSION

Appellant did not preserve many of the arguments now made on appeal. If preserved, none of the errors alleged constitute reversible error. His conviction and sentence must be affirmed. If retrial is ordered, the trial court's denial of the State's motion in limine must be reversed.

Respectfully submitted,

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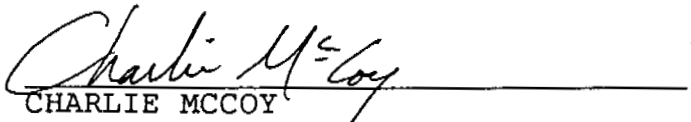
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MR. LEO THOMAS**, Esquire, Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., 226 South Palafox Street, Seville Tower, Post Office Box 12308, Pensacola, Florida 32501, this 28th day of June, 1991.

Charlie McCoy

CHARLIE MCCOY