IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 80,069
5th DCA CASE NO. 91-307

JOHNNY JONES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S MERITS BRIEF

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STATEMENT OF THE CASE AND FACTS

On February 21, 1990, the State Attorney for the Ninth Judicial Circuit filed a Second Amended Information against Respondent Johnny Jones in case no. CR88-4096, charging him with two counts of capital sexual battery and with failure to appear after being released on bond. (R 414-5) Count III, the failure to appear charge, was severed for trial on Mr. Jones's motion. (R 434-5, 447) Counts I and II were tried before a jury on December 10-12, 1990. (R 1-308) Mr. Jones was found guilty by the jury of both counts of capital sexual battery (R 466-7), and was adjudicated guilty on both counts and sentenced to concurrent life terms with concurrent 25-year mandatory minimum terms of imprisonment. (R 506-10)

A M was named in the Second Amended Information as the victim on both sexual battery counts. (R 414) She testified at trial that when she was eight years old Mr. Jones had sexual intercourse with her twice. (R 39-48, 50) She also testified that shortly after the second occasion the Department of Health and Rehabilitative Services ("HRS") removed her from her home. (R 49) A was twelve years old at the time of the trial. (R 32)

A also testified that one Ray Wheeler committed a similar act with her in December, 1986. (R 55) The acts charged in this case took place in the spring of 1987. (R 414-5) Linda Cline testified for the defense that A told her on June 15, 1987 that both James King (A maternal uncle) and Mr. Jones had had intercourse with her. (R 159-60, 176) A testified at trial that she did not remember telling anyone that about Mr. King; she

also testified that her mother told her to blame the incidents charged on Mr. King, and that what she told Ms. Cline was that her mother told her to blame it on Mr. King. (R 69, 223, 225) Mr. Jones was A mother's boyfriend at the time of the events charged; he was her mother's husband at the time of trial. (R 181-2) A also testified that she does not like the way Mr. Jones treats her mother, that she does not like him, and that she wants to live with her mother but cannot do so because of her mother's relationship with Mr.Jones. (R 58, 78-9)

Dr. Shashi Gore testified that he treated A for gonorrhea in December, 1986, after the Ray Wheeler incident. (R 133-6)

Dr. Matthew Siebel testified that he is a pediatrician in private practice and also works as medical director for the child protection team at Arnold Palmer Children's Hospital. (R 82) In his capacity as doctor for the child protection team he examined A on June 17, 1987 when she was brought to the CPT's office by an HRS worker. (R 85-6) Dr. Siebel obtained a history from A and performed a physical exam. The physical exam disclosed what Dr. Siebel characterized as a significant amount of swelling and a significant amount of pus exuding from the vaginal vault. (R 86-7) Dr. Siebel testfied that that kind of discharge is typical of a number of different infections. (R 87) He took specimens which showed after laboratory analysis that she had gonorrhea. (R 87-8) He also asked her if anyone had "messed with her;" she responded that Johnny Jones had done so. (R 89) His testimony as to her answer was admitted into evidence over a hearsay objection, based on the state's argument that A statement

was one made in connection with a physician's treatment. (R 89) Dr. Siebel prescribed penicillin for A . (R 88-9)

Dr Linda Pollock, another doctor with the child protection team, testified that she gave A a follow-up examination on July 1, 1987. (R 98-9) She found the hymenal ring to be slightly enlarged and torn in three places. (R 99-101) Dr. Pollock did not recall the details of the examination but testified, over a hearsay objection, that her notes reflected A having told her that Johnny Jones had had intercourse with her. (R 103)

C S , A 's mother, testified that Mr. Jones did not have gonorrhea during the time they lived together in 1986 and 1987. (R 212) Dr. Daniel Goldwyn testified that he performed a physical examination that included a urine test on Mr. Jones on June 7, 1987. The test did not show any sign of gonorrhea, but was not designed to do so and would not necessarily show any such signs even if the disease were present. (R 215-221)

The defense attempted to show that A had been sexually abused by her natural father six years before the acts charged; the evidence was proffered to show that the child protection team doctors' 1987 findings could have been affected by the 1981 activity. (R 195-6) The evidence was excluded because Dr.Pollock testified that the 1987 tearing injuries to A 's hymen appeared to be "fairly recent." (R 195-6, 101, 106) Dr. Gore, who examined A in December, 1986, testified that there were no tears in the hymenal ring at that time and that the hymenal opening was within normal limits. (R 135, 138)

On appeal, a panel of the Fifth District Court of Appeal reversed Mr. Jones's convictions, citing two bases for the ruling. Jones v. State, 17 FLW 1109 (Fla. 5th DCA May 1, 1992). The district court held that it was error to exclude the proffered evidence of sexual abuse to the victim six years earlier, noting that "perhaps [that] error could be treated as harmless, but given the other error noted below and the facts of the case, it is necessary to reverse." 17 FLW at 1109. The second basis for reversal was admission of Dr. Siebel's and Dr. Pollock's testimony that A identified the Respondent as her assailant.[1]

The district court, on the Petitioner's motion, certified conflict with the First District Court's decision in Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991), on June 19, 1992. The Petitioner filed a timely notice to invoke the discretionary jurisdiction of this court on June 22, 1992.

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[1] The district court noted that since the pretrial notice and hearing required by Section 90.803(23) did not take place in this case, it would express no opinion on whether the challenged hearsay would be admissible pursuant to that section. Jones v. State, 17 FLW 1109 at 1109-10, n.1.

SUMMARY OF ARGUMENT

The district court's decision in this case improperly creates a per se rule that precludes hearsay statements made to child protection team doctors from being introduced into evidence. The reason for the Fifth District's rule is that those doctors are law enforcement agents, and accordingly no statement made to them is made "for purposes of medical diagnosis or treatment." The First District Court of Appeal has held that the Legislature's express intent is that the child protection teams diagnose and treat the children brought to them, and that accordingly the medical diagnosis and treatment hearsay exception applies to statements made to them. The state submits that the First District Court is correct on this point, and statements like the ones contested in this case should be admitted unless they are more prejudicial than probative.

ARGUMENT

THE DISTRICT COURT IMPROPERLY CREATED A PER SE RULE PRECLUDING ADMISSION OF THE TESTIMONY OF CHILD PROTECTION TEAM DOCTORS PURSUANT TO THE TREATMENT AND DIAGNOSIS HEARSAY EXCEPTION.

The district court in this case held that the eight-year-old prosecutrix's hearsay statements, made to two child protection team doctors, were inadmissible hearsay. The district court held that the hearsay exception included in Section 90.803(4), Florida Statutes, did not apply to A M s statements

> since the examining physicians were providing services for the [Orange County] child protection team, one of the physicians being the director of the team at the time of the examination. While treatment for the disease [that was diagnosed during the examination] should result naturally from the examination, the true and only initial purpose of the examination was to determine whether sexual abuse had occurred and, if so, the identity of the individual responsible for it.

Jones v. State, 17 FLW 1109 (Fla. 5th DCA May 1, 1992). Section 90.803(4), Florida Statutes[2] provides that the following are excepted from the hearsay rule:

> Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present

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[2] Subsection 90.803(4) has not been amended since it was enacted in 1976.

> symptoms, pain, or sensations or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

Section 415.5055, Florida Statutes (1987)[3] provides that the Department of Health and Rehabilitative Services ("HRS") shall convene child protection teams and that

> [t]he role of the teams shall be to support activities of the [HRS children, youth, and families] program and to provide services deemed by the teams to be necesssary and appropriate to abused and neglected children upon referral. The specialized diagnostic assessment, evaluation, coordination, consultation, and other supportive services that a child protection team shall be capable of providing include, but are not limited to, the following:
>
> (a) Medical diagnosis and evaluation services, including provision or interpretation of X rays and laboratory tests, and related services, as needed, and documentation of findings relative thereto.
>
> (b) Telephone consultation services in emergencies and in other situations.
>
> (c) Medical evaluation related to abuse or neglect, as defined by department policy or rule.
>
> (d) Such psychological and psychiatric diagnosis and evaluation for the child or his parent or parents, guardian or guardians, or other care givers, or any other individual involved in a child abuse

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[3] Section 415.5055 has been amended twice since 1987; the amendments are superficial and primarily concern recordkeeping. See Chapter 90-306, s.53, Laws of Florida; Chapter 88-337, s.23, Laws of Florida.

> or neglect case as the team may determine to be needed.
>
> (e) Short-term psychological treatment....
>
> (f) Expert medical, psychological, and related professional testimony in court cases.
>
> (g) Case staffings to develop, implement, and monitor treatment plans for children whose cases have been referred to the team....
>
> (h) Case service coordination and assistance, including the location of services available from other public and private agencies in the community.
>
> (i) Such training services for program and other department employees as is deemed appropriate ....
>
> (j) Educational and community awareness campaigns on child abuse and neglect....

The district court in this case cited State v. Ochoa, 576 So.2d 854, 855 n.2 (Fla. 3rd DCA 1991); Hanson v State, 508 So.2d 780 (Fla. 4th DCA 1987); and Begley v. State, 483 So.2d 70 (Fla. 4th DCA 1986) in support of its decision, and certified conflict with the decision in Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991). See Jones, supra, 17 FLW at 1109; Jones v. State, 17 FLW 1519 (Fla. 5th DCA June 19, 1992).

The authorities cited by the Fifth District in this case do not support its decision that statements made to Child Protection Team doctors are per se not admissible by way of Section 90.803(4). Ochoa and Begley hold that provided the declarant knows that his or her statements are made for the purpose of

medical diagnosis, the statements are admissible as hearsay under Section 90.803(4). Hanson stands for a similar rule, but distinguishes statements which establish the identity of an assailant. See infra.

The state has found no authority to support the Fifth District's conclusion in this case that

> the true and only initial purpose of the examination was to determine whether sexual abuse had occurred and, if so, the identity of the individual responsible for it.

17 FLW at 1109. The testimony at the trial of this case showed that A M was diagnosed with and treated for gonorrhea by the Orange County child protection team. The First District Court of Appeal has expressly rejected the argument that the Child Protection Teams primarily serve an investigative police function, citing the announcement in Sections 415.502--415.5055, Florida Statutes, of the legislature's intent that the teams shall make diagnoses, propose plans of treatment, and provide short-term treatment. Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991). See also People v. Meeboer, 439 Mich. 310, 484 N.W. 2d 621 (Mich. 1992); State v. Aguallo, 318 N.C. 590, 350 S.E. 76, 79-81 (N.C. 1986).

The state submits that the First District is correct on this point. Where, as in this case, HRS workers intervene, the first doctor to make an examination may well be a child protection team member. Another child displaying the same disturbing symptoms A displayed might well be taken first to a private physician or an emergency room. The examining doctor in any case

would have the same duty as do child protection team members to disclose such cases to the police. See Sections 415.504, 415.513, Florida Statutes. However, the Fifth District's rule, as announced in this case, treats only child protection team members as de facto police agents; the distinction between child protection team members and other doctors is contrary to the legislative policy discussed in Flanagan. The state submits that the opinion issued by the Fifth District in this case should accordingly be disapproved.

The state further contends that the district court's decision should be reversed, since the trial court correctly admitted A M 's hearsay statements to the child protection team physicians into evidence. Hearsay statements made to medical personnel for purposes of medical diagnosis or treatment are admissible to the extent they are "reasonably pertinent to" that diagnosis or treatment. Section 90.803(4), Florida Statutes. The First District Court, en banc, held in Flanagan, supra, that statements made to medical personnel identifying an assailant are in some cases pertinent to treatment, distinguishing Torres-Arboledo v. State, 524 So.2d 403, 407 (Fla. 1988). See Flanagan, 586 So.2d at 1093-99. The state submits that the Flanagan decision and opinion are correct on this point as well and that the opinion in Hanson, supra, 508 So.2d 780 (Fla. 4th DCA 1987), announcing a blanket rule that statements identifying assailants are never admissible under 90.803(4), should be disapproved.

In Torres-Arboledo, this court held that the statement "I was shot" was reasonably pertinent to emergency room treatment, but "...by a couple of black people" was not. In Flanagan, the First District noted "the practical improbability if not impossibility of separating the 'what happened?' from the 'who caused what happened?' in describing incidents of sexual assault," and concluded that the prosecutrix's statements in that case describing her father's acts with her were correctly admitted. 586 So.2d at 1097, 1088, 1093. In this case, when A M was examined by the child protection team, she showed symptoms of a severe infection, which the child protection team doctors diagnosed as gonorrhea and treated. In those circumstances, questions and answers about who, if anyone, had had relations with her were, the state submits, unquestionably pertinent to diagnosis and an appropriate course of treatment. See People v. Meeboer, supra, 484 N.W.2d 621 (Mich. 1992) (identity relevant to diagnosis and treatment when venereal disease involved); Commonwealth v. Sanford, 580 A.2d 784, 792 (Pa. Super. Ct. 1990) (same); In re Rachel T., 77 Md. App. 20, 549 A.2d 27, 35 (Md. Ct. Spec. App. 1988) (same); State v. Maldonado, 13 Conn. App. 368, 536 A.2d 600, 602-3 (Conn. App. Ct. 1988) (same).

Numerous courts have also held that in cases involving sexual abuse of a child, statements establishing whether the alleged assailant is a member of the child's household are also pertinent to treatment. See Flanagan v. State, supra, 586 So.2d at 1093-98; A.M. v. State, 574 So.2d 1185, 1187 (Fla. 3rd DCA

1991) (Baskin, J., concurring specially); People v. Meeboer, supra, 439 Mich. 310, 484 N.W.2d 621 (Mich. 1992); Commonwealth v. Sanford, supra, 580 A.2d at 792 (Pa. Super. Ct.); State v. Larson, 453 N.W.2d 42, 47 (Minn. 1990), vacated on other grounds, ___ U.S. ___, 111 S.Ct. 29, 112 L.Ed.2d 7 (1990), appeal after remand 472 N.W.2d 120 (Minn. 1991); State v. Altgilbers, 109 N.M. 453, 786 P.2d 680, 686 (N.M. Ct. App. 1989); State v. Newby, 97 Or. App. 598, 777 P.2d 994, 996 (Or. Ct. App. 1989); In re Rachel T., supra, 77 Md. App. 20, 549 A.2d 27, 35 (Md. Ct. Spec. App. 1988); State v. Maldonado, supra, 13 Conn. App. 368, 536 A.2d 600, 603 (Conn. App. Ct. 1988); State v. Nelson, 138 Wis.2d 418, 406 N.W.2d 395, 391-2 (Wis. 1987); State v. Robinson, 153 Ariz. 191, 735 P.2d 801, 810 (Ariz. 1987); State v. Aguallo, supra, 318 N.C. 590, 350 S.E.2d 76, 80 (N.C. 1986); Stallnacker v. State, 19 Ark.App. 9, 715 S.W.2d 883, 884-5 (Ark. Ct. App. 1986); Sluka v. State, 717 P.2d 394, 399 n.3 (Alaska Ct. App. 1986).

To be excepted from the hearsay rule under Section 90.803(4), a statement must not only be pertinent to, but made for the purposes of, medical diagnosis or treatment. The record of this case shows that A 's statements were made in the context of a physical examination and that the questions and answers involved related to diagnosis and treatment of an infection which proved to be sexually transmitted. See State v. Ochoa, 576 So.2d 854, 855-6 (Fla. 3rd DCA 1991) (contested statements made in context of physical examination at rape treatment center; seven- and ten-year-old declarants sufficient-

ly shown to be aware of purpose of making statements). Cf. Begley v. State, 483 So.2d 70, 73-4, n.1 (Fla. 4th DCA 1986) (no showing three-year-old prosecutrix knew statements made to counselor were for purpose of treatment). See also Commonwealth v. Sanford, supra, 580 A.2d at 792 (Pa. Super. Ct. 1990) (statements made by three-year-old during physical exam at emergency room knowingly made for purpose of treatment); State v. Newby, supra, 777 P.2d at 996 (Oregon Ct. App. 1989) (no basis to conclude that seven-year-old cannot or did not understand that interview at time of physical examination was for purpose of treatment); In re Rachel T., supra, 549 A.2d at 34 (Md. Ct. Spec. App. 1988) (four-and-a-half-year-old with alarming symptoms reasonably shown to be aware that statement was for purpose of treatment); State v. Maldonado, supra, 536 A.2d at 602 (Conn. App. Ct. 1988) (three-and-a-half-year-old aware she needed medical attention; statements made at emergency room excepted from hearsay rule).

The state does not suggest that all statements made for the purpose of, and reasonably pertinent to, medical diagnosis or treatment are automatically admissible as evidence. The state's position is that the Legislature's apparent intention is for such statements to be admitted into evidence unless they are more prejudicial than probative. Sections 90.403, 90.803(4), Florida Statutes. See generally Pardo v. State, 596 So.2d 665 (Fla. 1992). Whether the declarant had a motive to fabricate, and whether the proffered statements were suggested, are factors weighing for or against probative value and should be analyzed as such.

One commentator has noted a tendency in child sexual abuse cases to distort the straightforward issue of pertinency to treatment or diagnosis by reaching for one result or another. Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C.L.Rev. 257, 258, 294 (1989). The Fifth District's decision in this case appears to represent the tendency Professer Mosteller warns against--constricting the appropriate dimensions of the hearsay exception in order to offset a perceived improper expansion of its use. Mosteller, supra, 67 N.C.L.Rev. at 258, 294. The district court's decision should be reversed, and its opinion disapproved.

CONCLUSION

The petitioner requests this court to disapprove the district court's opinion, to reverse the district court's decision, and to remand this matter for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Merits Brief has been delivered by hand to Anne Moorman Reeves, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 12th day of August, 1992.

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