IN THE SUPREME COURT OF FLORIDA

JAMES DALE YOUNG,

Petitioner/Appellant,

v.

FLA. SCT. # 82,461
2DCA CASE NO. 91-03788

STATE OF FLORIDA,

Respondent/Appellee.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT/APPELLEE ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner/Appellant, James Dale Young, was the defendant before the trial court and the Respondent/Appellee, the State of Florida, was the prosecution. The parties will be referred to by their proper names or as they appeared before the trial court. The record on appeal consists of four (4) volumes and (1) supplement and will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

In addition to the facts contained in the opinion of the Second District Court and the defendant's initial brief, the State of Florida, will also rely on the facts which are set forth in the argument portion of the instant answer brief.

The instant case is before this Honorable Court pursuant to a question certified by the Second District Court in Young v. State, 624 So. 2d 794 (Fla. 2d DCA 1993). The Second District Court affirmed Young's convictions for two counts of capital sexual battery on two young girls, ages two and four, "concluding that there was substantial competent evidence upon which the jury could find Young guilty." Id. at 795. However, concerned regarding the use of the videotaped child-victims' statements, which the Second District Court found was properly admitted into evidence and provided to the jury during deliberations, the Second District certified the following question of great public importance:

WHETHER FLORIDA RULE OF CRIMINAL PROCEDURE 3.400 AUTHORIZES THE TRIAL COURT TO ALLOW THE JURY TO TAKE VIDEOTAPED WITNESS TESTIMONY, WHICH IS RECEIVED INTO EVIDENCE, TO THE JURY ROOM FOR UNRESTRICTED REVIEW DURING DELIBERATIONS?

Young v. State, 624 So. 2d 794, 795 (Fla. 2d DCA 1993). This Court's jurisdiction is based upon the foregoing certified question. However, in addition to pursuing the question certified by the Second District Court, the Petitioner also presents six additional issues which were previously raised and rejected on direct appeal in the Second District Court.

SUMMARY OF THE ARGUMENT

ISSUE I: Certified Question

Since the videotaped child-victims' statements were properly admitted into evidence, the trial court did not abuse its discretion in allowing the videotape to be provided to the jury during their deliberations.

ISSUE II. Sufficiency of the evidence:

The trial court did not err in dying the defendant's motion for judgment of acquittal. Immediately upon returning from the defendant's apartment, 2-year old C.B. complained to her mother that her "peepee" hurt. C.B. demonstrated how the defendant touched her "peepee" and put medicine on her "peepee". C.B. showed her mother and father the new "game" Jim played with her, C.B. pulled up her dress, pulled down her pants and stuck her fingers in and out of vaginal area. B.B. was hysterical and said that Jim told them not to tell because he would get in bad trouble. Both parents observed the reddened, enlarged vaginal condition of each child. When B.B. recanted the allegations of abuse, the State relied on other corroborating evidence of the sexual abuse, including (1) the child's hysteria immediately after the incident, (2) the physical injuries which were observed by both parents who testified that B. B.'s vaginal area was red, swollen and enlarged, (3) C.B.'s independent testimony relating that she saw the defendant touch B.B.'s "peepee", and (4) B.B.'s prior out-of-court statements describing the acts committed by the defendant.

ISSUE III: Admission of child-victim hearsay exceptions:

The trial court did not abuse its discretion in admitting the prior out-of-court statements of the two female child-victims. In addition to being admissible under §90.803(23), the children's initial statements to their parents were admissible pursuant to §90.803(1) [spontaneous statement]; §90.803(2) [excited utterance]; or §90.803(3) [then existing mental, emotional, or physical condition]. With regard to C.B., a child victim's hearsay statement which qualifies for admission under §90.803(23) may be admissible in evidence when the child is able to testify at trial, even though the child's statement is a prior consistent statement. B.B.'s prior inconsistent statements were likewise admissible at trial in light of the independent corroborative evidence. Finally, the admissibility of the videotapes made of the child-victim's CPT interview is evaluated under §90.803(23), Florida Statutes; and the defendant's appellate complaint regarding the adequacy of the trial court's findings has not been preserved for review because no objection was made by the defense to the sufficiency of the trial court's findings.

ISSUE IV: Competency of three-year-old victim.

Since the defense raised no objection to the child being declared competent when her testimony was offered, this issue has not been preserved for appeal and it does not constitute fundamental error. The trial court did not abuse its discretion in allowing the three-year-old child to testify at trial.

ISSUE V: Motion for severance:

The trial court did not abuse its discretion in denying the defendant's untimely motion to sever the charges involving Z.B. from the charges involving the two little girls, who were siblings in the same household. The same evidence would have been presented at the time of the trial; and since the defendant was acquitted of the charges involving Z.B., error, if any, is harmless.

ISSUE VI: Admission of photograph of collage:

Evidentiary rulings are within the sound discretion of the trial judge, and should not be disturbed absent a clear abuse of discretion. When the various photographs of objects located within the defendant's residence were offered into evidence, Z.B. identified exhibit #12; and the State did not comment on the content of the photograph nor introduce this exhibit for any purpose other than identification.

ISSUE VII: Partial closure during child-victim's testimony:

This issue has not been preserved for appeal. Furthermore, the trial court did not abuse its discretion in excluding spectators, including the defendant's cousin, from the courtroom when the child-victims testified.

ARGUMENT

ISSUE I

CERTIFIED QUESTION

WHETHER FLORIDA RULE OF CRIMINAL PROCEDURE 3.400 AUTHORIZES THE TRIAL COURT TO ALLOW THE JURY TO TAKE VIDEOTAPED WITNESS TESTIMONY, WHICH IS RECEIVED INTO EVIDENCE, TO THE JURY ROOM FOR UNRESTRICTED REVIEW DURING DELIBERATIONS?

Rule 3.400, Florida Rule of Criminal Procedure allows the jury to receive all things received into evidence other than depositions. In Young v. State, 624 So. 2d 794 (Fla. 2d DCA 1993), the Second District Court determined that the trial court properly admitted the videotaped statements of the two child-victims into evidence, and stated:

> **. . . the court properly admitted the videotaped testimony of C.B. as a prior consistent statement of sexual abuse by a child. Section 90.803(23), Florida Statutes (1989); *see also Pardo v. State*, 596 So. 2d 665 (Fla. 1992). B.B.'s videotaped testimony was admissible also as prior inconsistent testimony because there was substantial competent independent evidence which corroborated the prior testimony of the sexual battery. *See Glendening v. State*, 536 So. 2d 212 (Fla. 1988); *Chambers v. State*, 504 So. 2d 476 (Fla. 1st DCA 1987).**
>
> Young v. State, 624 So. 2d at 795.

Since the videotaped child-victims' statements were properly admitted into evidence, the trial court did not abuse its discretion in allowing the videotape and equipment to be provided to the jury during their deliberations. As the Second District

noted, Rule 3.400 does not exclude tangible exhibits with verbal contents which have been admitted into evidence. Furthermore, "[N]ontestimonial exhibits with verbal content, such as recordings of criminal acts or recordings of scientific tests, are generally allowed to go into the jury room during deliberations." Id. at 796, *citing Crews v. State*, 442 So. 2d 432, 434 (Fla. 5th DCA 1983)(jury had right to review videotape of criminal act); *State v. Lewis*, 543 So. 2d 760, 767 (Fla. 2d DCA 1989) (held not error for jury to review videotape of luminol testing during deliberations).

The videotapes were admitted at trial pursuant to §90.803(23), Florida Statutes. (R. 321, 322). Before the jury retired, the trial court informed the parties that he would allow the jurors to view the videotape, if requested, since the jurors were entitled to review all physical evidence. (R. 507). The trial judge instructed the jurors,

> . . . if there is any of the evidence that you wish to inspect, including the television taped material, any part of it you wish to review, you may do so by knocking on the juryroom door and making contact with the bailiff and the bailiff will play the item of the tape which has been admitted into evidence, and we'll bring to you any of the items of evidence that you wish to review.
>
> * * *
>
> [THE COURT]: Any objections to the charge as read by the Court?
>
> [PROSECUTOR]: No.
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

> It's unclear to me whether the jury should be allowed to review the tape of the -- the CPT tape if they so wish. It would be like recalling a witness and having a witness testify.
>
> THE COURT: They can review any of the evidence they wish to. I could have put the whole thing in there, the television included along with the other -- all the other evidence. I thought it would be better if they wished to review it, they can request it. Anything other than that?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: Very well. We'll be in recess until such time as the jury returns.
>
> (Whereupon, the jury retired to the jury room for deliberations . . .)
>
> (R. 506-507)

Approximately three hours later, the jury returned to the courtroom with its verdict. The defense raised no further objection at trial to allowing the jurors to review the videotape. *(See R. 507-509).* During the hearing on the defense motion for new trial, defense counsel argued that the jurors were "playing the videotape, stopping it, starting it, and in fact paying undue attention to it". (R. 516). When the trial court asked, "How do you know that if you weren't in the jury room?", the defense counsel admitted, "Well, Your Honor, that's just speculation that they were stopping and starting." (R. 516-517). The principle is well-settled that reversal cannot be based on speculation and conjecture.

In addition to pursuing the certified question in this case, the defense argues that the failure to consult with defense

counsel before responding to the jury's request for the videotapes was *per se* reversible error. Not only is this claim not preserved for appeal, but the defendant's argument is without merit. In this case, the trial court informed the parties in advance that the jurors would be allowed to see the videotape if requested; thus, there is no merit to the defense claim that the trial court responded to a jury request without consulting the defense.

In Crews v. State, 442 So. 2d 432 (Fla. 5th DCA 1983), the defendant argued reversible error was committed in the contact between the bailiff, a witness and the jury. At trial, a videotape was admitted into evidence and shown to the jury. The videotape was also used to refresh the memories of police officers who testified at trial. After the jury retired to deliberate, the trial judge and defense counsel left the courtroom. Subsequently, the foreman of the jury returned to the courtroom and asked the bailiff to bring the videotape and television viewing equipment into the jury room. Since the bailiff had back problems, he requested a deputy who testified for the State and who was present in the courtroom to help him carry the equipment into the jury room. The defendant argued that pursuant to Ivory v. State, 351 So. 2d 26 (Fla. 1977) he was entitled to a new trial. Ivory involved a violation of Rule 3.410, Florida Rules of Criminal Procedure, which provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them, they should be conducted into the courtroom by the officer who has them in

> charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

In Ivory, the trial court responded through the bailiff to the jury's inquiries about additional instructions and documents in evidence, outside of the presence of the attorneys and defendant. However, Crews did not involve a violation of Rule 3.410 because the jury did not request additional instructions or to have testimony read to them. Rather, they requested that the videotape, which was admitted into evidence, be furnished to them, "as they had every right to do". In Crews, no communication was shown to have occurred between the bailiff and the deputy and the jurors; and in furnishing the jury with an item in evidence, and the mechanism to enable them to see it, the bailiff was acting properly. 442 So. 2d at 434 *citing* Degeer v. State, 349 So. 2d 713 (Fla. 2d DCA 1977).

In State v. Lewis, 543 So. 2d 760 (Fla. 2d DCA), *review denied,* 549 So. 2d 1014 (Fla. 1989), the State introduced into evidence a videotape of a "luminol" test conducted on carpet found in the murder victim's home. In addition, the jurors were allowed to review the videotape during their deliberations. On appeal, the Court found no error in allowing the jurors to review the videotaped exhibit during their deliberations. Lewis, at 767 *citing* Fla.R.Crim.P. 3.400, 3.410. Moreover, the defense was not deprived of the right of confrontation because the officers who

described the experiment were available for cross-examination at trial. Several years earlier, in Baxter v. State, 375 So. 2d 16 (Fla. 2d DCA 1979), the defendant argued that the trial court erred in sending a tape recorder and recording of a telephone conversation between himself and a witness into the jury room during jury deliberations. On appeal, the Court noted that Rule 3.400(d) Florida Rules of Criminal Procedure permits all things received into evidence, other than depositions, to be taken into the jury room during deliberations. While the committee recommended altering prior Section 919.04(3) Florida Statutes (1965) to exclude written or recorded statements or confessions from that evidence which would be allowed in the jury room during deliberations, this proposal was not approved.

In Flanagan v. State, 586 So. 2d 1085 (Fla. 1st DCA 1991), the defendant alleged that the trial court erred in permitting the jury's unsupervised viewing of the victim's videotaped testimony during its deliberations. Although this issue was raised in Chambers v. State, 504 So. 2d 476 (Fla. 1st DCA 1987), the issue was not preserved for appellate review in that Chambers' counsel failed to object when the jury requested to review the videotape. In discussing various out-of-state cases in which the courts found error in allowing the jury to have unrestricted and repeated viewing of a videotape of a child victim's testimony, the Flanagan court pointed out that in both Taylor v. State, 727 P. 2d 274 (Wy. 1986) and United States v. Binder, 769 F. 2d 595 (9th Circuit 1985), cert. denied, 484 U.S. 1073, 108 S.Ct. 1044, 98 L.Ed 2d

1007 (1988), the only evidence of criminal acts was presented through videotaped testimony. In Flanagan, the video cassette containing the victim's "first strike" interview may have been taken into the jury room along with other evidentiary exhibits. The Flanagan court first assumed the presence of this videotape in the jury room was unauthorized, and then relied on State v. Hamilton, 574 So. 2d 124 (Fla. 1991) to decide whether the mere presence of the videotape in the jury room without a record showing of "the extent to which jurors actually consulted the material" persuaded the court of error. Ultimately, the court in Flanagan held there was no reasonable possibility that the video cassette in the jury room affected the jury's verdict in this case. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

In U.S. v Sacco, 869 F.2d 499 (9th Cir. 1989), the trial court's decision to provide the jury with a videotape was upheld, where the quantum of other evidence downplayed the importance of the videotape and the tape was played in its entirety in open court.

In State v Kraushaar, 470 N.W.2d 509 (Minn. 1991), the court addressed a Minnesota rule of procedure which is similar to that in Florida in that it authorizes the jury to receive exhibits received into evidence, except depositions.[1] In Kraushaar, the

[1] Minn.R.Crim.P. 26.-03, subd. 19(1), (2) (1991) provides that the court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room. (1) If the jury, after retiring for deliberation, requests a review of

defendant was convicted of criminal sexual contact with his daughter, "M". "M" was given a two-part examination consisting of a conversation with her pediatrician and a physical examination. The exam was videotaped, the videotape was admitted into evidence, and the jury was permitted to replay the videotape during deliberations. The defendant in Kraushaar argued that the videotape was sufficiently like a deposition to be covered by the rule, however, the Minnesota Supreme Court rejected this argument, "The videotaped interview conducted by Dr. Levitt, in our view, was not a 'deposition' within the meaning of the rule nor something 'sufficiently akin' to a deposition to be precluded by the rule". Id., at 515. The Minnesota Supreme Court concluded that if any error was committed, it was harmless because (i) the videotape viewed in the jury room was no different from the videotape that the jury would have seen in the courtroom, (ii) at worst, the replaying of the tape allowed the jury to rehear what it had already heard, (iii) the testimony of the victim was positive and consistent and was corroborated by other evidence, and (iv) it is extremely unlikely that the replaying of the tape by the jury affected the verdict as by prompting the jury to

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certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence. (2) The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

convict where it otherwise would not have done so. Kraushaar, 470 N.W.2d at 516, (Tomljanovich, dissenting).

The court in State v. Jennings, 815 S.W.2d 434 (Mo. App. 1991), discussed some of the factors mitigating otherwise unrestricted jury access to a videotaped statement. In Jennings, the defendant was convicted of murder and assault. The state introduced into evidence a videotaped statement of a witness who claimed defendant admitted to the murders. At trial, the jury asked for a number of exhibits, including the videotape, which were provided. In evaluating the case under an abuse of discretion analysis, the court held that permitting the jury to review the videotape did not unduly emphasize the evidence, as the jury asked for a number of exhibits and the trial court retained control over the jury's exposure by calling the jury to the courtroom and replaying the tape only once.

In the instant case, the videotapes were properly admitted into evidence and no unauthorized materials were taken into the jury room; furthermore, the defendant's contention that the tapes may have been replayed more than once is pure speculation. Finally, the videotaped interviews did not constitute the sole evidence relied upon by the State and error, if any, was harmless. DiGuilio, *supra.* As the Second District Court noted, "While we know that the videotape and the equipment were sent to the jury room during deliberations, we do not know to what extent the jury used them. Accordingly, we cannot say that allowing the videotapes to go to the jury room contributed to the verdict,

especially in light of the other substantial competent evidence of Young's guilt." Id. at 797. While the cautionary procedures now suggested by the Second District Court may be utilized in future cases, this defendant's speculative arguments do not entitle him to a new trial under the facts of this case.

SUPPLEMENTAL ISSUES

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS I AND III OF THE AMENDED INFORMATION CHARGING THE DEFENDANT WITH COMMITTING CAPITAL SEXUAL BATTERY UPON THE TWO FEMALE CHILDREN.

Since the instant case is before this Honorable Court solely in response to the certified question addressed in Issue I, the following issues, which were raised and rejected on direct appeal by the Second District Court, should not be reexamined by this Court. Assuming, *arguendo,* this Court determines it appropriate to address the petitioner's six remaining claims, the Respondent relies on the arguments previously asserted before the Second District Court, to wit:

Counts I and III of the Amended Information charged the defendant, James D. Young, with capital sexual battery pursuant to §794.011(2), Florida Statutes. Victim C.B. was 2 years old at the time of the offense; she was 3 at the time of the trial. Her older sister, B.B. was 5 at the time of the trial and 4 at the time of the offense. Counts I and II of the Amended Information alleged that Young

> Count I: being eighteen (18) years of age or older, did unlawfully commit a sexual battery upon [B.B.], a child less than twelve (12) years of age, or did injure the sexual organ of [B.B.] in an attempt to commit sexual battery on [B.B.], by penetrating or attempting to penetrate her vagina with his finger.

* * *

> Count II: being eighteen (18) years of age or older, did unlawfully commit a sexual battery upon [C.B.], a child less than twelve (12) years of age, or did injure the sexual organ of [C.B.] in an attempt to commit sexual battery on [C.B.], by penetrating her vagina with his finger
>
> (R. 543).

During his motion for judgment of acquittal at trial, the defense argued that the counts regarding B.B. should be dismissed because of grounds previously stated (R. 404), *i.e.*, that her out-of-court statements were not substantiative evidence and were not corroborated. With regard to the charge against C.B., the defense argued that her testimony was inconsistent, incoherent, incomplete, and nonresponsive. (R. 404).

The defendant contends on appeal that the evidence presented at trial was insufficient to sustain his criminal convictions because the victims' in-court testimony, standing alone, allegedly failed (1) to prove penetration, (2) to prove the State's alternate theory of injury to the children's sexual organs during an attempt to penetrate their vaginas, (3) to prove that this action was the cause of any injury to the children's sexual organs, (4) to prove that injury occurred. Further, the defense now argues that mere redness or swelling does not constitute the injury contemplated by the sexual battery statute. Since the multiple arguments now asserted by the defendant on appeal were not raised in his motion for judgment of acquittal at

trial, this issue has not been properly preserved and may not be considered by the court on appeal. Campbell v. State, 553 So. 2d 184 (Fla. 1st DCA 1989); DeLaCova v. State, 355 So. 2d 1227 (Fla. 3d DCA 1978) [Bare bones motion for judgment of acquittal does not raise every possible claimed insufficiency in the evidence.]; Rule 3.380(b) Florida Rules of Criminal Procedure, [Motion must fully set forth the grounds upon which it is based]; Pierre v. State, 597 So. 2d 853 (Fla. 3d DCA 1992) [Conviction for sexual battery on a child under the age of twelve affirmed. Defendant's argument that state failed to adduce any evidence that the defendant was eighteen or older was not preserved for appellate review where not raised at trial in a motion for judgment of acquittal.]

Assuming, *arguendo,* the various claims now raised on appeal had been presented to the court below, the defendant's argument still must fail. The defendant's convictions may be sustained under either theory of guilt: (1) that the defendant committed capital sexual battery by penetrating the vaginas of each child or (2) injuring their sexual organs by attempting to penetrate their vaginas. The newly asserted defense claim that the prosecutor waived this alternative theory of guilt by virtue of a comment during closing argument has not been preserved for appeal and is without merit. The defense did not raise this argument at trial; the defense did not challenge the charge set forth in the Information, the jury instructions, or the jury verdict form. Thus, this claim is waived. Campbell v. State, 553 So. 2d 184

(Fla. 1st DCA 1989) Further, the prosecutor's emphasis on one theory of guilt during a portion of her closing argument did not constitute a waiver of the alternative theory supporting the sexual battery offense charged in the Information. Taken in context, it is clear that the prosecutor was merely responding to the defense counsel's argument regarding the absence of blood.

The principle is well-settled that a party moving for a judgment of acquittal admits all facts in evidence adduced and every conclusion favorable to appellee which is fairly and reasonably inferable therefrom. Lynch v. State, 293 So. 2d 44 (Fla. 1974). The test to be applied to said motion and on review of the denial of such a motion is not simply whether in the opinion of the trial judge or the appellate court that the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether a jury might reasonably so conclude. On review, an appellate court cannot reweigh the evidence. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981). An appellate court may only consider whether there is sufficient competent evidence in the record to establish all of the elements of the offense charged.

In reviewing the sufficiency of the evidence to sustain the defendant's convictions in the instant case, it is appropriate to review not only the in-court testimony of the two girls but their prior out-of-court statements and the independent corroborative evidence as well. Glendening v. State, 536 So. 2d 212 (Fla. 1988). Since the out-of-court statements were properly admitted

at trial *(see Issue III, infra),* the defendant's claim that review of the sufficiency of the evidence is limited solely to consideration of the victims' in-court testimony is without merit.

At trial, C.B. admitted that the defendant Jim played a touch game with her; he touched her "peepee" with his finger. (R. 132, 133). When asked if it hurt when Jim touched her "peepee" with his finger, she responded "yes" and stated she told her mommy. (R. 133). C.B. also responded "yes" when asked if Jim touched B.B.'s "peepee". (R. 133). When B.B. was asked if she was afraid that Jim was going to get in trouble, she first said "no" then "yeah". B.B. didn't want Jim to get into trouble and B.B. was mad at C.B. when C.B. told her mom about Jim. (R. 155). B.B. denied saying her "peepee" hurt, and denied talking on video. (R. 156). B.B. admitted that she told her mother that Jim touched her "peepee". (R. 157). B.B. said "no" when asked if she remembered when her "peepee" was red and "no" when asked if she hurt it. (R. 158). B.B. didn't want to see Jim get in trouble. B.B. thought it was C.B.'s fault because C.B. told her mom and dad and B.B. didn't want her to tell. (R. 159, 160). B.B. heard C.B. say that Jim touched her "peepee" and B.B. saw him do it. (R. 160).

After B.B. denied the allegations against the defendant, the prosecutor asked the trial court to consider the recanting victim's prior inconsistent statements based on other corroborating evidence. (R. 163). The State relied on other

corroborating evidence of the sexual abuse, including (1) the child's hysteria immediately after the incident, (2) the physical injuries which were observed by both parents who testified that B.B.'s vaginal area was red, swollen and enlarged, (3) C.B.'s independent testimony relating that she saw the defendant touch B.B.'s "peepee", and (4) B.B.'s prior out-of-court statements describing the acts committed by the defendant.

Chambers v. State, 504 So. 2d 476 (Fla. 1st DCA 1987) authorizes the admission of B.B.'s prior inconsistent statements and supports the trial court's denial of the defendant's motion for judgment of acquittal. In Chambers, the testimony of two children was videotaped for trial, with Chambers viewing the proceedings from behind a two-way mirror. After the videotaping and prior to trial, both children recanted their testimony that Chambers had sexually abused them. At trial, both children testified and the videotape was played. On appeal, the defendant argued that the trial court erred in denying his motion for judgment of acquittal since the only evidence of the sexual batteries was the uncorroborated prior inconsistent statements of the children. The court reject Chambers' argument, finding that the testimony of the children's stepmother and stepsister, as well as that of the detective concerning the behavior of the children and appellant in giving their statements, sufficiently corroborated the children's prior inconsistent statements. Thus, the trial court did not err in denying Chambers' motion for judgment of acquittal. Chambers specifically addressed State v.

Moore, 485 So. 2d 1279 (Fla. 1986), which held that prior inconsistent statements without any uncorroborating evidence are, as a matter of law, insufficient to prove guilt beyond a reasonable doubt. Chambers was distinguishable from Moore in light of the independent evidence corroborating the prior inconsistent statements. Here, as in Chambers, the defendant's motion for judgment of acquittal was properly denied in light of the corroborating circumstances presented at trial.

While the admission of the out-of-court statements is addressed in further detail in Issue III, the children's out-of-court statements were admissible at trial pursuant to §90.803(23), Florida Statutes, as well as pursuant to other sections of the evidence code. For instance, the children's initial statements to their mother, Lucretia Berman, were admissible as spontaneous statements or excited utterances under §90.803(1) and §90.803(2), Florida Statutes, as statement of then-existing mental, emotional, or physical condition under §90.803(3), Florida Statutes, as well as pursuant to §90.803(23), Florida Statutes and Perez v. State, 536 So. 2d 206 (Fla. 1988), *cert. denied,* 492 U.S. 923, 109 S.Ct. 3253, 106 L.Ed.2d 599 (1989). The statements were made by both children immediately after the incident. The statements were also child-like. The first spontaneous statement by C.B. was "my 'peepee' hurts" and she explained what happened as a game she learned. Further, B.B.'s hysteria, physical injury and reluctance to testify indicated reliability. The court announced his findings on the record in

accordance with §90.803(23), to wit: the time, contents and circumstances of the statement provided sufficient standards of reliability in that the statements are child-like in nature, made immediately after the alleged assault, and to the child's mother, thus, the safeguards of reliability are protected. (R. 208, 209).

When the jury returned to the courtroom, Mrs. Berman testified that as soon as C.B. came home from the defendant's apartment, C.B. complained that her "peepee" hurt. When Mrs. Berman pulled down the child's pants, she notice that her vaginal area was about the size of a dime, the lips were red and swollen. (R. 210). Mrs. Berman had never noticed those kinds of injuries on the child before. She had previously observed her daughter's vaginal area because C.B. had just recovered from the chicken pox, C.B. had received medication every day and never had any of this redness and swelling. Mrs. Berman asked C.B. if she had played a new game with Jim and she said "yes." Then, when she asked C.B. to show her the game, C.B. pulled up her dress, pulled down her pants and stuck her finger in and out of her vaginal area. (R. 211, 212). C.B. said Jim put a squeeze bottle of medicine inside of her and tried to put medicine on her. (R. 212). After she had observed C.B. and talked with her, Mrs. Berman tried to get B.B. to talk to her, but B.B. became hysterical. B.B. screamed at C.B., "You're not supposed to tell, C.B., you're not supposed to tell. Jim told us not to tell, that he could get into very big trouble." C.B. was crying, hysterical

and afraid. (R. 212). B.B. was holding onto her pants, screaming at Mrs. Berman and C.B. crying that Jim wouldn't like them any more and they wouldn't be able to play and it was a bad, bad thing and he could get into a lot of trouble. Finally, Mrs. Berman was able to observe B.B.'s vaginal area; it was the same as C.B.'s, about the size of a dime and bright red and swollen. (R. 213). Mrs. Berman waited for her husband to come home and observe the children, because she did not want to over react. When Mr. Berman came home, Mrs. Berman brought C.B. into the bedroom and asked her to show her daddy the new game that she had learned with Jim. Again, C.B. pulled up her skirt, pulled down her panties and proceeded to stick her fingers in and out of her vaginal area. When she called B.B. again B.B. became hysterical, crying and swinging, trying to keep them from pulling down her pants and telling them "no". (R. 213, 214). B.B. never acted like that before. (R. 214). As soon as Mr. Berman saw B.B's vaginal area, he went to the phone and called the police. B.B. tried to grab the phone from his hand, telling her father that she hated him and she didn't want Jim to be in trouble. (R. 214). Mrs. Berman was not present during the interview with the child protection team. (R. 216). About two weeks later, the children were taken for their medical examination. (R. 216). The children were not allowed to see Jim after this incident, although B.B. did want to go see him. (R. 216). The children had known the defendant about six months at the time of this offense. (R. 217, 218).

The State proffered the children's statements to Nicky Berman, their father. (R. 227-231). The trial court found that the statements were close in time and that the content and circumstances of the statements were such that they did safeguard sufficient reliability under §90.803(23). (R. 231, 232). Mr. Berman described C.B.'s demonstration of the new "game" that she had learned with Jim. (R. 232-233). Mr. Berman observed both girls, both of them had red swollen vaginal areas. (R. 233, 234). After the examination of B.B., Mr. Berman called the Sheriff's Office. B.B. was crying and upset and asked her father not to call that she would get in trouble and she wouldn't be allowed to play with Jim any more. (R. 235).

Prior to receiving the testimony of HRS witness Pat Gleason, the trial court announced that it considered the criteria outlined in §90.803, *i.e.*, the mental and physical age and maturity of the children involved, the nature and duration of the abuse, and the time and content and the circumstances of the statements, and found the circumstances in this case provided sufficient safeguards of reliability. Thus, HRS witness Pat Gleason would be allowed to testify as to what the children stated during their interview. (R. 252, 253). When the prosecutor asked for additional findings of fact indicating reliability, the court stated "[A]s far as I'm concerned I've done what I think I need to do." (R. 253). There was no defense objection to the sufficiency of the findings. *(see R. 253).*

HRS protective investigator, Pat Gleason, went to the Berman residence the day after the report of the abuse. The mother and three children were present. (R. 256, 257). Ms. Gleason spoke briefly with the mother and then interviewed each child separately. (R. 257). She went through a routine of truth and lies and good and bad touches and then C.B. told her that she had had a bad touch. C.B. told Ms. Gleason that Jim had touched here "peepee", that her pants were off and that he put his finger inside and it hurt. And she demonstrated that by pulling her shorts down and touching herself. C.B. was very matter-of-fact about the whole incident. (R. 258). When she interviewed B.B., B.B. told her they had been at Jim's watching T.V. and listening to records when he took them into the bedroom and pulled down her pants. He had a bottle and he put medicine in her "peepee" with the bottle and he also stuck his finger inside. (R. 258). B.B. referred to the bottle as sounding crunchy when he squeezed it. B.B. said Jim told them to keep it a secret and not to tell, he would get into a lot of trouble. (R. 258, 259). Ms. Gleason made an appointment for a child protection team (CPT) interview for August the 3rd. Ms. Gleason was present during the CPT interview when C.B. and B.B. disclosed the same information. (R. 260).

Dr. Troast's examination neither supported nor refuted the allegations of child abuse. (R. 267-269). When Dr. Troast was asked if it was likely that redness and swelling could be caused by a child rubbing against something, such as a window pane or

table, he responded "no". Dr. Troast explained, "I think it would have to be a repeated action. It's not going to happen from a single pushing against a table leg. It would have to be something of a significant repeated-type action." (R. 274, 275).

Detective David Strasbough met with the CPT team on August 3rd. Chris Earl conducted the CPT interview and the detective viewed the interviews with the children through a television monitor. (R. 278). Ms. Earl did not discuss any of the allegations of abuse with the children prior to the videotaped interview. (R. 329). During the interview, the children indicated they had been sexually assaulted. (R. 279). The CPT interview was videotaped; the children mentioned a squirt type of bottle used by the defendant on them. (R. 279). A search warrant was obtained after the videotaped interview and, on August 7th, when the search warrant was executed, two enema squeeze bottles were recovered from the defendant's residence. (R. 280-283). Photographs were taken of the interior of the defendant's apartment showing, *inter alia,* squeeze bottles beneath the sink and a collage type picture containing numerous pictures of children. (R. 283). A bottle demonstration with the children was videotaped on August 10th. (R. 284).

On the videotape, C.B. stated that Jim touched her "peepee" and, when asked if her pants were on or off, C.B. said "off". (R. 338). C.B. stated that Jim touch her "peepee" with his finger. (R. 339). On videotape, B.B. stated that Jim told her he would be in trouble because he did something to them and told

them to keep it a secret. (R. 363). B.B. said, "He just stuck his finger in there" when referring to the question of how did he touch her "peepee" with her panties on. (R. 378). C.B. said it hurt when he stuck his finger. (R. 379). B.B. said her pants were off, he pulled them off and then he put the water on her "peepee". (R. 387). When asked if he put the bottle inside her "peepee", B.B. nodded yes and said "just a little bit". (R. 389). The second videotape contained the squeeze bottle demonstration; B.B. again admitted that the defendant took off her pants. (R. 394; 396).

In Davis v. State, 569 So. 2d 1317 (Fla. 1st DCA 1990), the Information against Davis alleged that he committed sexual battery against K.L. and T.C., ages 2½ and 2, by penetrating the vagina of each child with his finger, in violation of §794.011(2), Florida Statutes. On appeal, Davis argued that there was insufficient evidence to prove penetration. The court found competent substantial evidence to support the two counts of sexual battery by vaginal digital penetration, stating:

> Florida law defines sexual battery to mean:
>
> Oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, a sexual battery does not include an act done for a bona fide medical purpose.
>
> §794.011(1)(h), Florida Statutes (1989)
>
> In *Furlow v. State,* 529 So. 2d 804 (Fla. 1st DCA 1988), the appellant had been convicted of a violation of section 794.011, Florida Statutes. The question on appeal to

this court was whether the state had established the key element of penetration in the case of sexual battery upon a child by penetrating the victim's vagina with his finger. In *Furlow,* this court held that proof of mere "union with" a victim's vagina is insufficient when an object other than the defendant's sex organ was used; therefore, the state was required to prove that the defendant penetrated the victim's vagina with his finger. The well-established rule in Florida, however, is that proof of even the slightest penetration is sufficient. *Williams v. State,* 53 Fla. 84, 43 So. 2d 431 (1907). While Williams dealt with the crime of rape, this rule has remained unchanged since implementation of Florida's modern sexual battery statute. In *Pride v. State,* 511 So. 2d 1068 (Fla. 1st DCA 1987), section 794.011(1)(h), Florida Statutes, was construed to mean, "any penetration, no matter how slight, constitutes a completed sexual battery." *Id.* at 1070.

Florida is among the 29 states listed in American Law Reports which have held that evidence of injury to external female parts of the victim may be sufficient circumstantial evidence of penetration. 76 A.L.R.3d 163, 192, Rape--What constitutes "penetration" §7. In the cases cited by American Law Reports, many types of injuries have been found to be sufficient evidence to support an inference of penetration, including redness or swelling, lacerations, abrasions or other unusual conditions in or on the female genitalia. In *Williams, supra,* where sexual abuse of a six-year-old girl was alleged, the Florida Supreme Court found that "the bruised and contused condition of her private parts" was sufficient direct evidence of penetration. *Id.* 43 So. 2d at 432. We recognize, of course, as in *Furlow, supra,* that appellant was charged under the specific statutory provision as to vaginal digital penetration, so that earlier cases relating to evidence of penetration of external genitalia are not directly applicable, and the decisions may be distinguished both factually and legally. Those decisions, however, remain pertinent in their conclusion

> **that a jury may find the necessary element of penetration of certain parts of the female genitalia, without direct evidence of such fact, based on inference arising from circumstantial evidence including the nature of external genital injuries. The particular facts in evidence here permit the application of that rule.**
>
> Davis, 569 So. 2d at 1319

In Davis, as here, both victims had observable vaginal conditions which were unusual for children of their ages and injuries which were new in origin. *See also,* Owens v. State, 300 So. 2d 70 (Fla. 1st DCA 1974) [Although there was no direct testimony regarding penetration of a nine-year old victim, the medical testimony of the nature and lacerations of her vagina plus other circumstantial evidence constituted sufficient evidence to support the jury's verdict.]

In this case, the defendant claimed that he caught the two naked little girls standing on a window sill and rubbing against the window frame. According the defendant Young, four-year old B.B. then spread her legs apart and propositioned the defendant, asking him if he "wanted some". (R. 441-442). As determined in Bradford v. State, 460 So. 2d 926 (Fla. 2d DCA 1982), the reviewing court must not reweigh the conflicting evidence but must limit its consideration to whether there was substantial competent evidence to support the verdict. Since the remaining complaints raised by the defendant involve matters of credibility and are solely within the province of the jury, the defendant's claim must fail. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981).

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE PRIOR OUT-OF-COURT STATEMENTS OF THE TWO FEMALE CHILD-VICTIMS.

The defendant reasserts his challenge the admission of the victims' out-of court statements to their parents and HRS worker and their videotaped statements during the CPT interview. On direct appeal, the Second District Court specifically found that the trial court did not abuse its discretion in admitting the prior out-of-court videotaped statements of the two female children, noting that

> **. . . the court properly admitted the videotaped testimony of C.B. as a prior consistent statement of sexual abuse by a child. Section 90.803(23), Florida Statutes (1989); *see also Pardo v. State*, 596 So. 2d 665 (Fla. 1992). B.B.'s videotaped testimony was admissible also as prior inconsistent testimony because there was substantial competent independent evidence which corroborated the prior testimony of the sexual battery. *See Glendening v. State*, 536 So. 2d 212 (Fla. 1988); *Chambers v. State*, 504 So. 2d 476 (Fla. 1st DCA 1987).**
>
> Young v. State, 624 So. 2d at 795.

Sub judice, as in Glendening v. State, 536 So. 2d 212 (Fla. 1988), *cert. denied*, 492 U.S. 907, 109 S. Ct. 3219, 106 L.Ed.2d 569 (1989), the trial court reversed ruling upon the admissibility of the hearsay statements until after hearing the proffer of the witnesses' testimony at trial concerning the circumstances under which the children's statements were made. Here, as in Glendening, this procedure was proper.

The defense concedes that the trial court made appropriate findings for C.B.'s out-of-court statements[2] to her mother. *(Brief of Petitioner at 35).* Thus, there can be no credible claim of error with regard to the admission of the mother's testimony under §90.803(23), Florida Statutes.

Furthermore, the children's out-of-court statements were admissible as exceptions to the hearsay rule pursuant to other sections of the evidence code, independent of the provisions of §90.803(23). For example, C.B.'s first report of the incident was spontaneously made and not the result of any adult-initiated interrogation. In addition to being admissible under §90.803(23), the children's initial statements to their parents were admissible pursuant to §90.803(1) [spontaneous statement]; §90.803(2) [excited utterance]; or §90.803(3) [then existing mental, emotional, or physical condition]. *See also,* MacDonald v. State, 578 So. 2d 371 (Fla. 1st DCA 1991) [Victim of sexual assault ran to a neighbor and blurted out a description of the event that was consistent with her trial testimony. At trial, the neighbor testified to the victim's description. The statement of the neighbor was held admissible under the sexual battery "first complaint" rule and also as a spontaneous

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[2] The defense challenges C.B.'s competence as a witness at trial in Issue IV of the instant case. The fact that a child allegedly may not be competent to testify at trial does not mean that the child is unreliable. The requirement that the court find sufficient safeguards of reliability obviate the necessity that the child understand the duty to tell the truth. Perez v. State, 536 So. 2d 206 (Fla. 1988).

statement.]; A.M. v. State, 574 So. 2d 1185 (Fla. 3rd DCA 1991). [Victims' mother testified that her children told her they had been raped several times by the defendant. Under the circumstances, the statements were not hearsay because they were not offered to prove the truth of the matter asserted. The statements were admitted to prove the time at which they were made and thus were not heresay.]

A child victim's heresay statement which qualifies for admission under §90.803(23) may be admissible in evidence when the child is able to testify at trial, even though the child's statement is a prior consistent statement. Pardo v. State, 596 So. 2d 665 (Fla. 1992). Under Pardo, C.B.'s prior consistent statements of sexual abuse were admissible at trial.

B.B.'s prior inconsistent statements were likewise admissible at trial in light of the independent corroborative evidence. B.B.'s videotaped statement was not cumulative to her trial testimony. B.B.'s individual videotaped statements, which were taken within a week of the incident and a year prior to trial, were inconsistent with her recanted trial testimony. In Glendening, the three-year-old victim testified at trial *via* videotape and she did not implicate the defendant, her father, in any misconduct. However, her prior inconsistent statements regarding the sexual abuse were admissible in light of the independent medical evidence and the defendant's inculpatory statements to cellmates. The independent corroboration based on medical testimony of the injuries went to reliability of the

statements. *Accord,* Chambers v. State, 504 So. 2d 476 (Fla. 1st DCA 1987). [Testimony of family members and investigating detective sufficiently corroborated the children's prior inconsistent statements.]

Moreover, during opening statements, the defense asked the jurors to pay particular attention to the timing of the sexual abuse complaints, *i.e.,* it was only after defendant Young reported Z.B.'s misbehavior at the summer camp that the allegations against Young surfaced. (R. 96-97). Where the defense suggests that the allegations of abuse are the product of improper influence and suggestion, there is no error in admitting the victim's prior out-of-court statements. For example, in Barnes v. State, 477 So. 2d 6 (Fla. 2d DCA 1985), the trial court did not err in admitting testimony from a neighbor to whom a witness confided about the sexual abuse. In Barnes, the court specifically noted that where a child's credibility is in issue and the defense is the improper influence by others, the child's prior consistent statements are properly admitted. *See also* Begley v. State, 483 So. 2d 70 (Fla. 4th DCA 1986). [When the defendant claims that the child abuse victim had a motive to lie based on the improper influence by the state and mother, the trial court properly admitted under §90.801(2)(b) the details of the child's statement to the mother that revealed the abuse.]

Even if §90.803(23) were the sole avenue for admission of the child's out-of-court statements, the circumstances surrounding the statements provided sufficient indicia of

reliability supporting their admissibility. The trial court discussed the factors which he considered and the trial court announced on the record his findings (supporting reliability) as the case progressed. A sufficient hearing is held pursuant to §90.803(23) when the trial court considers a proffer and announces its observations concerning the reliability of the hearsay. Although specific findings are preferable, this procedure was found permissible in Stone v. State, 547 So. 2d 657 (Fla. 2d DCA 1989). In the instant case, as in Stone, the defense did not object to the sufficiency of the trial court's findings and this issue did not involve fundamental error.[3] Similarly, in Jones v. State, 610 So. 2d 105 (Fla. 3d DCA 1992), the trial court, pursuant to §90.803(23) made the following findings of reliability and unavailability, stating:

> the content and circumstances . . . provide sufficient safeguards of reliability to be admissible.
>
> I further find that J.P is unavailable and that if he were to testify a substantial likelihood of severe emotional mental harm would result. Therefore, I am going to allow this detective to testify as to any hearsay statements made by J.P.

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[3] With regard to the need and sufficiency of an objection to the purported lack of specific findings, Appellant correctly noted that this issue is pending review before this Honorable Court in Feller v. State, 617 So. 2d 1091 (Fla. 1st DCA 1993), (FSC Case No. 81,771) and Hopkins v. State, 608 So. 2d 33 (Fla. 1st DCA 1992) (FSC Case No. 80,514).

On appeal, the district court declined to reach the merits of Jones' claim that the trial court's findings should have been made with greater particularity. This issue was not preserved for appellate review because no contemporaneous objection was made to the sufficiency of the trial court's findings. Id., citing, *inter alia,* Paukner v. State, 556 So. 2d 1231, 1232 (Fla. 2d DCA 1990); Freeman v. State, 545 So. 2d 915, 916-17 (Fla. 2d DCA), *review denied,* 548 So. 2d 662 (Fla. 1989). Additionally, the failure to comply with the procedural requirements of §90.803(23) is harmless when statements are admissible under another provision of the evidence code. *See,* Sampson v. State, 541 So. 2d 733 (Fla. 1st DCA 1989). Any alleged error in failing to make specific findings fact on the record as to its ruling concerning the state's request to present heresay under §90.803(23) is not reversed where the evidence erroneously presented is merely cumulative to other overwhelming evidence. Cook v. State, 531 So. 2d 1369 (Fla. 1st DCA 1988).

The defendant relies extensively on Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988). In Jaggers, testimony of Jaggers' daughter and stepdaughter were introduced at trial by way of their videotaped depositions, pursuant to §92.53, Florida Statutes (1985). The daughter and stepdaughter specifically testified that Jaggers did not penetrate their vaginas with his finger. The stepdaughter's videotaped testimony established that Jaggers touched the "privates" of all the victims with his finger, but she stated that Jagger touched "around the hole but

did not go inside." This testimony contradicted her previous statements to several persons including a police sergeant, a pediatric specialist, police officer, and to her grandmother. In Jaggers, the Court concluded:

> . . . the State's attempts to remedy the negative *trial testimony* by the daughter and stepdaughter on the issue of penetration with the unsworn out of court victim's statements that were themselves often contradictory and not made at a time closely approximate to the alleged occurrence, were not sufficiently reliable to warrant admission into evidence. The time of the out of court statements, relative to the time of the incident charged and the circumstances of the statements, are critical to determination of reliability. See Perez v. State, 536 So. 2d 206 (Fla. 1988). That testimony, offered under Section 90-803(23), Florida Statutes (1985) was relied on as substantive evidence. However, in this case, it amounts to nothing more than evidence of prior inconsistent statements of a testifying witness which are not admissible except when offered to contradict and impeach the direct testimony offered at trial. We conclude that evidence of such prior unsworn, inconsistent statements, not subject to cross-examination at the time they're made, cannot constitute the sole evidence upon which to sustain Appellant's conviction of the sexual battery by penetration of his daughter and stepdaughter. State v. Moore, 485 So. 2d 1279 (Fla. 1986). To hold otherwise would put us in conflict with Moore. Jaggers, 536 So. 2d at 324-325.

Specially concurring in part and dissenting in part, Judge Parker pointed out that while Moore prohibits the State from proving its case **solely** on the basis of prior inconsistent

statements, Moore does not apply where there is competent corroborative evidence of the crimes aside from the statements. *See, Parker, J. specially concurring in part and dissenting in part,* Jaggers v. State, 536 So. 2d at 331, citing Chambers v. State, 504 So. 2d 476, 478 (Fla. 1st DCA 1987).

The admissibility of a videotape made by the police of the child-victim's statement is evaluated under §90.803(23), Florida Statutes. State v. Asfour, 555 So. 2d 1280 (Fla. 4th DCA 1990). In Distefano v. State, 526 So. 2d 110 (Fla. 1st DCA 1988), the appellate court found no abuse of discretion in admitting (1) the child's out-of-court statements which were made to her mother immediately after the sexual incident and (2) the child's videotaped interview with a CPT counselor which was recorded two days after the incident. The CPT counselor testified that the interview was conducted privately while the mother remained in the waiting room and the child was not asked any questions prior to the videotaped interview. In the instant case, as in Distefano, the CPT interview was conducted a short time after the incident, outside the presence of the mother, and the children were not questioned by the CPT counselor prior to the interview. Lastly, error, if any, in admitting any of the out-of-court statements of the child victims was harmless under the circumstances of this case. *See e.g.,* Ward v. State, 565 So. 2d 917 (Fla. 5th DCA 1990); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Salter v. State, 500 So. 2d 184 (Fla. 1st DCA 1986) [Any error in admitting testimony is harmless when substantially the

same evidence was presented to the jury through the testimony of other witnesses. Here, the child testified concerning the lewd and lascivious assault, and her mother and friend testified that immediately after the incident, the child reported the assault to them. Accordingly, testimony of the CPT counselor was merely cumulative and did not give significant additional weight to the child's testimony. Id., *citing* Woodfin v. State, 553 So. 2d 1355 (Fla. 4th DCA 1989), *review denied,* 563 So. 2d 635 (Fla. 1990); Cook v. State, 531 So. 2d 1369, 1371 (Fla. 1st DCA 1981), *cert. denied,* 489 U.S. 1084, 109 S. Ct. 1542, 103 L.Ed.2d 846 (1989)].

ISSUE IV

THE TRIAL COURT DID NOT COMMIT FUNDAMENTAL ERROR IN ALLOWING THE 3-YEAR OLD CHILD VICTIM TO TESTIFY.

The defendant argues that the trial court erred in allowing convictions based on the testimony of 3-year old C.B., without finding C.B. to be competent. As the record shows, following the proffer of C.B.'s testimony, the defense did not object that C.B. was not competent to testify. (R. 120). Specifically, the prosecutor inquired,

> **[PROSECUTOR]: Are you objecting she's not competent to testify?**
>
> **[DEFENSE COUNSEL]: No, Your Honor.**
>
> **(R. 120).**

Sometime later during the trial, the defense objected to the admission of the videotapes and stated that they were not sure if the court made a ruling on C.B.'s competence to testify. (R. 324). However, since the defense raised no objection to the child being declared competent when her testimony was offered (R. 120), this claim is waived. This issue has not been preserved for appeal and it does not constitute fundamental error. Woodfin v. State, 553 So. 2d 1355 (Fla. 4th DCA 1989).

Assuming, *arguendo,* this claim had been preserved for appeal, the defendant's argument still must fail. When a child's competency is at issue, the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the

court or to the jury, and (3) whether the child has a moral sense of obligation to tell the truth. Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988), citing Williams v. State, 400 So. 2d 471 (Fla. 5th DCA), *affirmed,* 406 So. 2d 1115 (Fla. 1981). *See also* Kentucky v. Stincer, ___ U.S. ___, 107 S.Ct. 2658, 2665, 96 L.Ed.2d 631 (1987). The trial court is accorded a wide discretion in determining a child's competency as a witness, and absent an abuse of discretion, the trial court's decision will not be disturbed. Lloyd, 524 So. 2d 396 at 400; Rutledge v. State, 374 So. 2d 975 (Fla. 1979), *cert. denied,* 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980).

The issues now raised involve considerations of credibility -- an issue in any trial. The jury received instructions concerning the methods whereby they could deem testimony either worthy or unworthy of belief, including the consideration of inconsistent statements and the ability to know or recall and relate what happened. Stone v. State, 547 So. 2d 657 (Fla. 2d DCA 1989) ["We do not believe it is incumbent upon parents to teach their toddlers the sexual vocabulary of *Gray's Anatomy* in order to protect them from the lifelong psychological damage of sexual battery."] Whether the child was developmentally or intellectually inferior did not *ipso facto* render her incompetent and the trial court did not abuse its discretion in allowing the three-year-old child-victim competent to testify. *See also,* §§90.601, 90.603 and 90.605(2), Florida Statutes.

ISSUE V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT' UNTIMELY MOTION FOR SEVERANCE

On October 22, 1990, the State filed an information in this case. An amended information was filed on May 10, 1991 (R. 539; 543-544). On June 17, 1991, the day before trial was commenced, the defense filed a motion for severance (R. 559); and the trial court specifically found that the motion for severance was untimely. (R. 6; 8). The defendant now argues that the charges involving the Berman's son, Z.B., should have been severed from the charges involving the two female children, B.B. and C.B.

Granting or denying a requested severance is within the trial court's discretion, and the test on review is whether the trial court abused its discretion. State v. Vasques, 419 So. 2d 1088, 1090 (Fla. 1982); Murphy v. State, 495 So. 2d 1237 (Fla. 4th DCA 1986). A motion to sever should be made before trial unless the grounds for it are not known before trial. Rule 3.153(a) Florida Rule of Criminal Procedure; Crum v. State, 398 So. 2d 810 (Fla. 1981). The defendant's untimely filing of this motion at the 11th hour should be deemed to constitute a waiver of the defendant's right to rely on this claim. Assuming, *arguendo,* this Court finds it appropriate to address the merits of this issue, the defendant's argument nevertheless must fail.

The trial court did not err in denying the defendant's untimely motion to sever the charges involving the minor

children, who were siblings living in the same household. First, the offenses against the victims were connected acts or transactions; second, that the acts and relationship between the defendant and the victims were similar; third, there was no unfair prejudice to the defendant in trying all of the counts of the single Information together; fourth, the same evidence would have been presented at the time of trial; and fifth, since the defendant was acquitted of the charges involving Z.B., error, if any, is harmless.

The charges involving the two little girls were at the same time in each other's presence and the defendant does not challenge the propriety of trying these counts together. With regard to Z.B., the testimony was independently admissible as Williams' Rule evidence at the time of this trial in order to show motive, intent, preparation, plan, knowledge, absence of mistake or accident and that the defendant had an opportunity to sexually molest children while they were in his home. §90.404(2)(a), Florida Statutes.

In Warren v. State, 475 So. 2d 1027 (Fla. 1st DCA 1985) the court determined that the joinder of multiple counts in a child abuse case alleging abuse of two different children within a short period of time was correct when the abuse was part of an ongoing pattern involving one household, the same family members, and the same primary caretaker of the child victims. Additionally, as noted in Spivey v. State, 533 So. 2d 306 (Fla. 1st DCA 1988), where the offenses could have been admitted as

Williams [4] rule evidence, the Court does not err in refusing to sever.

Offenses are deemed related if they are triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions. In Ellis v. State, 534 So. 2d 1234 (Fla. 2d DCA 1988), the defendant was charged with sex crimes against three children within a three month period; the defendant had confessed to one crime. The circumstances connecting the offenses were only that the crimes occurred in the same period in defendant' home. The court held that the three counts were improperly joined; and, in light of the fact that the State argued that if the defendant did one crime, he must have done them all, the defendant did not get a fair trial. In Warren, *supra,* separate child abuse incidents involving two children were reasonably considered connected together as one ongoing-pattern, involving one household, the same family member, a short time frame, and the same adult, primary custodial supervisor of the children at the time of their injuries. Id. at 1031, citing Mayberry v. State, 430 So. 2d 908 (Fla. 3d DCA 1982). Here, too, the separate incidents against the children were reasonably considered together; they involved children in one household, one ongoing-pattern, a similar method of operation, common scheme, sequence, and opportunity.

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[42] Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 80 S.Ct. 102, 4 L.Ed.2d 86.

In Heuring v. State, 513 So. 2d 122 (Fla. 1987) the court recognized that Williams' Rule evidence should be more liberally allowed in child abuse cases. The court in Flanagan, *supra,* rejected the defendant's argument that Heuring stands for the proposition that the rule permitting similar facts evidence in cases involving sexual battery upon children is limited to only illicit sex between family members. In Flanagan, *supra,* the defendant argued that the trial court erred in admitting Williams' Rule testimony of an incident of sexual abuse committed by the defendant against another child. The court found the similar-fact testimony of the second child clearly relevant to prove material facts in issue--motive or intent, as required by §90.404(2)(a), Florida Statues. Id. at 1092 citing Gibbs v. State, 394 So. 2d 231, 232 (Fla. 1st DCA) affirmed, 406 So. 2d 1113 (Fla. 1981) [existence of a lustful attitude toward stepdaughter proven by prior sexual assaults, makes it more likely or probable that the defendant possessed the same state of mind on the date of the offense.] Potts v. State, 427 So. 2d 822 (Fla. 2d DCA) review denied, 434 So. 2d 888 (Fla. 1983).

In Beasley v. State, 518 So. 2d 917 (Fla. 1988) this Court, relying on Heuring, rejected the defendant's claim that testimony of the victim's sister in a sexual batter prosecution was inadmissible under Section 90.404(2)(a), Florida Statues. This Court quoted from the District Court's finding that "the trial court properly allowed the victim's sister to testify because the location, times acts, and method employed on both girls were

substantially the same. The similar fact evidence was relevant to show [Petitioner] had the opportunity to commit the crime." 517 So. 2d at 918, citing Beasley v. State, 503 So. 2d 1347 at 1349 (Fla 5th DCA 1987) (citations omitted). *See also,* Green v. State, 408 So. 2d 1086 (Fla. 4th DCA 1982) [No abuse of discretion in denying the defendant's motion for severance. Furthermore, where "there is no doubt that even if the case had been tried separately there would have been no difference in the state's evidence, the substantial right of the defendant have not been injuriously affected and the judgment should not be reversed." Id. at 1088, citing Zeigler v. State, 402 So. 2d 365 (Fla. 1981)]

Finally, evidence of collateral acts "may not make such crimes a feature of the trial instead of an incident. . . " Ashley v. State, 265 So. 2d 685, 693 (Fla. 1972). Here, the limited testimony of one witness, Z.B., did not become a feature of this defendant's trial. Lastly, in light of the defendant's acquittal on the charge involving Z.B., error, if any, was harmless.

ISSUE VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE PHOTOGRAPHS SHOWING ITEMS LOCATED INSIDE THE DEFENDANT'S APARTMENT

In the instant case, the State introduced a series of photographs showing various items located inside the defendant's apartment. These photographic exhibits depicted (#10) an organ, (#11) an entertainment unit, (#12) a collage of children's pictures, (#13) ceramics, and (#14) squeeze bottles located underneath the sink. (R. 561-562). At the commencement of the trial, the prosecutor argued that these photographs were relevant identification exhibits, *i.e.*, the children could identify them, showing their location in the defendant's apartment. (R. 9-10). The defendant's trial was held approximately one year after the offenses, and, as the prosecutor explained,

> the credibility of the children is a major issue her. Their ability to remember things they saw in the Defendant's apartment also goes to the credibility and their ability to remember what he did to them. We're dealing with three-and-a-half and five-year-old children here. If they remember seeing this and tell me where they saw it, that goes to show they remember.
>
> (R. 11).

Evidentiary rulings are within the sound discretion of the trial judge, and should not be disturbed absent a clear abuse of discretion. Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986). On appeal, the defendant now

challenges only the admission of the photograph taken of the collage located in the defendant's bedroom. For the following reason, the trial court did not abuse its discretion in admitting this photograph into evidence at trial.

In support to his argument, the defendant relies on Page v. Zordan, 564 So. 2d 500 (Fla. 2d DCA 1990), a civil case, in which Ms. Zordan sued Page, alleging that on various occasions between 1977 and 1982, when she was between 7 and 12 years old, Page handled, fondled and touched her in a lewd, lascivious or indecent manner. On appeal, the court determined that evidence that Page, the alleged child molester, possessed pornographic magazines, had allegedly peeped into the bedroom of the child's mother twenty years earlier, and suffered from sexual dysfunction was inadmissible as irrelevant to the issues at trial.

In the instant case, the children were 3, 5, and 10 years old at the time of the trial, which was held approximately one year after the allegations of abuse. The children's ability to remember things they saw in the defendant's apartment was significant to demonstrating their ability to remember what the defendant did to them. When the photographic exhibits were offered into evidence in sequence, (R. 180-183), Zack identified exhibit #12 as a photograph of a collage of pictures located in the corner of the defendant's bedroom. (R. 182). The prosecutor did not comment on the content of the photograph nor introduce this exhibit for any purpose other than identification. (See R. 182).

The defendant's argument on this point primarily criticizes the prosecutor's cross-examination. After the State rested its case, the defendant testified on his own behalf. During direct examination, the defendant testified that his hobbies included collecting teddy bears and photographs. (R. 429) Young explained, in detail, how and why he prepared the photo collage depicted in the photograph. (R. 429-430). Thereafter, the prosecutor, without objection, questioned the defendant about his testimony on direct examination concerning the collection of photographs. (R. 449-450). The defendant cannot credibly argue that he is entitled to a new trial on the basis of the prosecutor's unobjected-to cross-examination regarding a topic specifically addressed by the defendant on direct examination. Since the trial court has broad discretion to determine the proper scope of the examination of the witness, Harmon v. State, 527 So. 2d 182 (Fla. 1988); and since the unobjected-to cross-examination of the defendant has not been preserved for appeal and was clearly invited by the defendant's testimony on direct examination, the defendant's claim of reversible error must fall.

ISSUE VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING SPECTATORS, INCLUDING THE DEFENDANT'S COUSIN, FROM THE COURTROOM WHEN THE CHILD-VICTIMS TESTIFIED

In the instant case, the State filed a motion to clear the courtroom when the children testified and the trial court announced that he would deal with that motion after the jury was selected. (R. 12). Following jury selection, the trial court stated that the did not know if the defense objected the state's motion, and the defense counsel responded,

> **"Your HONOR, according to the rule, it allows immediate family member. That man her, James Pike, is Mr. Young's first cousin.**
>
> **THE COURT: It's discretionary with the Court. As far as I'm concerned, if that's the request due to the tender age of the children, I'm going to clear the courtroom of everybody except the Defendant.**
>
> *** * ***
>
> **THE COURT: That doesn't mean you have to leave right now. That means when the children testify.**
>
> **(R. 87-88)**

Shortly thereafter, when C.B. was called to testify, the trial court announced "let the record reflect that the courtroom has been cleared of everybody except officers of the court and the defendant." The defense did not object to the closure of the courtroom. (R. 98).

This issue has not been preserved for appeal. In Dixon v. State, 191 So. 2d 94 (Fla. 2d DCA 1966), the defendant was charged with handling and fondling of a nine-year old girl. At the beginning of the trial, the trial judge announced that due to the nature of the trial, the courtroom would be cleared of all spectators. There was no objection by the defense after the trial court announced the closure. On appeal, the court found that the defendant failed to preserve this issue for review.

In this case, the defendant now argues that he is entitled to a new trial because (1) the prosecutor never articulated an overriding interest likely to be prejudiced, (2) closure was broader than necessary to protect an overriding interest, (3) the trial court did not consider any reasonable alternative to closure and made no specific findings to support closure, and (4) the defendant's cousin was among those allowed to remain present within the meaning of the statute. With the exception of the claim that the defendant's cousin arguably might be considered as part of his "immediate" family, none of the foregoing claims were presented to the trial court. In light of the failure to object when the courtroom was cleared, and failure to rely on the grounds now raised, review of the partial closure of the trial is procedurally barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Gibson v. State, 533 So. 2d 338 (Fla. 5th DCA 1988) [Defense objected at trial that placement of one-way mirror between defendant and 13-year old victim in courtroom might give jury the impression that the victim was afraid of defendant. On

appeal, Gibson's argument that the procedure violated Confrontation Clause was not preserved for review.]

Furthermore, the trial judge's action in clearing the courtroom was mandated by section 918.16, Florida Statutes:

> 918.16. Sex offenses; testimony of person under age 16; courtroom cleared; exceptions
>
> In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their **immediate families** or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters. (e.s)

The defendant's cousin was not an immediate family member,[5] partially closing the trial during the testimony of the child victims. The defendant relies primarily on three case, none of which warrant a finding that the court below erred in closing the proceedings and none of which even address the issue of sufficiency of findings to support a closure. Both Pritchett v. State, 566 So. 2d 6 (Fla. 2d DCA), rev. dismissed, 570 So. 2 1306 (Fla. 1990) and Thornton v. State, 585 So. 2d 1189 (Fla. 2d DCA 1991) involved situations where a trial court ordered a complete closure of a trial, without making any findings and without allowing any exceptions such as for immediate family members of

[5]Even in the various statutes which specifically identify members included within a "family", cousins are not inclued iwth this class. *See e.g.*, §741.21; §440.13(2)(h)(2), Florida Statutes.

the parties and members of the media as required pursuant to Section 918.16, Florida Statutes. Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) also considered the propriety of a complete closure, as the trial court in that cas had ordered everyone except the parties, lawyers, witnesses, and court personnel to be excluded for the entire seven days of a suppression hearing, although the sensitive evidence only consumed about two and a half hours of the hearing.

Many courts have recognized that there is a compelling (not just substantial) interest in protecting young witnesses called upon to testify in cases involving sensitive and painful issues such as those presented in cases of alleged sex offenses. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9, n. 2, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986); Globe Newspaper Co. v. Superior Ct. for Norfolk County, 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Davis v. Reynolds, 890 F.2d 1105, 1110 (10th Cir. 1989); United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989); Pritchett, supra.

Federal cases recognize that a trial court's findings to support a closure do not have to meet any prescribed evidentiary standards. For example, in Fayerweather v. Moran, 749 F.Supp. 43 (D.R.I. 1990), the district court considered the claim of a habeas petitioner that his state trial court judge's findings to support a partial closure were insufficient because the judge did not conduct an evidentiary hearing on the issue. This claim was rejected, with the court noting "there is no prescribed format to

which a trial judge must adhere in fulfilling the mandate that adequate findings be made to support a closure order." Id. at 46. All that is required is articulated findings, specific enough that a reviewing court can determine whether the closure order was properly entered. Id.; see also, Morgan v. Lane, 705 F.Supp 410 (N.D.Ill. 1989), aff'd., 897 F.2d 531 (7th Cir. 1990)(finding from prosecutor's representations, that request for closure was reasonable based on embarrassing nature of the testimony, was adequate to support closure).

As to the trial court's consideration of reasonable alternatives prior to ordering the partial closure below, the burden is on the party opposing the closure to show that reasonable alternatives are available. United States v. Raffoul, 826 F.2d 218, 225 (3d Cir. 1987), citing Gannett Co. v. DePasquale, 443 U.S. 368 at 401, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The defense was unable to articulate any to the trial judge, nor has the appellant offered any in his brief. Typically, the partial closure granted below is considered to be the reasonable alternative to a complete closure. See, Waller; Morgan v. Lane, supra, at 414.

The facts of this case indicate that the trial court's order partially closing the proceedings during the testimony of the young child-victims was properly considered and constitutionally permissible. Therefore, the defendant is not entitled to a new trial on this issue.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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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 the Office of the Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33830, on this 20th day of December, 1993.

OF COUNSEL FOR RESPONDENT/APPELLEE