IN THE SUPREME COURT OF FLORIDA

JAMES DALE YOUNG,

Petitioner,

vs. Case No. 82,461

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On October 19, 1990, the Lee County state attorney charged the Appellant, JAMES DALE YOUNG, with two counts of capital sexual battery and one count of lewd assault. (R539) On May 10, 1991, the information was amended to include three counts of capital sexual battery and two counts of lewd assault. (R543) On June 19, 1991, a jury found Mr. Young guilty of two counts of capital sexual battery by using his finger on B.B. and C.B.. (R564-65) On October 31, 1991, Judge Nelson sentenced Mr. Young to life in prison. (R572-73) He appealed his case to the Second District Court of Appeal. (R577) Although the Second District Court of Appeal affirmed the convictions, it certified the following question to be of great public importance:

> WHETHER FLORIDA RULE OF CRIMINAL PROCEDURE 3.400(b) 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?

STATEMENT OF THE FACTS

C.B., 3, (a female); B.B., 5, (a female); and R.B., 10, (a male) were children of N[redacted] and L[redacted] B[redacted]. (R123, 140, 172-73, 196A) Mr. B[redacted] was Jewish and Mrs. B[redacted] was Christian, but they raised their children to know both religions. (R222) R.B. liked the Christian church. (R222) They moved to an apartment building in Lee County in February 1990 and soon met the Appellant, JAMES DALE YOUNG, who lived a few buildings away. (R196A-98, 223-

24) Mr. Young suffered from polio and could not walk without braces and crutches. (R423)

Mr. Young would talk to the B[redacted] children or ask them to play ball with him and other children. (R197, 223) R.B. and his friends played sockball with Mr. Young one day. (R177) The next day, Mr. Young was playing sockball again and handing out Bibles and slips for free Bible lessons. (R177-78) R.B. received a Bible inscribed, "A friend in Christ," and dated May 7, 1990. (R185) R.B. and B.B. started going with Mr. Young to church on Sunday and to other church groups during the week. (R197-98, 224, 426) C.B. was too young to go along. (R198) Mr. B[redacted] went with Mr. Young to two church functions in June and July. (R198, 224-25, 427)

N[redacted] and L[redacted] B[redacted] talked to people who knew Mr. Young and they said he was a nice person. (R198) Mr. Young asked to give the children organ lessons; and, according to the parents, R.B. and B.B. had lessons at Mr. Young's apartment perhaps three times a week for an hour or two. (R198-200, 219, 238) Mr. Young often called to ask R.B. to come. (R199)

R.B. and Mr. Young testified, however, that R.B. came almost every day for lessons and stayed all day except for lunch and dinner. (R179-80, 199, 428) B.B. often went with him, but C.B. went only a few times. (R179) Once C.B. came by herself. (R428) A retired neighbor who rented the apartment directly underneath Mr. Young's apartment saw R.B. dragging his sister to Mr. Young's apartment every day for several months. (R410-11) She never saw adults escorting the children. (R410-11)

Mr. Young had many games and toys for the children, and they would play on his movable hospital bed mattresses and watch television. (R131, 148, 179, 429) Afterwards, Mr. Young would bring the children home, and the adults would talk. (R199) They gave Mr. Young a birthday party in June with a cupcake as the cake. (R199, 448)

In June 1990 at Mr. Young's apartment, according to R.B., Mr. Young momentarily tickled R.B.'s private over his clothes. (R185-86) Neither Mr. Young nor R.B. said anything. (R186) R.B. walked away, and B.B. and C.B. began jumping on Mr. Young. (R186) Later in June, R.B., B.B., and C.B. were playing at Mr. Young's apartment; and Mr. Young was crawling around to catch R.B.. (R187) He tickled R.B. again in the same place. (R187) R.B. did not tell his mother what had happened because his mother often worried, and he was afraid she would not allow him to see Mr. Young again. (R186-88, 193)

R.B. went to a Salvation Army camp with Mr. Young during the third or fourth week of July 1990. (R178, 188, 193, 225, 432) Mr. Young stayed in a cabin with another counselor. (R193, 432) The camp nurse testified that R.B. was fighting while playing volleyball. (R414) He swore and said he saw a VCR tape at home of Satan and God having sex. (R415) He told several wild stories about sex. (R415) When the nurse asked why he was lying, he said it was fun. (R415) She called a counselor, and they talked to him about lying. (R415) When Mr. Young questioned R.B. about these statements, he

said he had learned them from two neighbor boys. (R433) He said he was Jewish and hated Mr. Young, who was a Christian. (R433)

On the way home when Mr. Young told R.B. he would tell R.B.'s parents, R.B. started screaming and said he hated Mr. Young, hated Christians, and wanted to be a Jew. (R200) When they came home, Mr. Young told R.B.'s parents what R.B. had said. (R188, 200, 225-26, 435) R.B. denied doing anything wrong and said that other boys had instigated the problems. (R201, 226, 435) His parents did not believe him because he often was bad at school, and they grounded him for a week. (R188-89, 201, 225-26, 435)

According to Mr. and Mrs. B[redacted], a detective called the camp later and learned that R.B. had only described what other boys had said and did not say them himself. (R217) They learned from a counselor and another woman whose son went there that the children were unsupervised and that each camp had perhaps twelve boys, of which R.B. was the only white boy. (R226) The other boys took his candy and made him do unnatural things. (R226)

The next day, July 30, according to Mrs. B[redacted], Mr. Young called five times to ask B.B. and C.B. to come over because he was lonely. (R201-02) Mrs. B[redacted] initially said that C.B. was too young; but, after lunch, she took them to Mr. Young's apartment. (R201-02) R.B. could not go along because he was grounded. (R187) They were there for an hour and a half. (R202) Mrs. B[redacted] called twice to make sure they were all right. (R202)

C.B. testified that Mr. Young touched her peepee and B.B.'s peepee with his finger. (R132-33) They had their clothes on.

(R137) He was holding them down somehow. (R137-38) He did not put medicine on her. (R134) R.B. was not there. (R135) B.B., however, testified that R.B. was there. (R152-53) Mr. Young did not put medicine on her or give her or C.B. a bad touch. (R154) He did not touch B.B. at all. (R159) She did not want him to get in trouble. (R155) She was angry when C.B. told her mother that Mr. Young had touched her peepee because he didn't. (R155-56) She did not see a bottle there. (R161) The neighbor who lived downstairs did not hear any sounds of distress or similar noises from Mr. Young's apartment that day. (R411-12) She would have heard these noises had there been any, because the walls were thin. (R410-11)

Mr. Young testified that he asked Mrs. B[redacted] once to send R.B. over, because he had not wanted to hurt R.B. and wanted to explain what he had done the previous night. (R438-39) She said she would think about it. (R439) About 9 or 10 a.m., the two girls came but not R.B.. (R439) They said their mother sent them. (R440) They played the organ and watched television. (R440) At noon, Mrs. B[redacted] called for them and they went home. (R440)

Half an hour later they returned saying their mother had said they could come. (R440-41) He lay on the couch to watch television while the children played with his bed. (R441) The children were quiet, and he went into the bedroom to ask what they were doing. (R441) B.B. said they were only playing. (R441) They continued to be quiet, so he went into the bedroom again and saw them naked and standing on the window sill. (R441-42) B.B. was rubbing on a metal piece on the sliding window. (R454) He yelled at them and told

them to put their clothes on. (R442) B.B. spread her legs and asked if he wanted some. (R442) He said he did not believe in that. (R442)

When they had their clothes on, he asked if B.B. wanted him to tell her mother what she had done. (R442) She said spitefully that she did not care. (R442) He decided not to call her mother, but he told her that what she had done was not proper. (R442) He went into the bedroom before lying on the couch while they sat in the lounge chair and watched television. (R443) He did not hear them talking; and, when he looked around the couch, B.B. was gone again. (R443) He asked what she was doing, and she said she was in the kitchen getting a drink. (R443) He went to the kitchen and found that she had spread his baby powder everywhere, including the refrigerator and the food. (R443) He used baby powder for his leg braces. (R443)

He was angry and asked her why she had done this. (R443-44) He said he would call her mother. (R444) She said she did not care. (R444) A few minutes later Mrs. B[redacted] called. (R444) The children did not hear what he said to her. (R444) Mrs. B[redacted] said it was 5:30 p.m. and time to go home. (R444) The children gave him a normal hug, said they would see him tomorrow, and went home. (R444)

According to Mrs. B[redacted], they came home about 3:30 or 4:00 p.m. (R209) C.B. said her peepee hurt. (R210) C.B. had had chicken pox in her vaginal area that week, and Mrs. B[redacted] thought C.B. wanted medicine for it. (R210) Mrs. B[redacted] pulled down her

panties and saw that her hymen had a hole the size of a dime and her vaginal lips were swollen and bright red. (R210) Her vaginal area had not looked that way earlier that week when they had put medicine on it. (R211) Mrs. B[redacted] saw no blood. (R219)

Mrs. B[redacted] was upset but remained calm and asked if Mr. Young had been playing a new game with her. (R211) When C.B. said he had, Mrs. B[redacted] asked C.B. to demonstrate it. (R211) She spread her legs and put her fingers in and out of the vaginal area. (R212) She said that Mr. Young had put a squeeze bottle of medicine inside her and tried to put medicine on it. (R212)

When Mrs. B[redacted] came to the living room where B.B. was watching television, B.B. started screaming that Mr. Young had told C.B. not to tell and that he could get in very bad trouble. (R212) They would not be able to play with him anymore. (R213) B.B. was crying and hysterical. (R212) She held her pants when Mrs. Berman tried to take them off. (R213) Finally, Mrs. B[redacted] pulled them off and saw that B.B.'s vaginal area looked like C.B.'s. (R213)

When Mr. B[redacted] came home at 5 p.m., Mrs. B[redacted] asked C.B. to show her father the new game she had learned. (R213, 232) She took off her panties and put her fingers in and out of her vaginal area. (R213, 232) B.B., however, cried and screamed that she was not supposed to tell and would not be allowed to play with Mr. Young. (R214, 234) She tried to keep them from pulling down her panties. (R214)

When Mr. B[redacted] saw the redness around their vaginas, he called the police and the Child Protection Team (CPT). (R214, 233-

35) They told him to act normally and get a gallon of milk for Mr. Young as he had requested. (R215, 236) They did not need to take the children to the hospital. (R235-36) While Mr. B[redacted] got the milk, Pat Gleason of HRS called Mrs. B[redacted] (R215, 255) Ms. Gleason told her not to do anything, and she would come the next day. (R215, 255)

The next morning Ms. Gleason talked to the children individually. (R215-16, 256-57) C.B. told her calmly that Mr. Young had put his finger inside her peepee and it had hurt. (R258) B.B. told her that Mr. Young had pulled her pants down, put medicine in her peepee, and put his finger inside. (R258)

Ms. Gleason and Christine Earl of the CPT interviewed the children on tape on August 3 with the police also present. (R216, 259, 278) According to the videotape, C.B. said that Mr. Young took off her panties and hurt her peepee with his finger. (R338-39) He took off his pants. (R355) Mr. Young put his peepee on her peepee. (R342, 344) He kissed her on the mouth and stomach. (R353, 356) She first said he kissed her peepee and then said he did not. (R356-57) He kissed her with his tongue. (R357) She touched his peepee. (R356) She first said that Mr. Young did not put medicine on her peepee and later said that he did. (R340, 345) They both lay on the bed. (R350) He also touched B.B. and R.B. on their peepees. (R346)

B.B. said on tape that Mr. Young told her not to tell anyone what had happened because he would get in trouble. (R361-62, 389-90) He gave her many bad touches. (R374) She was playing and ran

to his bedroom. (R375-76) He caught her, she fell down, and he touched her with his glass (crutch). (R376) She was on the bed, and R.B. was there too. (R376) The following leading questions and confusing answers occurred on the tape.

> Q: Did you ever see Jim touch [C.B.'s] peepee?
>
> A: Yes.
>
> Q: What did he do to [C.B.'s] peepee?
>
> A: He just -- I don't know.
>
> Q: Well, try to think. You know why, [B.B.], because this is very important that we know so we can make sure that Jim doesn't touch anybody else's peepee like that.
>
> A: Well, he didn't touch anybody else's peepee. That's why I said I don't know, because he hasn't touched anybody's peepee.
>
> Q: Did he touch your peepee?
>
> A: No.
>
> Q: But you told me that he did touch your peepee, and [C.B.] told me that he touched her peepee.
>
> A: Yes, well, I was in the bedroom and I fall down and then he got me and he touched my peepee.
>
> Q: When you fell down, were you on the bed?
>
> A: Yes.
>
> Q: Where was Jim?
>
> A: He was in the other room watching TV.
>
> Q: If he was in the living room watching TV, and you were on his bed in the bedroom, how did he touch your peepee?
>
> A: He walked in there and he got me -- (inaudible).

Q: Did he take off your panties or did he leave your panties on?

A: He leave my panties on.

Q: Well how did he touch your peepee with your panties on?

A: He just stuck his finger in there.

Q: He just stuck his finger in there? Did that hurt when he stuck his finger in there?

A: (Witness nodding head in the affirmative)

Q: What did you say?

A: I didn't say nothing.

Q: Oh, and what did Jim say?

A: He said -- (inaudible).

Q: How many times did Jim put his finger in your peepee?

A: Five times.

Q: Five times? Was it more than one time, many times?

A: It was just one time.

(R377-78)

B.B. said later on the tape that he touched her peepee many times. (R380) She did not know whether he put his finger inside her or what he did. (R381) He did not do anything. (R381) He hurt her by touching the middle of her peepee, not her skin or shorts. (R381) She twice refused to demonstrate on dolls what he had done. (R379, 382) He did not take off her pants, and she did not know how he touched her peepee. (R382) He did not touch her peepee with his finger and instead touched it with a hard gold glass (crutch) that he wore on his arm to walk down the stairs. (R382-84)

B.B. said on the tape that he pulled down her pants and used a squeeze bottle to put medicine on her peepee and C.B.'s peepee while they were on the floor. (R387-89) He put the bottle inside her peepee, and it hurt. (R389) She did not see his peepee, and he did not kiss her. (R390)

On August 7 the police searched Mr. Young's apartment and found a collage of children's pictures on a bedroom wall. (R283, 292) Mr. Young made the collage to teach Bible study to children and show how the pictures related to Bible stories. (R430) Two enema squeeze bottles, one of which had water in it, were under the bathroom sink. (R281, 283, 292) As a victim of polio, Mr. Young sometimes had to give himself an enema in order to go to the bathroom. (R445) On August 10 the police asked B.B. and C.B. on tape to pick out one of the bottles from a bottle lineup. (R283-84) C.B. picked the bottle from Mr. Young's apartment and demonstrated what he did with it. (R288, 394) B.B. picked a different bottle, however, and said that he touched her on her panties and put it into her butt with her pants off. (R396)

A CPT doctor examined C.B. and B.B. on August 13 and found no laceration or scarring in the genital area or disruption of the hymen. (R216, 266-68) The hymenal opening can look larger to a layperson if the lips are swollen even if it is not larger as in this case. (R273) The doctor could not support or refute the allegations of abuse. (R267-68) Redness and swelling by itself would not last longer than a week. (R273) Chicken pox, heat rash, masturbation, and rubbing with an object can cause this redness. (R274-76)

Afterward, B.B. still wanted to see Mr. Young but was told she could not. (R216) The children saw Mr. Young at the pool once while their father was with them. (R237) B.B. was upset, but the other children were not. (R237) The first or second week of August, John Donaldson walked with Mr. Young to get the mail. (R418) They saw C.B. and B.B. on a balcony. The girls were happy to see Mr. Young and called to him to play with them. (R419) Mr. Young ignored them and kept walking. (R419)

At trial the CPT nurse testified as an expert about the child sexual abuse accommodation syndrome. (R398) In the engagement phase, the perpetrator develops a relationship with the child. (R398) In the interaction phase, the sexual abuse occurs. (R399) In the secrecy phase, the perpetrator makes implied threats and asks the child not to tell. (R399) If the child eventually tells what happened, often after a crisis or accidental disclosure, then chaos occurs because many people ask questions and the child's parents might be upset and angry. (R399) The child may recant her story because she likes the perpetrator. (R400) The pressure of trial increases the likelihood of recantation. (R401)

SUMMARY OF THE ARGUMENT

I. The trial judge failed to consult with defense counsel when the jury asked to see the videotapes. Many out-of-state cases say that the jury should not be allowed to have unrestricted viewing of videotapes.

II. The in-court testimony did not establish penetration or an attempt to penetrate and instead said only that Mr. Young

touched the girls on their clothes in the vaginal areas. The out-of-court testimony was inadmissible because it consisted of prior inconsistent statements which were not substantive evidence. It was also not corroborated by competent evidence.

III. The eight hearsay statements were not reliable because they were contradictory. They were unduly prejudicial because most of them contributed nothing to the State's case except to bolster it by repetition. They were also videotapes, which are especially prejudicial. The court failed to make specific findings of fact to show reliability.

IV. The judge failed to find that the three-year-old key state witness was competent, and he allowed her testimony even though he seemed to believe that she was not competent. Her statements provided ample basis for the conclusion that she was not competent. The judge has a fundamental duty to determine competence; the parties cannot waive the competence of witnesses.

V. The judge should have severed the counts involving R.B. from the other counts. The motion to sever was timely because it was made before trial. The error was not harmless, because testimony regarding the severed counts was not admissible as Williams Rule evidence. Although the jurors acquitted Mr. Young of the counts involving R.B., their knowledge of the evidence relevant to these counts could have influenced their decision on the other counts.

VI. The collage of children in various poses had no relevance to anything and served only to show that the defendant had an unhealthy interest in children.

VII. The right to a public trial was violated when the judge excluded the defendant's cousin from the trial without making adequate findings. The statute should be interpreted to include cousins within its provisions.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY RESPONDING TO A JURY REQUEST WITHOUT CONSULTING WITH DEFENSE COUNSEL AND BY ALLOWING THE VIDEOTAPES TO GO TO THE JURY OVER DEFENSE OBJECTION.

The court instructed the jurors that, if they wished to see a videotape, they should tell the bailiff and he would play it for them. (R506) When the court asked if the parties had any objections to the instructions, the defense objected that the jury should not get the videotapes, which would be like recalling a witness and having a witness testify. (R507) The court responded that the jurors were entitled to review all physical evidence. (R507)

At a hearing on a motion for new trial, citing Chambers v. State, 504 So. 2d 476 (Fla. 1st DCA 1987), defense counsel stated that he was present during jury deliberations when the bailiff called the judge on the phone and spoke to him about something. (R515-16) Suddenly, the videotape machine and the tapes were taken into the jury room. (R516) Under the circumstances, counsel had no

opportunity to object, because the materials were already in the jury room by the time he knew what had happened. (R516) He stated that, although determining exactly what the jury was doing with the tapes was speculative, he could hear that the tapes were played, stopped, and started repeatedly in the jury room. (R516-17) Judge Nelson denied the motion for new trial. (R519)

The Second District Court of Appeal, in its opinion in this case, held the videotaped testimony to be admissible (contrary to Petitioner's argument - see Issues II and III); but the court seriously questioned the use of such testimony during jury deliberations. The court certified that issue to this court. It is to be noted that the Second District Court of Appeal found Mr. Young's attorney's objection to the jury's use of the videotapes sufficient. Young v. State, Case No. 91-3788 (Florida 2d DCA September 24, 1993), slip opinion at page 2.

The jury's use of the videotapes during deliberations was error in two ways. First, the failure to consult with defense counsel before responding to the jury's request for the videotapes was per se reversible error. Lacue v. State, 562 So. 2d 389 (Fla. 4th DCA 1990) (victim's taped statement to the police); Rodriguez v. State, 385 So. 2d 1019 (Fla. 3d DCA 1980) (photographs).

Crews v. State, 442 So. 2d 432 (Fla. 5th DCA 1983), conflicted with Lacue in a similar situation, but Crews was wrong. Crews reasoned that the jury did not ask for additional instructions or to have testimony read to them pursuant to Florida Rule of Criminal Procedure 3.410 but instead asked for evidence under Florida Rule

of Criminal Procedure 3.400. As Lacue correctly found, Bradley v. State, 513 So. 2d 112 (Fla. 1987), rejected this reasoning when the jury asked to see a police report used for impeachment and to refresh a witness's memory. Bradley found that this request about a particular aspect of the evidence was a request for instructions within the meaning of Rule 3.410. Accordingly, the judge erred by responding to this request without first consulting the defense. Also see Mills v. State, 18 Fla. Law Weekly S337 (Fla. June 17, 1993), wherein this court reaffirmed its per se error rule where a trial court responds to a jury's question without giving counsel notice and the opportunity to participate in discussing how the jury's question will be responded to.

The State might argue here that defense counsel should have objected when he realized what had happened. The court, however, had an affirmative obligation to consult with defense counsel and the failure to do so was error. "The failure to respond in open court is alone sufficient to find error." Bradley, 513 So. 2d at 114, quoting Curtis v. State, 480 So. 2d 1277, 1278 n.2 (Fla. 1985). In any event, defense counsel did object to allowing the tapes to go to the jury.

The State might also argue that defense counsel in effect responded to the jury's request in advance when he objected to the judge's instruction that the jurors could view the tapes if they asked for them. Bradley and Curtis, however, espouse a per se reversible error rule that does not include advance objections of this sort. Furthermore, the judge's action in response to the

jury's request was different from the instruction he gave. His instruction said only that the bailiff would play the tapes for the jury, which suggested that the jury would not actually get the tapes but would only hear them played for them. The judge's actual action, however, gave the tapes themselves to the jury whereupon they were played unrestrictedly and repeatedly. Had defense counsel known what the judge's actual action would be, he might have made more objections which might have persuaded the judge to act differently or in accordance with his original instruction.

The second error--unlimited, unrestricted use of the videotapes by the jury during deliberations--is the area that concerned the Second District. Although the court noted that Florida Rules of Criminal Procedure 3.400 does not prohibit admitted exhibits with verbal contents from going to the jury room during deliberations,[1] it noted that 3.400(d) specifically excluded depositions. The court, however, could not see how videotaped witness testimony differed in effect from depositions; or if there was a difference, it was a negative one:

> The common law rule was that the trial court had no discretion in submitting depositions to the jury during deliberations for unsupervised review. The purpose for this exclusion was to prevent the jury from placing undue emphasis on the depositions over all of the other testimony. See Schoeppl v. Okolowitz, 133 So.

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[1]Other cases allowing video tapes to go to the jury, the Second District noted, concerned nontestimonial exhibits. "See, e.g., 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 jury to review videotape of luminol testing during deliberations)." Young, slip op. pg. 3.

2d 124 (Fla. 3rd DCA 1961) (for discussion of the common law regarding depositions in the jury room).

Young, slip op. pp. 3,4.

> If anything, these videotaped interviews are less reliable than a typical deposition. The lack of confrontation raises serious Sixth Amendment concerns. Capital sexual battery cases may require a modified approach to evidentiary issues because of the tender age of the victims, but the potential prejudice cause by the submission of videotapes to the jury seems to outweigh even society's great need to vigorously prosecute these offenses.

Young, slip op. pg. 7, Judge Altenbernd concurring.

> I agree with both the majority and specially concurring opinions. I write only to note that if the defendant had been given notice and the children had been sworn to tell the truth and subject to cross-examination, then the videotapes would be depositions and not available to the jury during deliberations. Without the safeguards of notice, oath, and cross-examination, the rules appear to allow the viewing of the tapes during the same deliberations.

Young, slip. op. pg. 8, Judge Blue concurring. The Second District then examined the issue in light of existing case law:

> In Flanagan v. State, 586 So. 2d 1085 (Fla. 1st DCA 1991), the court was faced with the possibility, like this case, that the jury may have reviewed without supervision the child victim's videotaped testimony during jury deliberations. In Flanagan, harmless error was applied because of the lack of proof that the jury was provided equipment to view the videotape. However, the court noted that courts from other jurisdictions were also concerned about the prejudice that would result from unrestricted, unsupervised viewing of videotaped testimony, especially when that testimony constituted the only evidence of guilt. Flanagan, 586 So. 2d at 1091.
>
> The courts from these other jurisdictions have urged caution when faced with this issue.

The Wyoming Supreme Court, in Chambers v. State, 726 P.2d 1269 (Wyo. 1986), held that while it is generally preferred that a videotape be played in open court, "it is not necessarily error to allow the carefully controlled replay...in the jury room." Chambers, 726 P.2d at 1274-75. The court acknowledged that under common law principles when the jury requested to review the testimony the court was required to "discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis." 726 P.2d at 1275. Under Wyoming law it would never be proper to reread a transcript or replay a videotape of a witness's entire story. See 1-11-209, Wyo. Stat. (1977).[1] See also Martin v. State, 747 P.2d 316 (Okla. Crim. App. 1987) (holding that a videotape of the child's testimony could not be submitted to the jury for its unrestricted repeated viewing during deliberations).

[1]Section 1-11-209, Wyoming Statute (1977) permits a court to refresh the jury's recollection of trial testimony under certain limited circumstances. The statute provides:

> After the jurors have retired for deliberation, if there is disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where information upon the matter of law shall be given. The court may give its recollection as to the testimony on the points in dispute, in the presence of or after notice to the parties or their counsel.

Young, slip op. pp. 4, 5. Other cases cited in Flanagan were: Taylor v. State, 727 P.2d 274 (Wy. 1986); State v. Fried, 585 P.2d 647 (N.M. Ct. App.), cert. denied, 586 P.2d 1089 (1978); and United States v. Binder, 769 F.2d 595 (9th Cir. 1985), cert. denied, 484

U.S. 1073 (1988).

In its conclusion, the Second District stated:

> [T]hat videotaped statements of witnesses require much closer scrutiny than other types of videotaped evidence admitted at trial. Further, we conclude that the better practice with videotaped witness statements is for the trial court to instruct the jury that if the jury wishes to see the evidence contained on a videotape a second time, that the trial court should alert the attorneys involved and allow those attorneys to be heard and to state any objections. See Bradley v. State, 513 So. 2d 112 (Fla. 1987). Next, should the trial court permit the jury to view the videotape, the replay should be under the supervision of the trial court in the presence of the attorneys and defendant, unless the attorneys or defendant wish to waive their appearances.

Young, slip op. pp. 5, 6. Mr. Young contends that the procedure outlined by the Second District should have occurred in his case; and the fact that the jury was allowed unlimited, unrestricted use of the videotapes during deliberations resulted in prejudicial, reversible error.

The Second District believed it had to affirm Mr. Young's case because there was "no statute, case law, or rule which prohibits what happened in this case." Young, slip op. pg. 6. As Judge Altenbernd noted in his concurring opinion, he did not believe the Second District "had the authority to prohibit jurors from viewing these videotapes during their deliberations...." Young, slip op. pg. 6. Where the majority opinion differs from Judge Altenbernd's concurring opinion is whether such an error would be reversible in this case. Although the majority opinion could not say this error contributed to the verdict "in light of

the other substantial competent evidence of Young's guilt,"[2] Judge Altenbernd did not agree with that conclusion:

> At trial, the older victim denied that the defendant had ever assaulted her. The younger victim testified that the defendant had touched her "peepee" with his finger while she was fully clothed, and that he had done the same to her older sister. The victims' parents, however, observed physical evidence of vaginal penetration on the day of the alleged assaults.
>
> The critical videotapes in this case are recorded interviews conducted by a member of a child protection team. In a comfortable setting similar to a living room, both victims answered the questions of the team member and described the defendant's digital contact with their genitals. In light of the victims' testimony at trial, the videotapes of the earlier interviews were very critical evidence.
>
> The videotaped interviews were not conducted in the presence of any representative of the defendant, and the victims were not subjected to anything comparable to confrontation or cross-examination during those interviews. The jury saw and heard the victims' testimony in the courtroom on only one occasion. That testimony was relatively favorable to this defendant. In contrast, the members of the jury were given the opportunity to view the earlier videotaped interviews as often as they wished during their deliberations.

Young, slip op. pp. 6, 7, Judge Altenbernd concurring. Judge Altenbernd, given the authority to prohibit jurors from unrestricted, unlimited viewing of videotapes during deliberations, would have found the error reversible. Young, slip op. pg. 6. Mr. Young, of course, believes Judge Altenbernd's view to be the correct one. As Mr. Young argues throughout all the remaining

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[2]Young, slip op. pg. 6.

issues (especially in Issues II and III), the evidence in this case did not establish the crimes contained in counts I and III; and the trial court erroneously allowed unreliable hearsay. Mr. Young contends that the evidence against him was not substantial nor was it competent; and the harmless error analysis established by this Court in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), cannot be met. Mr. Young is entitled to a new trial.

ISSUE II

THE IN-COURT TESTIMONY FAILED TO PROVE PENETRATION.

The jury found Mr. Young guilty of counts I and III of the amended information for committing capital sexual battery with his finger either by (1) penetrating the vaginas of B.B. and C.B. or (2) injuring their sexual organs by attempting to penetrate their vaginas. (R543, 564-65) The State's in-court testimony failed to establish either theory of guilt.

In court, B.B. denied that any sexual battery occurred. The sole in-court testimony of penetration consisted of the following testimony from C.B.:

> Q: When Jim touched your peepee, what did he touch it with?
>
> A: His finger.
>
> Q: Can you tell us in the microphone.
>
> A: His finger.
>
> Q: Okay. Did it hurt when Jim touched your peepee with his finger.

A: Yes.

Q: Did you cry?

A: No. I just told my mommy.

Q: You told your mommy? Did Jim touch [B.B.] while you were there?

A: Yes.

Q: Where did he touch [B.B.]?

A: (Unintelligible).

Q: Did he touch [B.B.] in the same place he touched you?

A: (Witness nodded affirmatively).

Q: Did he touch [B.B.'s] peepee?

A: Yes. . . .

Q: [Y]ou say you had all your clothes on when this happened, is that right?

A: Yes.

Q: Did [B.B.] have all of her clothes on also?

A. Yes.

(R133-34, 139)

This in-court testimony was certainly insufficient to prove penetration on B.B., who denied in court that anything happened, and was also insufficient to prove penetration on C.B.. Stidham v. State, 567 So. 2d 14 (Fla. 2d DCA 1990) (child testified only that appellant touched her between her legs over her clothes); see also Firkey v. State, 557 So. 2d 582, 586 (Fla. 4th DCA 1989) ("The jury had to have guessed that vaginal penetration occurred. A jury cannot convict on evidence susceptible to speculation or conjec-

ture."). As in Jaggers v. State, 536 So. 2d 321, 326 (Fla. 2d DCA 1988), there "is not one scintilla of direct evidence produced at trial that this defendant ever penetrated with his finger the vagina of the [children]."

The in-court testimony also failed to prove the alternate theory that the children's sexual organs were injured during an attempt to penetrate their vaginas, particularly after the prosecutor waived this theory. Although she initially argued otherwise, the prosecutor ultimately argued that she did not "have to prove he injured the sexual organ. . . . [T]he Judge . . . [is] going to tell you I don't have to prove that he injured the sexual organ." (R494-95) These statements waived this theory of guilt. See Sizensky v. State, 588 So. 2d 287, 288 (Fla. 2d DCA 1991) (prosecutor conceded failure to prove .10 blood alcohol level and asked for conviction instead on impairment theory).

Even if the prosecutor did not waive this theory, the evidence failed to support it. This special theory applies only to capital sexual battery as defined in section 794.011(2), Florida Statutes (1989); it does not apply to other forms of sexual battery. In this instance, the theory required proof that the defendant injured the victims' sexual organs during an attempt to penetrate their vaginas with his finger. Because the in-court testimony showed that Mr. Young did not take off the children's clothes, however, it wholly failed to show that he attempted to penetrate their vaginas. Touching someone outside their clothes does not imply an intent to penetrate their vaginas. The in-court testimony certainly failed

to prove an attempt to penetrate B.B., who denied in court that anything happened.

Furthermore, the State failed to prove that this action was the cause of any injury to the children's sexual organs. The parents testified that they saw redness, swelling, and a vaginal hole the size of a dime. (R210) C.B., however, had chicken pox in her vaginal area that week. (R210) A CPT doctor examined C.B. and B.B. on August 13 and found no laceration or scarring in the genital area or disruption of the hymen. (R216, 266-68) The hymenal opening can look larger to a layperson if the lips are swollen, even if it is not larger as in this case. (R273) The doctor could not support or refute the allegations of abuse. (R267-68) Chicken pox, heat rash, or masturbation could have caused the redness the parents saw. (R274-76) The State provided no in-court testimony showing that the redness was caused by an attempt to commit sexual battery rather than by chicken pox or heat rash. The testimony was similar to the pediatrician's "inconclusive" testimony in Jaggers v. State, 536 So. 2d 321, 326 (Fla. 2d DCA 1988), including the evidence of redness and a vaginal opening sufficient to admit a small finger. Id. at 331 (Parker, J., dissenting).

Finally, mere redness or swelling does not constitute the injury contemplated by the statute. No Florida case interprets the word "injury" in this context. Generally, penal statutes are strictly construed under the rule of lenity. "[W]hen the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), Fla. Stat. (1989).

A reasonable construction of "injury" is that it refers to cuts, lacerations, bruises, and the like, but not to mere redness or irritation. Because the language is susceptible to this interpretation favorable to the accused, it is the interpretation that should be adopted. Under this interpretation, the in-court testimony did not prove the crime charged because no injury occurred.

The trial judge agreed that the in-court testimony failed to prove the crime. After B.B. recanted, he said he was

> not letting any jury convict . . . on evidence like this unless the evidence gets better. . . . [Y]ou have to have at least some scintilla of some evidence that something has occurred. The only evidence I have heard so far, the strongest evidence is from a three-year-old that I can barely understand. . . . I'm not putting anybody in the state prison for life with no possibility of parole for twenty-five years on that kind of evidence unless the Second District tells me I got to, so I hope it improves is all I'm telling you.

(R170)

The State will argue that the out-of-court statements admitted as evidence sufficiently supported the jury's finding of guilt. As the defense argued (R325) while citing Wallace v. Rashkow, 270 So. 2d 325 (Fla. 3d DCA 1972); and Everett v. State, 530 So. 2d 423 (Fla. 4th DCA 1988), however, prior inconsistent statements are not substantive evidence. Counsel argued that these prior inconsistent statements could be used only as impeachment, which is exactly what the Second District said in Jaggers when it cited Everett. 536 So. 2d at 325. In this instance, the State used B.B.'s prior inconsistent statements in total contradiction to her trial testimony and used C.B.'s prior inconsistent statements to impeach her critical

trial testimony that both she and B.B. were wearing their clothes at the time of the alleged act. These prior inconsistent statements were improper substantive evidence and could not be used to contradict the trial testimony.[3] In any event, B.B. expressly denied in the tape that Mr. Young did anything (R377) and expressly denied that he "put his finger up inside [her] peepee." (R387)

Furthermore, a verdict cannot rest solely on out-of-court statements unless they are corroborated by competent evidence. Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988); State v. Moore, 485 So. 2d 1279 (Fla. 1986). In this instance, the only remotely corroborating evidence was the vaginal redness and swelling; but the doctor agreed these physical manifestations could have had other causes, particularly since C.B. had chicken pox in her vaginal area. Moreover, a touch on the clothes, even if it causes redness, hardly implies penetration or an attempt to penetrate. This ambiguous, inconclusive testimony--the slenderest of reeds and the longest of bootstraps--was not the "competent corroborating" evidence required by Moore, 485 So. 2d at 1281, and Jaggers to send Mr. Young to prison for life. In Jaggers, redness in the vaginal

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[3] Petitioner points out that, except for the HRS worker's testimony (R258), the other hearsay testimony did not prove penetration either. The two parents testified only that C.B. said that Mr. Young put his finger in and out of the vaginal area. (R212, 232) In the videotape, C.B. said only that Mr. Young touched her peepee and it hurt. (R340) B.B. said on the tape that Mr. Young left her panties on before he "stuck his finger in there." (R378) He touched her peepee in the middle but did not touch her skin or shorts, presumably because her panties were still on. (R381) These statements did not establish penetration or attempted penetration.

area and a vaginal hole large enough to admit an adult finger was insufficient corroboration. 536 So. 2d at 331 (Parker, J., dissenting). It was certainly insufficient for B.B., who denied in court that anything happened.

The defense motion for judgment of acquittal could have been more specific but it was specific enough. After B.B. recanted, the judge said that "Counts I and II are down the drain." (R163) The prosecutor responded that she could introduce the prior inconsistent statements because she had other corroborating evidence, namely the injuries observed by the parents. (R163-64) The defense pointed out that the "State is trying to bootstrap nothing into something by having a trial entirely by hearsay." (R168) The defense later argued that prior inconsistent statements were not substantive evidence and could only be used as impeachment.

In his motion for judgment of acquittal, the defense argued that the counts regarding B.B. should be dismissed because of the reasons previously stated. (R404) These previously stated reasons were the arguments citing Everett for the proposition that prior inconsistent statements were not substantive evidence of guilt. With respect to C.B., the defense said her testimony was wildly inconsistent, incoherent, incomplete, and nonresponsive. (R404) This latter argument preserved the point that the only evidence of guilt was in C.B.'s prior inconsistent out-of-court statements. The prosecutor responded that convictions could be based on prior inconsistent statements "as long as there's corroborating evidence." (R405) The judge denied the motion. The defense renewed

its motion at the close of its case for the reasons previously stated, and the judge again denied it. (R461)

Considering all of the events at trial and the defense and prosecution arguments together, the defense clearly presented to the trial judge the argument that the State's evidence was insufficient because it improperly relied on hearsay out-of-court statements which were not substantive evidence and were not corroborated. This is also the defense argument on appeal. Accordingly, this issue is preserved.

If this Court finds that any issues or subissues in this respect are not preserved, then it should hold alternatively that the State failed to present a prima facie case of guilt. In Jaggers, the failure to prove penetration was preserved even though the defense objected only that the evidence failed to "prove a prima facie case." 536 So. 2d at 323. District Courts of Appeal have often held that "it is fundamental error to convict a defendant of a crime whose essential elements are not prima facie established by the evidence." Johnson v. State, 569 So. 2d 872, 874 (Fla. 2d DCA 1990); accord State v. McConnell, 582 So. 2d 775 (Fla. 2d DCA 1991); K.A.N. v. State, 582 So. 2d 57 (Fla. 1st DCA 1991). In the present case, no in-court testimony established a prima facie case of penetration or of injury during an attempt to penetrate, an essential element of the crime. Accordingly, reversible error occurred; and this Court should remand for discharge.

ISSUE III

THE HEARSAY TESTIMONY WAS UNRELIABLE, UNDULY CUMULATIVE AND PREJUDI-

CIAL, AND ALLOWED AS EVIDENCE WITHOUT APPROPRIATE FINDINGS OF FACT.

This case illustrates the prejudicial power of introducing a parade of witnesses to testify about hearsay statements of child sexual assault complainants. In addition to their trial testimony, the prosecutor used five hearsay videotaped and oral statements for C.B. and three for B.B. but did not introduce such statements for R.B. because R.B. "gave a detailed description. His hearsay statements would simply be cumulative and not necessary." (R302) The jury promptly acquitted Mr. Young of the charges involving R.B. but convicted for two counts involving C.B. and B.B., even though their statements were contradictory. Clearly, introducing hearsay prior statements greatly affects the jury's verdict.

A. Procedural Background

Before trial, the defense moved in limine to prohibit hearsay statements of C.B. and B.B.; because the requirements of section 90.803(23) had not been met and the probative value of such evidence would be outweighed by the resulting prejudice, confusion, misleading of the jury, and presentation of cumulative evidence. (R541) Shortly before trial, the prosecutor filed amended notices of intent to introduce hearsay statements of C.B. and B.B.. (R616-19) On the day of trial, the defense objected to this hearsay and pointed out that the requirements of section 90.803(23), Florida Statutes (1989), had not yet been met. According to the defense, repetition was the key to the State's case and allowing five or six State witnesses to repeat the same statements would be repetitive,

cumulative, and prejudicial. (R3-4) The court said he would rule on this evidence as it was introduced. (R8-9)

After B.B. recanted the defense objected that the purpose of the hearsay exception in section 90.803(23) was corroborating the child's testimony. The hearsay testimony did not corroborate her testimony and in fact contradicted it. The State was improperly trying the case solely on hearsay and lots of it. (R166) The court asked how hearsay could be reliable when it contradicted statements made under oath. (R167) Defense counsel said that the State was bootstrapping something from nothing by having a trial entirely by hearsay. (R168)

After a proffer of the mother's testimony, the defense objected that these statements were buttressing something that was not there. (R208-09) The judge found that the hearsay statements to the mother were reliable because the statements were childlike and made immediately after the alleged assault. (R209) After a proffer of the father's testimony, the defense objected for the reasons previously stated and because the testimony was becoming cumulative.[4] (R231) The court agreed that it was partially cumulative but nevertheless found the hearsay statements admissible because they were made closely in time to the event. (R231)

After a proffer of the HRS worker's testimony, the prosecutor argued that the hearsay statements were reliable because they did

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[4]The father did not repeat what C.B. said. Instead, he testified that she took her fingers in and out of the vaginal area when asked about the new game she had learned that day. (R232) This testimony was hearsay because it related to nonverbal conduct intended to be an assertion. § 90.801(1)(a)(2), Fla. Stat. (1989).

not use adult language, were made the next day, and were corroborated by the medical testimony. (R251) The court ruled that the statements were admissible but made no specific findings beyond the boilerplate language of the statute. (R252) Despite a direct request by the prosecutor, the court refused to make specific findings. (R253)

After a proffer of the CPT worker's testimony about the videotaped hearsay statements, defense counsel objected that he was denied the right to confrontation and could not cross-examine a television camera. (R304) The tape was also cumulative hearsay on hearsay. (R318) The court again made no specific findings but instead, after reciting boilerplate language from the statute, found that the tape was reliable. (R319)

After a proffer of the tape about the videotaped bottle demonstrations, the defense added to the previous objections that the answers were not spontaneous because they had been questioned before by a qualified adult authority figure.[5] (R321) The judge made no specific findings beyond boilerplate and admitted the tape as evidence. (R322-23)

B. Reliability

The defense objected repeatedly to the reliability of the hearsay statements because they were inconsistent with the trial testimony and buttressed something that had not been directly testified to at trial. (R166, 208-09, 325-26) The court erred by

[5]These demonstrations included verbal statements and nonverbal conduct. The nonverbal conduct was hearsay. See footnote 4.

overruling these objections and finding that the hearsay statements were reliable in the face of their manifest inconsistency.

This inconsistency was especially evident for B.B.'s testimony, because she flatly denied at trial that anything happened. This exculpatory testimony meant that the inculpatory hearsay testimony was inadmissible. "Once the state introduced the exculpatory testimony, the inculpatory prior unsworn statements became prior inconsistent statements and should not have been allowed into evidence, in this case, for any purpose, and certainly not as substantive evidence." Jaggers v. State, 536 So. 2d 321, 325 (Fla. 2d DCA 1988).

Moreover, this fatal inconsistency meant that the statements were not reliable for purposes of section 90.803(23). "[T]here appear to be serious problems with a trial judge determining such reliability of out of court statements in the face of directly contradictory in-court or video taped statements under oath and introduced at trial." Id. See also Ford v. State, 592 So. 2d 271, 275 (Fla. 2d DCA 1991) (A "person's statements cannot be reliable if they were constantly changing."); Weatherford v. State, 561 So. 2d 629, 633 (Fla. 1st DCA 1990) ("all of the statements . . . attributed to T.J. were inconsistent with each other and with the testimony of T.J. in material respects").

B.B.'s videotaped statements were not only inconsistent with her trial testimony but were also inconsistent with themselves. In one videotape, she said that Mr. Young touched her on her buttocks over her panties with an enema bottle--a statement she never made

again. (R396) In the other tape, she said that Mr. Young touched her with his glass (crutch). (R376) She said R.B. was there, although he could not have been present because their mother had grounded him. (R189, 201, 376) She did not know what Mr. Young did to C.B.'s peepee because he did not do anything to anybody. (R377) He did not touch her peepee. (R377) He touched her in the bedroom while he was in the living room watching television. (R377) He touched her "in there" with her panties on. (R378) He touched her five times. (R378) He touched her one time. (R378) He touched her lots of times. (R380) She did not know what he did. (R381) He did not do anything. (R381) He did not take down her pants. (R382) He did not touch it with his finger but his glass. (R382) He pulled off her pants and put water on her with a bottle. (R387) He did not put his finger inside her peepee. (R387) Her brief statement to the HRS worker was also inconsistent, since as pointed out in Issue II, the videotaped testimony expressly contradicted the HRS worker statement that Mr. Young put his finger inside her. In the face of these inconsistencies, the judge's finding of reliability stood the concept of reliability completely on its head.

C.B.'s trial testimony also contradicted her prior statements. In her trial testimony, she said that Mr. Young touched her and B.B. with his finger. (R133) He did not take off their clothes. (R137) He did not put medicine on her. (R134) He did not kiss her. (R134) She said that R.B. was there, although he in fact could not have been present. (R135) She did not know what Mr.

Young did to B.B.. (R138) She said first that B.B. told her to tell and later that B.B. did not tell her to tell. (R137-38)

In her videotaped testimony, she said that Mr. Young took off her clothes. (R338) He touched her peepee and it hurt. (R339) She touched his peepee. (R342) He put his peepee on her peepee. (R344) He put medicine on her. (R345) He kissed her on the mouth, stomach, and peepee. (R353, 356) She then said he kissed her only on the mouth. (R357) R.B. was present, and Mr. Young touched R.B. on his peepee. (R346) He took his clothes off. (R355) These statements were contradictory on the critical point whether the children were wearing their clothes. They were also contradictory on whether B.B. told her to tell and whether Mr. Young kissed her, took off their clothes, used medicine, exposed himself, or touched her sexual organ with his. Consequently, they cannot be considered reliable, particularly on the crucial point discussed in Issue II--whether penetration was proved.

The videotaped testimony for both C.B. and B.B. was replete with leading questions and frequent congratulations for the girls for being good after they made damaging statements against Mr. Young. The answers were not obtained through neutral investigation tactics. In light of the manifold inconsistencies of the statements and the leading and encouraging questioning, the judge erred by finding the videotapes to be reliable hearsay.

The judge made appropriate findings for C.B.'s statement to the mother, but her statements to the father and to the HRS worker had no special indicia of reliability. These statements merely

repeated what she told her mother. As defense counsel pointed out (R321), once she had committed herself to her mother, the other statements were not spontaneous and occurred in response to adult questioning. Accordingly, just as the videotapes were unreliable, so also the oral statements were unreliable. If these statements were reliable, then almost all child hearsay is reliable. The law, however, states that hearsay is presumptively unreliable absent a special showing of reliability.

Prejudice

The defense objected repeatedly both orally and in writing that the hearsay statements were not only inadmissible but also cumulative, confusing, misleading, and improperly prejudicial. (R3-4, 166, 208, 231, 318, 541) These objections were made pursuant to section 90.403, Florida Statutes (1989). This Court has held that child hearsay statements are inadmissible if they are unduly prejudicial under section 90.403. Pardo v. State, 596 So. 2d 665 (Fla. 1992). The reason for this holding is clear.

> [A] witness's testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed up by those citizens but was solely founded upon the integrity of the said witness. This danger would seem to us to be especially acute in criminal cases like the present where the prosecutrix is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers.

Pardo, 596 So.2d at 668, quoting Allison v. State, 162 So. 2d 922, 924 (Fla. 1st DCA 1964). As Mr. Young has already pointed out, the

State in this case obtained convictions only when it introduced hearsay to bolster a particular charge; it did not obtain convictions on counts that did not have bolstering hearsay. The powerful effect of this hearsay was clear.

In this case the State introduced eight prior hearsay statements, three from B.B. and five from C.B.. The jury thus heard from B.B. and C.B. about the same transaction either in court and by hearsay a total of eight times. Even if C.B.'s and B.B.'s statements to the HRS worker were not unduly cumulative because they were the only statements to clearly allege penetration, none of the other six hearsay statements added anything to the State's case except to parade a succession of adult witnesses before the jury and give the children's statements "an imprimatur of truth far beyond the content of the testimony." Pardo, 596 So. 2d at 668, quoting Kopko v. State, 577 So. 2d 956, 960 (Fla. 4th DCA 1991).

Moreover, four of the hearsay statements were videotapes. Videotapes are more prejudicial than other hearsay, because they allow children to testify again without cross-examination. "A videotaped interview of a child victim is undoubtedly more powerful, and thus potentially more prejudicial, than testimony of a witness about what the child said." People v. Newbrough, 803 P.2d 155, 161 (Colo. 1990). "The error was prejudicial in that the defendant was denied the right to cross-examine the child at the time she made her videotaped statement and the state was in effect permitted to offer the direct testimony of the victim twice, once through the videotape and once through live testimony." Cogburn v.

State, 732 S.W.2d 807, 809 (Ark. 1987). "We are further troubled by the fact that in some cases, the State, through the use of the videotape, would be able to essentially present its principal witness twice. . . . We find that this scenario produced an improper bolstering of the State's case and was error." Burke v. State, 820 P.2d 1344, 1347 (Okla. Crim. App. 1991).

Permitting the jury to hear two in-court statements, four videotaped statements, and four oral hearsay statements (a total of ten statements) about the same transaction was unduly cumulative by any standard. Accordingly, reversible error occurred in violation of section 90.403.

Findings

The trial court made specific findings for admitting the hearsay statement from the mother, but, for the hearsay statement from the father, said only that the statement was made close in time to the event. This finding was inadequate since the statement to the father was made in response to the father's questions and several hours after the girl had talked to her mother. Needless to say, she would tell the same thing to her father that she told her mother. The statement to the father, therefore, had no special indicia of reliability; and the judge's finding was insufficient. The judge also made no findings beyond boilerplate for the statements from the HRS worker or for the videotaped statements.

He refused to make more precise findings despite the prosecutor's specific request to do so. (R253) While defense counsel did not object at this point, he had no reason or obligation to object

when the court expressly rejected the prosecutor's request for specific findings. Counsel had already said orally and in writing that the requirements of section 90.803(23) had not been satisfied. (R3-4, 541) "A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless." Brown v. State, 206 So. 2d 377, 384 (Fla. 1968). "[I]t is certainly unnecessary that an accused undertake to accomplish an obviously useless thing in the face of a positive adverse ruling by the presiding judge." Birge v. State, 92 So. 2d 819, 822 (Fla. 1957).

Accordingly, this issue is preserved. Moreover, the lack of case-specific findings beyond the boilerplate statutory language was fatal. Leggett v. State, 565 So. 2d 315 (Fla. 1990); Wade v. State, 586 So. 2d 1200 (Fla. 1st DCA 1991); Weatherford v. State, 561 So. 2d 629 (Fla. 1st DCA 1990); Fricke v. State, 561 So. 2d 597 (Fla. 3d DCA 1990); Griffin v. State, 565 So. 2d 752 (Fla. 1st DCA 1988); Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988).

If this Court finds that an objection to the lack of specific findings was not preserved, then it is to be noted that the issue of whether or not an objection is required or how specific that objection must be has twice been certified as one of great public importance by the First District Court of Appeal: 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). Hopkins was orally argued on September 2, 1993, and is pending a decision with this Court. Mr. Young contends, of course,

that Judge Zehmer's dissent in Hopkins is the correct resolution of this issue:

> [O]nce the arguments have been completed and the court has ruled, neither the stat e nor the defendant should e permitted, much less required, to argue with the court over the sufficiency of the recited grounds of the court's decision. Such argument over the legality of the court's ruling is more appropriately made to the appellate court should an appeal eventually be taken. On the other hand, the procedure required by the majority opinion sounds much like a requirement to file exceptions to the trial court's ruling, a practice long abolished in court proceedings.

Hopkins, 608 So. 2d at 38.

Because the hearsay statements paraded before the jury in this case were unreliable, prejudicial, and introduced without a proper predicate of reliability, reversible error occurred and remand is necessary for a new trial.

ISSUE IV

THE COURT FUNDAMENTALLY ERRED BY ALLOWING CONVICTIONS BASED SOLELY ON THE TESTIMONY OF A THREE-YEAR-OLD WHOSE COMPETENCE WAS QUESTIONABLE AND WHOM THE JUDGE DID NOT FIND TO BE COMPETENT.

As this brief has already shown, C.B.'s testimony and hearsay statements were the crux of the State's case. The State, in fact, had no case without the statements she made before and during trial. Accordingly, the judge's decision to allow her to testify was fundamental error because he found that her competence was questionable and he appeared to believe that she was not competent.

During the competency colloquy, C.B. told the judge that she knew the difference between truth and falsehood and knew what it meant to tell the truth. (R99) She would tell the truth in court. (R99-100) She was three years old and did not believe in God. (R99-100)

During the prosecutor's questions at the competency colloquy, the judge interjected that C.B.'s answers were unintelligible and he did not have a clue what she was saying. (R102-03) Thereafter, the court reporter often recorded her answers as unintelligible. The prosecutor told her repeatedly to sit up in the chair, take her hand off the microphone, speak into the microphone, and give the prosecutor her gum. (R101, 103, 112-13, 118) The prosecutor repeatedly could not hear her. (R115, 116, 119)

C.B. said that her father had a job making a church. (R102-03) She did not know what she had for lunch and then said she had a hot dog. (R104) The ears of a Mickey Mouse doll were there "to put it on you." (R108) She did not know what she did with her ears, but she did not hear with them. (R108) She did not initially know what she did with her peepee. (R115-16) She did not know what Mr. Young touched her with and then said it was his finger. (R116)

She denied ever telling a lie but admitted that she had said some wrong things. (R106) If she did something wrong, she received a spanking. (R106) When asked whether it was good to say something wrong, she responded, "Spanking, spank." (R107) It was not good to say something right, except sometimes. (R107) If she did not say

what was right at trial, she would play. (R111) She would get a spanking if she lied; she promised to tell the truth. (R111)

While C.B. answered other questions appropriately, these answers prompted the judge to conclude that her competence was "questionable." (R119-20) He never determined that she was competent. Instead, he decided to let the jurors decide her competence, telling them that counsel would

> ask her questions to indicate to you her intelligence level, her ability to determine between right and wrong, her ability to know the difference between a truth and a lie, but what I want to admonish you is [C.B.] is three. I want you to give her testimony the weight that you think it deserves based on how she testifies and what she testifies to. It could be that you'll give it no weight, it could be that you'll give it some weight, but I think you're entitled to hear at least what she has to say based on the fact that what you're listening to is a three-year-old child and the State is trying to elicit as best they can the truth, as is the defense. So with that admonishment, I'm going to let counsel for the State do the best she can, and you'll notice the difficulty as we go along.

(R121-22)

During C.B.'s trial statements which were not under oath, the prosecutor repeatedly told her to sit up straight and talk into the microphone. (R124, 125, 127, 133) The prosecutor could not hear her. (R129) Defense counsel told her to talk more slowly, and neither he nor the court could understand her. (R136, 137) The court reporter often recorded her statements as unintelligible.

She told the jury that her father worked at the cross making a church. (R124) She did not know what Minnie Mouse used her nose

and ear for. (R126-27) She could not identify a body part that she had identified during the competency colloquy. (R127-28)

She did not know what a lie was but knew she would get a spanking if she uttered one. (R129) She would not promise that she would not say anything at trial that was bad. (R129) She would get a spanking if she said something bad. (R129) She would tell the truth. (R129) B.B. told her to tell what happened. (R137) B.B. did not tell her to tell what happened. (R138-39) B.B. did not get angry with her when she told her mother. (R134) R.B. was present at that time, and he told on them. (R135-36) When Mr. Young touched her, B.B. was "on Jim." (R136-37)

Her statements were at times incoherent.

> Q: Was Jim holding you and [B.B.] down at the same time?
>
> A: No; both of us.
>
> Q: Both of you? Could you get up and run away if you wanted to?
>
> A: And tell my mom.
>
> Q: Tell your mom? Who was going to tell your mom?
>
> A: My mom, my grandmom was --
>
> Q: Going to tell your mother or your grandmom?
>
> A: I don't have one (unintelligible). Tell my mom.

(R138)

After B.B.'s testimony, the judge commented as follows:

> So you want me to convict this fellow . . . on hearsay testimony and the testimony of a three-year-old that forty percent of her

> testimony you couldn't understand? . . . The child doesn't seem to be upset by him being here. The child said she liked him and wanted to go to his house. . . . [Y]ou have to have at least some scintilla of evidence that something has occurred. The only evidence I have heard so far, the strongest evidence is from a three-year-old that I can barely understand.

(R169-70)

The judge's failure to determine C.B.'s competence was plain error. Moreover, before she could talk to the jury without taking an oath, the judge had to determine that the "child understands the duty to tell the truth or the duty not to lie." § 90.605(2), Fla. Stat. (1989). No such determination was made in this case. Not only did the judge not find that she was competent, but his comments strongly suggested that he thought she was incompetent. His decision to let the jury itself determine the competence of her testimony "based on the fact that what you're listening to is a three-year-old child" was almost identical to the judge's inadequate finding in Griffin v. State, 526 So. 2d 752, 755 (Fla. 1st DCA 1988), that the child was competent "within the confines of what is reasonable for a four-year-old." This finding did "not satisfy the criteria set forth in section 90.605(2)."

Moreover, the competency colloquy did not establish a sense of moral obligation to tell the truth. The questions and answers were strikingly similar to those found not to establish competence in Griffin and Wade v. State, 586 So. 2d 1200 (Fla. 1st DCA 1991). While some of her answers showed that she knew the difference between truth and falsehood, they did not indicate a moral obligation to tell the truth. She in fact said that she did not know what a

lie was, that it was not good to say something right, and that if she said something wrong she would 'play.' (R107, 111, 129) These answers inspired no confidence in her desire to tell the truth. The competency colloquy suggested that "the child knew what a lie is and that it is bad; but knowing the difference between the truth and a lie does not impute a moral obligation or sense of duty to be truthful." Id. at 1204.

The defense did not object to the failure to determine competency. In fact, when asked, defense counsel said that he was not objecting on this ground. (R120) Trial judges however have an affirmative duty to determine a witness's competence whenever it is questionable, whether requested or not.

> It is the duty of the trial court, where an infant of tender years is offered as a witness, especially in a criminal case, to examine him and ascertain whether he has sufficient intelligence and understanding of the nature and obligation of an oath to be a competent witness, and such investigation should be carried far enough to make the infant's competence apparent.

Rowe v. State, 87 Fla. 17, 98 So. 613, 614 (1924); Clinton v. State, 53 Fla. 98, 43 So. 312 (1907).

The competence of witnesses is not a matter that the parties can waive, because it strikes at the very heart of a trial. McAbee v. State, 391 So. 2d 373 (Fla. 2d DCA 1980) (fundamental error goes to the foundation of the case). A trial is not a trial but a charade if the witnesses are not competent. The court's fundamental obligation in this respect was like that imposed to determine a defendant's competence if necessary whether requested or not,

because convicting an incompetent defendant is fundamental error. Lane v. State, 388 So. 2d 1022 (Fla. 1980).

In Woodfin v. State, 553 So. 2d 1355 (Fla. 4th DCA 1989), the judge made no competency inquiry before allowing a five-year-old child to testify without an oath. Woodfin, however, did not reverse because "no objection was made and we do not believe the deficiency rose to the level of fundamental error in light of the particular facts of this case." Id. at 1357 (emphasis added). In Woodfin, the testimony revealed that the child had sufficient mental capacity. "Moreover her testimony was cumulative and not nearly so damaging or explicit as that of other witnesses. . . . Their testimony corroborated that of the younger victim." Id. at 1359.

In this case by contrast, C.B.'s statements were rife with inconsistency and her in-court behavior was so unimpressive that the judge appeared to believe she was not competent. Her competence was certainly questionable. Unlike Woodfin, the testimony of the other key state witness, B.B., directly contradicted C.B.'s testimony. C.B. was also two years younger than the five-year-old in Woodfin. Unlike Woodfin and like Wade and Griffin, "the competency determination was of increased significance because the critical facts are totally dependent on the child's ability to observe and recollect." Wade, 586 So. 2d at 1203. As Issues II and III of this brief show, the hearsay evidence in this case was inadmissible and this entire case stands totally on C.B.'s in-court testimony. Allowing a man to go to prison for life based solely on

the incompetent testimony of a three-year-old was fundamental error by any standard, and this Court should reverse.

ISSUE V

THE TRIAL JUDGE SHOULD HAVE SEVERED TWO OF THE COUNTS.

The day before trial, the defense moved in writing to sever the charges involving R.B. from those involving C.B. and B.B.. (R559) The next day, the prosecutor agreed that the charges should be severed but complained that the motion was untimely. (R5-6) If any counts were severed, she asked to use them as Williams Rule evidence for the other counts. (R6) The judge ruled that the motion was untimely. (R8) During trial, defense counsel cited Florida Rule of Criminal Procedure 3.153, which allowed him to renew the motion for severance at or before the close of the evidence. (R406-07, 461) The court denied the renewed motions.

The prosecutor was correct that the cases should have been severed. In Ellis v. State, 534 So. 2d 1234 (Fla. 2d DCA 1988), the court found that three counts of sexual assault on different children were improperly joined. "The acts were related only in that they were sex offenses occurring within the same two month period in defendant's home, the victims knew each other, and the defendant was allegedly guilty. Therefore, we do not think the acts were connected in the episodic sense." Id. at 1236. See also Crossley v. State, 596 So. 2d 447 (Fla. 1992) (robberies committed a few hours and miles apart were improperly joined).

The prosecutor was wrong that the motion to sever was untimely. Rule 3.153 provides that the motion is timely if filed before trial. The motion in this case was filed before trial and heard before trial. Moreover, the rule also allows the motion to be renewed at or before the close of the evidence. Granting the motion would have made no difference procedurally, because the trial at hand would still occur. The only difference would have been that another trial would be scheduled later.

The State will claim that the error was harmless because the severed counts could be used as Williams Rule evidence. This case, however, did not involve familial custody, and the relaxed rule of Heuring v. State, 513 So. 2d 122 (Fla. 1987), did not apply. See Thomas v. State, 599 So. 2d 158 (Fla. 1st DCA 1992) ("There is likewise no basis for treating either episode as one involving the requisite familial relationship such as that involved in . . . Heuring."). Moreover, the acts did not bear the striking similarity required by Heuring because the victims' sexes were different, and Mr. Young allegedly tickled R.B. over his clothes while he allegedly penetrated B.B. and C.B. after taking off their clothes. The prosecutor claimed that the evidence showed opportunity, (R6) but opportunity was not at issue in this case. Thomas, 599 So. 2d at 158. Mr. Young never denied being in his apartment at the time.

The State might argue that the error was harmless because the jury acquitted Mr. Young of the counts involving R.B.. However, because Mr. Young was acquitted of these counts, they could not be used as Williams Rule evidence and cannot be used as such on

retrial. State v. Perkins, 349 So. 2d 161 (Fla. 1976). Moreover, although the jury did not believe that these counts were proved beyond a reasonable doubt, the testimony regarding them might easily have influenced their decision on the remaining counts. This error was not harmless, and this Court should reverse.

ISSUE VI

THE PROSECUTOR IMPROPERLY INTRODUCED EVIDENCE THAT PETITIONER HAD AN UNHEALTHY INTEREST IN CHILDREN AND PUT PICTURES OF CHILDREN ON HIS WALL.

Before trial, the defense moved orally and in writing to exclude evidence of a collage of children's faces cut out from magazines that the police found in Mr. Young's bedroom. (R4, 550, 647) Counsel argued that the "State is trying to show the jury that in fact the defendant is some sort of bisexual pedophile." (R11) The prosecutor claimed that this collage was relevant to show that the children were in the bedroom because they remembered seeing the collage. (R10) The court denied the motion and later overruled a defense objection at trial to this evidence that it was unnecessarily prejudicial and confused the issues. (R11, 182) Mr. Young explained at trial that he made the collage to teach Bible study to children and show how the pictures related to Bible stories. (R430)

The prosecutor's claim that the collage was relevant to show that the children were in the apartment was utter nonsense. Nobody ever argued or even remotely suggested that the children had not been in the apartment. The prosecutor's real purpose was to show

that Mr. Young had an improper interest in children, as her cross-examination of Mr. Young showed. If the only purpose of this evidence was to show that the children were present, she would not have cross-examined Mr. Young on it at all.

> Q: You testified that you didn't have any sexual interest in young children?
>
> A: I don't have any.
>
> Q: Do you collect anything other than the pictures that deal with young children?

(R448-49) The juxtaposition here of "sexual interest in children" and "pictures that deal with young children" was unmistakable.

This evidence was undoubtedly prejudicial. Even the judge was influenced by it, because he told Mr. Young at sentencing that he was guilty in part because "they found the collage of young, young children in various poses and . . . so forth, which is also a matter of evidence." (R532) The collage was like the pornographic magazines which the Second District found were improperly admitted to prove child molestation. Page v. Zordan, 564 So. 2d 500 (Fla. 2d DCA 1990).

Because this collage was prejudicially irrelevant, it was improperly admitted and this Court should reverse.

ISSUE VII

PETITIONER WAS DENIED HIS RIGHT TO A PUBLIC TRIAL WHEN THE COURT DID NOT ALLOW HIS COUSIN TO BE PRESENT WHEN THE CHILDREN TESTIFIED.

Citing section 918.16, Florida Statutes (1989), the prosecutor moved before trial to clear the courtroom while the child witnesses testified. (R614) At trial, defense counsel objected that the statute allowed family members to be present and that James Pike, who was present, was Mr. Young's first cousin. (R87) The judge ruled that the courtroom would be cleared of everyone except the defendant when the children testified. (R88) The courtroom was in fact cleared at that time. (R98) This ruling was reversible error for two reasons.

First, although defense counsel did not object in so many words that the motion to close the courtroom violated Mr. Young's constitutional right to a public trial, he did in effect object that the trial should be public at least to the extent of allowing a family member to be present. The defendant's right to have a cousin present was included in the defendant's right to a public trial, and, accordingly, the constitutional issue was preserved.

The United States Supreme Court has held for criminal trial proceedings that the

> presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Waller v. Georgia, 467 U.S. 39, 45 (1984), quoting Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 (1984). This Court has construed Waller to require the following four tests:

> First, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; second, the closure must be no broader than necessary to protect that interest; third, the trial court must consider reasonable alternatives to closing the proceedings; and fourth, the court must make findings adequate to support the closure.

Pritchett v. State, 566 So. 2d 6 (Fla. 2d DCA 1990); accord Thornton v. State, 585 So. 2d 1189 (Fla. 2d DCA 1991).

In this instance, the court's action failed all four tests. The prosecutor never articulated an overriding interest likely to be prejudiced. Closure was broader than necessary to protect whatever the overriding interest was, because allowing the cousin to be present would not have been an appreciably greater burden on the child witnesses than allowing the defendant to be present. The court did not consider any reasonable alternatives to closure. The court made no specific findings to support closure. Thornton and Pritchett compel reversal on this issue.

Second, defense counsel was correct that the statute included first cousins among those allowed to be present. Section 918.16 reads as follows:

> In the trial of any case . . . 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, newspaper reporters or broadcasters, and court reporters.

The critical phrase here is "parties to the cause and their immediate families." Whether first cousins are included within a

party's immediate family for purposes of section 918.16 is an issue of first impression in this state.

According to Black's Law Dictionary, 5th ed., "[t]he meaning of word 'family' depends on field of law in which word is used, purpose intended to be accomplished by its use, and facts and circumstances of each case." Florida law agrees with Black's Dictionary that the meaning of "family" depends on its context.

> While the word "family" may be said to have a well defined, broad, and comprehensive meaning in general, it is one of great flexibility and is capable of many different meanings according to the connection in which it is used, its meaning not being sufficiently certain or defined to permit its use as descriptive of particular persons for some purposes, although for other purposes, the term is not considered to be so indefinite.

Carroll v. City of Miami Beach, 198 So. 2d 643, 645 (Fla. 3d DCA 1967), quoting 35 C.J.S. Family at 936.

The court in Pritchett said that section 918.16 is constitutional as applied only if it is interpreted in accordance with Waller. Specifically, Waller requires the statute to be "narrowly tailored" to serve a compelling state interest. Barron v. Florida Freedom Newspapers, 531 So. 2d 113, 118 (Fla. 1988), agreed that "a strong presumption of openness exists for all court proceedings." Accordingly, "the trial court shall determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose."

Thus, the context of section 918.16 is that its provisions must be narrowly tailored and the trial court must use the least

restrictive closure necessary. In light of this context and the strong presumption of openness for court proceedings, section 918.16 should be interpreted liberally in favor of openness. Specifically, a defendant's immediate family should be interpreted to include first cousins. This would be consistent with everyday experience because most persons believe that relatives with this degree of consanguinity -- such as grandparents, uncles, and aunts -- are part of one's immediate family, particularly if the relative in question is the only relative to appear at the defendant's criminal trial.

Because both the statute and the constitution were violated, this Court should reverse, and remand is necessary for a new trial.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Petitioner respectfully asks this Honorable Court to reverse the sentence of the lower court.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES DALE YOUNG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 91-03788

Opinion filed September 24, 1993.

Appeal from the Circuit Court for Lee County; William J. Nelson, Judge.

James Marion Moorman, Public Defender, Bartow, and Stephen Krosschell, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Katherine V. Blanco, Assistant Attorney General, Tampa, for Appellee.

PARKER, Acting Chief Judge.

James Young (Young) appeals the final judgment which adjudicated him guilty of two counts of capital sexual battery on

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two young girls ages two and four. We affirm Young's convictions, concluding that there was substantial competent evidence upon which the jury could find Young guilty. However, because of our concern regarding the proper use of the videotaped testimony during jury deliberations, we certify the following question of great public importance:

> WHETHER FLORIDA RULE OF CRIMINAL PROCEDURE 3.400(b) 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?

In the instant case, the court properly admitted the videotaped testimony of C.B. as a prior consistent statement of sexual abuse by a child. § 90.803(23), Fla. Stat. (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).

During jury instructions, the court advised the jury that upon request the bailiff would provide the videotapes to the jury. Young's attorney objected stating that it would be synonymous to providing deposition testimony to the jury. Although the record is not clear, the defense argues that the videotapes and the equipment to play the tapes were thereafter provided to the jury during deliberations, which the state does not dispute. The question that this court must answer is whether

providing videotaped witness statements with equipment to play and replay those statements is reversible error.

Florida Rule of Criminal Procedure 3.400 provides:

> The court may permit the jury, upon retiring for deliberation, to take to the jury room:
> (a) a copy of the charges against the defendant;
> (b) forms of verdict approved by the court, after being first submitted to counsel;
> (c) any instructions given; but if any instruction is taken all the instruction shall be given; ..
> (d) all things received in evidence other than depositions.

Fla. R. Crim. P. 3.400(a), (b), (c), and (d). This rule does not exclude tangible exhibits with verbal contents which have been admitted into evidence. Nontestimonial 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. See, e.g., 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).

Rule 3.400(d) specifically excludes depositions. However, in our view videotaped witness testimony has much the same effect as depositions. The common law rule was that the trial court had no discretion in submitting depositions to the jury during deliberations for unsupervised review. The purpose for this exclusion was to prevent the jury from placing undue

emphasis on the depositions over all of the other testimony. See Schoeppl v. Okolowitz, 133 So. 2d 124 (Fla. 3rd DCA 1961)(for discussion of the common law regarding depositions in the jury room).

In Flanagan v. State, 586 So. 2d 1085 (Fla. 1st DCA 1991), the court was faced with the possibility, like this case, that the jury may have reviewed without supervision the child victim's videotaped testimony during jury deliberations. In Flanagan, harmless error was applied because of the lack of proof that the jury was provided equipment to view the videotape. However, the court noted that courts from other jurisdictions were also concerned about the prejudice that would result from unrestricted, unsupervised viewing of videotaped testimony, especially when that testimony constituted the only evidence of guilt. Flanagan, 586 So. 2d at 1091.

The courts from these other jurisdictions have urged caution when faced with this issue. The Wyoming Supreme Court, in Chambers v. State, 726 P.2d 1269 (Wyo. 1986), held that while it is generally preferred that a videotape be played in open court, "it is not necessarily error to allow the carefully controlled replay . . . in the jury room." Chambers, 726 P.2d at 1274-75. The court acknowledged that under common law principles when the jury requested to review the testimony the court was required to "discover the exact nature of the jury's difficulty, isolate the precise testimony which can solve it, and weigh the probative value of the testimony against the danger of undue emphasis." 726 P.2d at 1275. Under Wyoming law it would never be proper to reread a transcript or replay a videotape of a

witness's entire story. See § 1-11-209, Wyo. Stat. (1977).[1] See also Martin v. State, 747 P.2d 316 (Okla. Crim. App. 1987) (holding that a videotape of the child's testimony could not be submitted to the jury for its unrestricted repeated viewing during deliberations).

While Florida does not have a statute that is exactly like the Wyoming statute, we conclude that videotaped statements of witnesses require much closer scrutiny than other types of videotaped evidence admitted at trial. Further, we conclude that the better practice with videotaped witness statements is for the trial court to instruct the jury that if the jury wishes to see the evidence contained on a videotape a second time, that the trial court should alert the attorneys involved and allow those attorneys to be heard and to state any objections. See Bradley v. State, 513 So. 2d 112 (Fla. 1987). Next, should the trial court permit the jury to view the videotape, the replay should be under the supervision of the trial court in the presence of the

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[1] Section 1-11-209, Wyoming Statute (1977) permits a court to refresh the jury's recollection of trial testimony under certain limited circumstances. The statute provides:

> After the jurors have retired for deliberation, if there is disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where information upon the matter of law shall be given. The court may give its recollection as to the testimony on the points in dispute, in the presence of or after notice to the parties or their counsel.

attorneys and defendant, unless the attorneys or defendant wish to waive their appearances.

In the instant case, we affirm because we find no statute, case law, or rule which prohibits what happened in this case. 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.

ALTENBERND, J., Concurs specially.
BLUE, J., Concurs specially.

ALTENBERND, Judge, Concurring.

If I could convince myself that this court had the authority to prohibit jurors from viewing these videotapes during their deliberations, I would reverse this conviction. I believe that authority rests only with the supreme court.

At trial, the older victim denied that the defendant had ever assaulted her. The younger victim testified that the defendant had touched her "peepee" with his finger while she was fully clothed, and that he had done the same to her older sister. The

victims' parents, however, observed physical evidence of vaginal penetration on the day of the alleged assaults.

The critical videotapes in this case are recorded interviews conducted by a member of a child protection team. In a comfortable setting similar to a living room, both victims answered the questions of the team member and described the defendant's digital contact with their genitals. In light of the victims' testimony at trial, the videotapes of the earlier interviews were very critical evidence.

The videotaped interviews were not conducted in the presence of any representative of the defendant, and the victims were not subjected to anything comparable to confrontation or cross-examination during those interviews. The jury saw and heard the victims' testimony in the courtroom on only one occasion. That testimony was relatively favorable to this defendant. In contrast, the members of the jury were given the opportunity to view the earlier videotaped interviews as often as they wished during their deliberations.

If anything, these videotaped interviews are less reliable than a typical deposition. The lack of confrontation raises serious Sixth Amendment concerns. Capital sexual battery cases may require a modified approach to evidentiary issues because of the tender age of the victims, but the potential prejudice caused by the submission of videotapes to the jury seems to outweigh even society's great need to vigorously prosecute these offenses.

BLUE, Judge, Concurring.

I agree with both the majority and specially concurring opinions. I write only to note that if the defendant had been given notice and the children had been sworn to tell the truth and subject to cross-examination, then the videotapes would be depositions and not available to the jury during deliberations. Without the safeguards of notice, oath, and cross-examination, the rules appear to allow the viewing of the tapes during the same deliberations.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Katherine Blanco, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of October, 1993.

Respectfully submitted,

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