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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 84.106

LARK O'SEAN DUPREE,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner state presented a six-page statement of the case and facts which was consistent with the standard of review and contained those facts relevant to the two issues presented. Respondent objected to the petitioner's statement of the case and facts as incomplete and inadequate and supplemented with a dozen pages of facts largely irrelevant to the issues presented, thus obscuring both the relevant facts and the legal issues. Justice Terrell admonished counsel on this unprofessional practice in Kneale v. Kneale, 67 So. 2d 233, 234 (Fla. 1953).

> Preparation of the record is likewise a most important part of the appeal. To an overburdened court like this one, the preparation of the record and the brief are all the more important. Paragraph (2), Rule 11, Supreme Court Rules is specific as to method of abbreviating the record. Somewhere in the Merchant of Venice, one of Shakespeare's characters is made to say: "his reasons are as two grains of wheat hid in two bushels of chaff, you may seek all day ere you find them and when you have them they are not worth the search". With the caseload we carry, and for other reasons more important to the litigant, we need nothing in the record or the briefs but the wheat, the chaff should be let go. The overburden imposed by excesses in either is not the worst vice. The litigant's right may be so embedded or hidden in the chaff that no amount of argument or reading may reveal it to the Court. When that is the case, the litigant is disappointed and very justly loses confidence in our system of administering justice. It becomes rather a system for handing out injustice, not because of any fault in the system, but on account of lack of skill and industry on the part of those who administer it. Less chaff in the wheat will be a great boon to litigants.

The state relies on the relevant facts set out in its initial brief.

SUMMARY OF REBUTTAL ARGUMENT

The respondent argues that the statute is not ambiguous and cannot be read to permit the admission of out-of-court statements of children who are not themselves the victims of the charged offense(s). The state relies on its initial brief showing that there is ambiguity in the statutory wording and that the intent of the legislature would be frustrated by denying factfinders relevant evidence of this type from child witnesses who are not themselves the victims of the charged offenses. See, Russell v. State, 570 So. 2d 940 (Fla. 5th DCA 1990), where the court read the statute consistent with the state's position and contrary to respondent's.

The evidentiary rule in Florida is one of admissibility. Evidence may be admissible for more than one reason or may be admissible for one reason and inadmissible for another. The evidence here was admissible under both sections 90.803(23) and 90.801(2)(b). Assuming it was not admissible under the former, it was still admissible under the latter. Respondent clearly challenged the direct testimony of the child witness during cross-examination as a recent fabrication which was caused by improper influence or motive. The prior consistent statement of the child rebutted this claim; it was not introduced until after the child's direct testimony had been challenged as a recent fabrication. Further, the well-settled law in Florida is that no criminal judgment should be reversed absent a showing of prejudicial error and rulings of trial courts should be affirmed if they are correct for any reason. Moreover, there is no requirement that the "any

reason" offered by the appellee be one that was presented to the lower court.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN RULING THAT THE OUT-OF-COURT STATEMENTS OF THE CHILD WERE ADMISSIBLE PURSUANT TO SECTION 90.803(23)?

Respondent asserts that the statutory language can only be read to permit out-of-court statements of child victims who are the victims of the charged offense. This assertion is contrary to the language of the statute which addresses child victims and declarant children and does not by its terms limit the hearsay exception only to child victims of the charged offense. To read the statute as respondent argues would produce absurd results and would be contrary to the express declaration of legislative intent contained in the Whereas clauses of the act. The overstated claim that there can be no ambiguity, that only the respondent's truncated reading is correct, is plainly contrary to the decision of the court in Russell v. State, 570 So. 2d 940 (Fla. 5th DCA 1990), on which the trial court properly relied as controlling authority.

Contrary to respondent's assertion, the Florida Rules of Evidence contained in chapter 90 are not penal statutes. They apply to parties of all persuasions in both civil and criminal cases. There is no general rule of statutory construction requiring that rules of evidence be interpreted to favor one party over another.[1] Here, for example, had the surviving child stated

[1] Although not cited, respondent is apparently relying on section 775.021, Rules of construction, Florida Statutes. Section 775.021(1) provides that the "provisions of this code and offenses

out-of-court that someone other than the defendant slammed the deceased child against the wall, the out-of-court statements of the surviving child would have been admissible for the defense pursuant to section 90.803(23) or, if appropriate to rebut a charge of recent fabrication, section 90.801(2)(b). The only provision in either section of the law favoring the accused is the requirement in section 90.803(23)(b) that a defendant be notified ten days before trial of the state's intent to use an out-of-court statement. That provision was complied with.

The state relies on its full argument set out in its initial brief.

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defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." The "code" referred to is the Florida Criminal Code, section 775.011(1), which was created by the legislature's extensive revision of criminal statutes in 1974. Ch. 74-383, Laws of Florida. There is nothing in the Act suggesting that the Florida Criminal Code encompasses the Florida Evidence Code. Indeed, the latter was not created until 1976 by Chapter 76-237, Laws of Florida, which titled chapter 90 as the Florida Evidence Code. §90.101, Florida Statutes. There is no general rule in chapter 90 favoring one party over another, if there was it would almost certainly violate due process.

ISSUE II

WAS THE OUT-OF-COURT STATEMENT OF THE DECLARANT CHILD ADMISSIBLE AS A PRIOR CONSISTENT STATEMENT PURSUANT TO SECTION 90.801(2)(b)?

The state relies on its full argument set out in its initial brief and emphasizes the following in rebuttal.

First, prior to trial, over the objection of respondent, the state successfully moved the trial court to admit the out-of-court statement of the surviving child witness that he had seen the respondent pound the deceased child's head against the wall of the home. The state so moved the court pretrial for the very good reason that section 90.803(23) required it to do so. At that time the state had no way of determining whether the child, if called to testify, would be capable of recalling and testifying concerning events happening at some point in the past; nor could the state confidently anticipate that the statements could be introduced as prior consistent statements to rebut charges of recent fabrications. Rodriguez v. State, 609 So. 2d 493 (Fla. 1992). See, also, State v. Baird, 572 So. 2d 904 (Fla. 1990)(State may not introduce hearsay statement as rebuttal to defense opening argument; it must await a material fact being placed in issue). Complying with the law in the pretrial posture of the case did not prohibit the state from subsequently introducing the direct evidence of the child and the prior consistent statement, as such, to rebut a charge of recent fabrication raised during the course of the trial. That situation developed because the child testified

succinctly on direct examination that he saw the respondent pound the deceased child's head against the wall. (There had been earlier expert medical testimony that the child's death was caused by some violent force such as that to which the surviving child testified.) The child was then subjected to very lengthy and severe cross examination on whether his critically, damming testimony was a recent fabrication caused by improper influence or motive. Other witnesses were similarly questioned. In that posture, the child's out-of-court statement became critical, not merely because of its substantive content, but more importantly because it was a prior consistent statement which refuted the claim of recent fabrication, the central basis of respondent's defense. As such, it was admissible pursuant to section 90.801(2)(b) regardless of its admissibility or inadmissibility under other provisions of the evidence code.

The law in Florida is that "all relevant evidence is admissible, except as provided by law." §90.402, Fla. Stat. See, Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959)("Our initial premise is the general canon of evidence that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion," .... "we begin by thinking in terms of a rule of admissibility, as contrasted to a rule of exclusion."); Bryan v. State, 533 So. 2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028, 104 L. Ed. 2d 200, 109 S. Ct. 1765 (1989)(Reiterating Williams holdings on controlling importance of relevancy as broad rule of admissibility).

Second, it is also the law in Florida that the rulings of trial courts are presumptively correct and should be upheld if they are correct for any reason. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1980). Two corollaries of law necessarily flow from this controlling principle. First, the respondent here, appellant in the district court, has the burden of showing reversible error by demonstrating that admission of the prior consistent statement was error under both sections 90.801(2)(b) and 90.803(23). State v. Jones, 625 So. 2d 821 (Fla. 1993). Second, an appellee is entitled, indeed obligated, to raise any argument which supports the correctness of the trial court ruling. Thus, the state's argument here that the trial court properly admitted the prior consistent statement pursuant to section 90.801(2)(b) is cognizable.

Third, with the possible exception of death penalty sentences, the right to appeal is purely statutory under decisions of both this Court and the United States Supreme Court and, consistent with due process and equal protection, the legislature may set such terms and conditions as it deems wise on any right to appeal which it grants. McKane v. Durston, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1894); Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974); Abney v. United States, 431 U.S. 651, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977); Evitts v. Lucey, 469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985); and State v. Creighton, 469 So.2d 735 (Fla. 1985).

The Florida Legislature has enacted chapter 924, Florida Statutes, granting a right to appeal under certain terms and conditions. One of these terms or conditions is set out in section 924.33:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

This condition of appeal requires that an appellate court satisfy itself that any error was in fact prejudicial. Appellants cannot simply argue that errors of fact or law occurred, they must show that reversible or prejudicial error occurred. Applying section 924.33 here, or the harmless error rule in State v. DiGuilio, 491 So. 2d 491 (Fla. 1986), any error in admitting the out-of-court statement of the declarant child pursuant to section 90.803(23) was rendered harmless, indeed irrelevant, by the fact that the prior consistent statement was also admissible pursuant to section 90.801(2)(b). Thus, pursuant to section 924.33 and DiGuilio, the trial court ruling must be affirmed.

Finally, respondent argues that previous counsel for the state did not argue to the district court that the trial court must be affirmed if right for any reason or that the prior consistent statement was admissible pursuant to section 90.801(2)(b) and, consequently, the state cannot make those arguments here. Thomas v. State, 599 So. 2d 158 (Fla. 1st DCA 1992), and Cannady v. State, 620 So. 2d 165 (Fla. 1993), are cited in support. Respondent's

argument is incorrect for a number of reasons. In Thomas, the basis for the decision was that the criminal defendant had properly preserved his objection to the admission of other crimes or acts evidence and that such evidence was improperly admitted. In so holding, the court chastised the state in passing for not making a preservation argument until it filed its petition for rehearing. The preservation argument itself was rejected. That chastisement was well-deserved but it does not prohibit this Court from applying, or the state from arguing, the well-settled law that a trial court should be upheld if it is correct for any reason and no judgment should be reversed unless there is a showing of prejudicial error.[2] Similarly, respondent's reliance on Cannady is misplaced. In Cannady, the state did not ask the trial court to give a jury instruction in the penalty phase of a first degree murder trial on the aggravating factor of a prior violent felony conviction by the defendant. On appeal, this Court rejected several aggravating factors found by the trial court and directed that a life sentence be imposed. This Court refused the urging of the state to reopen the sentencing proceeding so that the state could argue and present evidence on the prior violent felony to support a death penalty. The Cannady situation does not exist here. The state is not arguing for new proceedings, it is simply urging the Court to follow well-established law that a trial court

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[2] See, State v. Murray, 443 So. 2d 955 (Fla. 1984)(Shortcomings of counsel for the state may appropriately be admonished but they do not furnish a basis for reversal of conviction unless they are so egregious as to vitiate the entire trial). To the extent that Thomas holds otherwise, it is erroneously decided.

ruling on the admissibility of evidence should be upheld if correct for any reason.

On the question of whether the trial court erred in admitting the out-of-court or prior consistent statement, it should be noted that admissibility of this evidence is inextricably intertwined with both sections 90.801(2)(b) and 90.803(23). This is one of those relatively rare situations where this Court having accepted discretionary review on one question of law must necessarily address an additional question of law because both are inextricably intertwined with the issue on which jurisdiction is based. See, Jacobson v. State, 476 So. 2d 1282 (Fla. 1985), and Savoie v. State, 422 So. 2d 308 (Fla. 1982), where the issues on which jurisdictions were based were so intertwined with other issues that review could not be conducted without going beyond the jurisdictional issue.

The issue and the circumstances here are on all fours with those in State v. Jones, except in one particular, where this Court held that out-of-court statements of a child could not be admitted pursuant to the medical treatment and diagnosis exception of section 90.803(4), and that the state should have sought admission pursuant to section 90.803(23). On its own volition, the Court then held:

> However, the State's failure to introduce the physicians' statement through section 90.803(23) is not fatal to the State in this case because the statements in question were admissible as prior consistent statements by the child to rebut charges of recent fabrication and improper influence. Section 90.801(2)(b), Fla. Stat. (1985).

State v. Jones, 625 So. 2d at 826.

CONCLUSION

The Court should hold that the child's out-of-court statements were admissible under both sections 90.803(23) and 90.801(2)(b), approve Russell v. State, quash the decision of the district court below, and remand with instructions that the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. Mail to **MR. DAVID P. GAULDIN**, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 28th day of December, 1994.

James W. Rogers

JAMES W. ROGERS