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IN THE SUPREME COURT OF FLORIDA

STEVEN JEROME ANDERSON,

Petitioner,

v. CASE NO. 84,345

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PETITIONER'S INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Steven Jerome Anderson, was the defendant in the trial court, and the appellant below. He will be referred to in this brief as petitioner, or by his proper name. Respondent, the State of Florida, was the prosecution in the trial court, and the appellee below. Respondent will be referred to herein as the state.

The record on appeal will be referred to by use of the symbol "R," and the trial transcript by use of the symbol "T," each followed by the appropriate page number.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Petitioner was charged in circuit court in Okaloosa County with a single count of lewd and lascivious conduct (R 1-2).

Petitioner was tried by a jury, and found guilty as charged (R-6). Thereafter, he was found to be a habitual offender (R-48), and was sentenced to a term of twenty-two (22) years imprisonment (R-23).

Petitioner appealed his conviction and sentence to the First District Court of Appeal (DCA), which affirmed both. The First DCA certified the following question to be one of great public importance:

> Can hearsay testimony relating to statements made by an incompetent witness constitute legally sufficient proof as the sole evidence of the commission of a criminal offense where the trial court has made no finding as to the reliability of the hearsay testimony?

Thereafter, petitioner filed a timely Notice To Invoke Discretionary Jurisdiction, which this Court acknowledged.

STATEMENT OF THE CASE

Petitioner was charged with a single count of lewd and lascivious conduct with a minor (R 1-2).

Prior to trial, the state filed an amended notice of intent to rely on hearsay statements pursuant to Section 90.803(23), Florida Statutes (T-65). The notice advised that the state intended to introduce hearsay statements at trial that 7 year old D T made to D T , Sharon DeVita, and police officer Becky Hart. The notice for each statement provided in pertinent part: "The essence of said statement has been provided in discovery and is contained in the written statement of" the above-mentioned witnesses (T-65).

There was no pre-trial hearing to ascertain the circumstances under which the child's statements were made. Furthermore, there was no judicial determination that the child's hearsay statements were made under circumstances that indicated they were reliable, and thus, admissible in evidence.

The state's first witness at trial was Shannon DeVita, the soon-to-be step-mother of the victim, D T . Ms. DeVita testified that July 23, 1992, D went fishing on a pier across the street from where she lived with D 's father (T-67).

A short time later Ms. DeVita called D and told her to come home (T-68). Ms. Devita testified that when D arrived home she "come running up to me, she put her arms around me, and she was shaking and she said, `There's a bad man on the pier'" (T-69). Ms. DeVita testified that D began to cry

and told her, "He touched me with his winkee," but did not say where she was touched (T-70). D , according to Ms. DeVita, used the term "winkee" to refer to a penis (T-69). Defense counsel made no objection to this hearsay testimony.

Ms. DeVita told D 's father what the child had told her. Thereafter, D , her father, and Ms. DeVita went to the pier. D 's father, Dean, was very angry, and upset at that time (T-77). They saw petitioner on the pier (T-70).

The trio, along with their pit bull terrier (T-87), walked to the pier at a "fast" pace (T-79), "to confront" petitioner (T-80). Before anything was said (T-78), petitioner reached into a garbage can and took out a bottle (T-71), which he held at his side (T-72).

Dean, "asked the defendant what he was doing with his daughter" (T-72), and petitioner "said he wasn't doing anything" (T-73). Petitioner "didn't do anything" else, but Dean told Ms. DeVita to call 911 (T-73).

Ms. DeVita testified that later, she helped D prepare a written account of what happened on the pier. She admitted, "I had to write it, because she can't write really yet." Ms. DeVita also admitted that she "was just helping [D] with the words" used in the statement (T-75). The statement Ms. DeVita wrote for D was:

> I was standing on the pier fishing at 8:00. This black man started talking to me. He said see the plane in the sky, see that light. He asked how old I was, then where I lived. He asked me my name. He zipped his pants down, he wrapped me around him, then he put his thing against me from behind

> after he was telling me to look at the lights in the sky. Then I kicked him in the legs and told him to leave me alone. By that time I ran because Shannon [Ms. DeVita] called me (T-76).

On cross-examination, Ms. DeVita testified that [redacted] always referred to a penis as a "winkee." She admitted that in the statement she wrote for [redacted], the term "thing" was used (T 76-77). She testified, "That was really my word. I should have put winkee" (T-77).

The state then called [redacted] to the stand (T-79). He testified his daughter "was upset," and that this, in turn, made him "mad" and "angry" (T-80). He walked over to the pier "to confront the guy" (T-80), and "asked him what the hell was going on" (T-84). He said petitioner said "he didn't do nothing, he didn't know what was going on" (T-80), that "he was down there and he was talking with her or something" (T-84). Based on petitioner's demeanor, [redacted] thought he "just basically wanted to grab his stuff and hit the road" (T-81).

[redacted] told Ms. DeVita to call 911. By the time [redacted] walked back to the pier appellant had gone (T-82).

[redacted] testified that [redacted] never made allegations of sexual abuse in the past, but that she lived with his mother for four years (T-83), while he was in prison (T-88). He also, without objection, testified, "My little girl doesn't lie to me. That's one thing I can say" (-88).

The state next called Valparaiso police officer Becky Hart to the stand. She testified that [redacted] was "stressed or distressed" when she first saw her (T-97). Without an

objection from defense counsel, or any predicated being laid by the state, Officer Hart testified D told her:

> ...that while fishing, she had been there fishing, and she spoke with Mr. Anderson. They had made small talk. She asked for some fishing bait from him and they continued to talk and to fish, and she ended up standing on Mr. Anderson's fishing cooler. He had a cooler with him, and was facing away from him when she believes that he exposed himself and touched her at that time (T-97).

Officer Hart continued to recount the statement D made to her, and claimed: "She stated that she heard his pants -- the snap on his pants and she heard his pants unzip... before she was touched from behind. ...she believes he placed his penis against her backside" (T-98).

When asked for D 's "exact words" (T-98), Hart responded, "Her exact words, I can't say, most likely I think she said private, I believe she said his private" (T-98).

Next, Officer Hart said D said:

> "she was frightened by this and she started to cry and that he told her to stop crying and continued this, and she, at that time, kicked back at him with her foot. I believe that's when it stopped at that time. She said she turned around and he had covered the front of his jeans with his shirt. He apparently -- his shirt was untucked at that time and he then apparently covered himself and rezipped his pants when she turned around (T-98).

Officer Hart testified that later, she asked D to identify an individual (T-98), and D ID'ed petitioner (T-99).

On cross-examination, Officer Hart testified that D never saw appellant's penis, and that she did not know what she

was touched with (T-99). She testified D told her she was touched only once from behind (T 99-100).

The state's last witness was patrolman Dereck Shawn Dempsey of the Valparaiso Police Department. He testified he responded to a BOLO (T-102) regarding a black male wearing a dark ball cap, blue jeans, black tennis shoes and a white pinstriped baseball-type shirt (T-102). He stated he encountered petitioner, told him "we had a little incident," and requested that he accompany him to the police department "to straighten the situation out" (T-103). Petitioner "willingly complied to accompany [him]" (T-103).

At the police department, petitioner was read Miranda warnings (T-104), and the officer "basically explained somewhat" of the information they had (T-105). The officer could not recall whether he told petitioner "that he was charged with molesting or being investigated for molesting a child" (T-105). According to Officer Dempsey, petitioner advised him "...that he had encountered down at the pier, a small child that requested him for -- if memory serves correct, some bait to do some fishing with. He let her stand up on his ice chest and fish off the pier. They had a conversation at that time. Included in the conversation was the fact that the little girl allegedly brought up about four white people having molested her in the past" (T-105). He continued: "And during this conversation he asked -- the gentleman, Mr. Anderson, requested if what the girl's father had done to these four white people and she said he didn't do anything, and he said,

well, I would have shot one of them or something to that effect" (T-106).

Petitioner was then arrested and informed of the allegations made in the statement D 's mother wrote. (T-108). At that point, petitioner "advised that while the little girl was standing there on the ice chest fishing over the edge of the pier, he had unzipped his trousers, [and] removed his penis to relieve himself" (T-109).

The officer testified that he asked D to identify petitioner via a camera and monitor. D "couldn't make out a good positive ID," he speculated, because of the "distorted view of the individual" projected by the camera (T-110). Officer Hart then took D to another room, after which, Officer Dempsey testified, without objection, that Officer Hart told him, that D told her, that petitioner was the man "who had committed this alleged act" (T-111).

Before D was allowed to testify, the court conducted a competency hearing. The following transpired:

> Q. Okay, D , do you know what it means to tell the truth?
> A. No.
> Q. You don't know what it means to tell the truth?
> A. No.
> Q. Do you know what it means to tell a lie?
> A. Yes.
> Q. Okay. Is the truth the opposite of a lie? If I show you this pen and I tell you that this pen is white, is that the truth or is that a lie?
> A. No, it's a lie.
> Q. And if I tell you this paper is white, is that the truth --
> A. Yes.

Q. -- or is that a lie?
A. Truth.

On cross-examination, the following occurred:

Q. ... And when Mr. Grinsted asked you if you knew what it meant to tell the truth, you told him no the first time?
A. Yes.
Q. But then you changed and said you did. Can you tell me why you changed your mind? Is it because you knew Mr. Grinsted wanted you to answer the other way?
A. Yes.
Q. It is? So if you raise your hand today and give an oath to tell the truth, what does that mean. Can you tell us? You don't know?
A. I don't know.

(T-115, 117).

The court ruled D was not competent to testify (T-119).

The state rested without presenting any evidence that corroborated the child's hearsay statements (T-119).

Petitioner moved for a judgment of acquittal, and argued inter alia, that there was "no direct evidence, other than the hearsay of an incompetent witness as to what occurred on that dock" (T-120).

The court denied the motion (T-122).

The defense then rested, and renewed the motion for judgment of acquittal (T-130). Petitioner relied on his original argument and added, "inasmuch as the court has ruled that the child witness in this case is incompetent to testify, I submit that there is a lack of indicia of reliability for the hearsay testimony that is the only testimony really before the

court to support any conviction" (T-131), to which the court responded, "Denied" (T-131).

The jury was instructed on the law, and retired to deliberate. Forty-five minutes later they returned a verdict of guilty as charged (T-158).

Thereafter, petitioner was sentenced to twenty-two (22) years imprisonment as a habitual offender (T-23).

SUMMARY OF ARGUMENT

Petitioner was convicted of committing a lewd and lascivious act with a minor. Before trial, the state filed notice of its intent to rely on hearsay statements made by the child victim pursuant to Section 90.803(23), Florida Statutes. At trial, the state presented the hearsay testimony without objection from petitioner, and without the court making any inquiry into the reliability of the hearsay statements. The court also failed to make any written findings to support its decision to admit the child's hearsay statements in evidence.

The child declarant was found to be incompetent by the court because she did not know the truth from a lie, and she did not know what it meant to take an oath to tell the truth. As a result, the child did not testify. The state presented no evidence that corroborated her hearsay statements.

The jury convicted petitioner based entirely on the uncorroborated, never-found-to-be-reliable hearsay testimony of the incompetent declarant. The First District Court of Appeal affirmed petitioner's conviction, but certified the following question:

> Can hearsay testimony relating to statements made by an incompetent witness constitute legally sufficient proof as the sole evidence of the commission of a criminal offense where the trial court has made no finding as to the reliability of the hearsay testimony?

Petitioner asserts the certified question must be answered in the negative.

It is well settled that uncorroborated hearsay, standing alone, is legally insufficient evidence to sustain a criminal conviction. State v. Moore, infra; Everhart v. State, infra; Bell v. State, infra. That principle applies to hearsay statements admitted pursuant to Section 90.803(23), as well. State v. Townsend, infra; Ready v. State, infra.

In the case at bar, the only evidence of petitioner's guilt was uncorroborated hearsay. Not only were the hearsay statements uncorroborated, the declarant was incompetent due to her inability to distinguish the truth from a lie. What's more, the trial court made no determination that the hearsay statements were made under circumstances that indicated they were reliable. Under these circumstances, the sum total of the state's evidence was legally insufficient to sustain petitioner's conviction. State v. Moore, infra; State v. Townsend, infra. As a result, this Court must quash the decision of the district court, and remand with instructions to discharge petitioner.

In the alternative, the trial court failed to comply with any of the statutory safeguards that insure otherwise inadmissible hearsay is reliable before it is admitted in evidence. See, S. 90.803(23), Fla. Stat.; Griffin v. State, infra. This resulted in the abrogation of petitioner's right to confront his accuser. Idaho v. Wright, infra; Perez v. State, infra; Weatherford v. State, infra. Consequently, this Court must quash the decision of the district court, and remand

with instructions to vacate petitioner's conviction and sentence, and to remand to the trial court for a new trial.

ARGUMENT

FIRST ISSUE PRESENTED

WHETHER HEARSAY TESTIMONY RELATING TO STATEMENTS MADE BY AN INCOMPETENT WITNESS CONSTITUTE LEGALLY SUFFICIENT PROOF AS THE SOLE EVIDENCE OF THE COMMISSION OF A CRIMINAL OFFENSE WHERE THE TRIAL COURT HAS MADE NO FINDING AS TO THE RELIABILITY OF THE HEARSAY STATEMENTS, AND THE STATE PRESENTED NO EVIDENCE TO CORROBORATE THEM?

Petitioner was found guilty of lewd and lascivious conduct and sentenced to twenty-two years in prison as a habitual offender. The only evidence of petitioner's guilt was hearsay testimony. There was not a scintilla of evidence to corroborate the hearsay. Furthermore, the child declarant was found to be incompetent because she did not know the truth from a lie, or what it meant to take an oath to tell the truth (T 117-119). What's more, the court made no determination that the hearsay statements were made under circumstances that provided any indicia of reliability. In fact, at trial one witness admitted that a written hearsay statement, from which she testified, was not taken down in the child's own words. Sharon DeVita claimed, however, that she "was just helping (the child) with the words" in the statement she (DeVita) wrote (T-75). The other witness admitted she did not remember exactly what the child told her. Officer Becky Hart testified, "Her exact words, I can't say, most likely I think she said...." (T-98). In effect, the state presented paraphrased hearsay statements that were attributed to the child. There is no legal authority for the introduction of such testimony.

The state failed to present sufficient competent evidence to sustain petitioner's conviction. The only matter actually proved below was that the child declarant was incompetent to testify because she did not know the difference between the truth and a lie (T-119). The out-of-court statements she made to the witnesses who testified were never found to have been made under circumstances that insured they were reliable. And those statements, which were paraphrased by the witnesses who testified at trial, were the only evidence of petitioner's guilt. The state presented no corroborating evidence.

In moving for a judgment of acquittal, petitioner correctly argued, "We have no direct evidence, other than the hearsay of an incompetent witness, as to what occurred on that dock" (T 119-120). The trial court rejected this argument.

It has long been the law of this state that uncorroborated hearsay testimony, standing alone, is legally insufficient to sustain a criminal conviction. State v. Moore, 485 So. 2d 1279 (Fla. 1986). In Moore, the only evidence of guilt was prior inconsistent statements used at trial as substantive evidence. This Court approved a district court opinion reversing Mr. Moore's conviction for first-degree murder, and reasoned "that the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements." Id. at 1281. See also, Everhart v. State, 592 So. 2d 352 (Fla. 3d DCA 1992) (uncorroborated hearsay statements cannot be used as the sole evidence to convict).

Likewise, in Bell v. State, 569 So. 2d 1322 (Fla. 1st DCA 1990), the First District Court concluded:

> "[T]he law in this state is that uncorroborated hearsay statements cannot be used as the sole evidence to convict. State v. Moore, supra. This rule applies to statements admitted under section 90.803(23), Florida Statutes. See, Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988), and Williams v. State, 560 So. 2d 1304 (Fla. 1st DCA 1990) (prior, unsworn, uncorroborated statements without more are simply insufficient as a matter of law to sustain a conviction).

See also, State v. Townsend, 635 So. 2d 949 (Fla. 1994); Ready v. State, 636 So. 2d 67 (Fla. 2d DCA 1994). Thus, the rule that uncorroborated hearsay testimony, standing alone, is insufficient as a matter of law to sustain a criminal conviction, has been applied statewide in the context of evidence presented pursuant to Section 90.803(23), Florida Statutes. Id.

The concern expressed by this Court in State v. Moore, at 1281, supra, that uncorroborated hearsay will not sustain a criminal conviction "because the risk of convicting an innocent accused is simply too great..." is a legitimate concern. Petitioner asserts that risk is at its greatest when the accused is charged with molesting a child. Therefore, the rule articulated in Moore, should apply with even greater force when the hearsay evidence is presented pursuant to Section 90.803(23).

Consequently, in the final analysis, the uncorroborated hearsay evidence presented by the state was insufficient, as a

matter of law, to sustain petitioner's conviction. State v. Moore, supra. As a result, this Court should answer the certified question in the negative, and reverse the district court's order affirming the conviction obtained below.

To avoid future convictions based on legally insufficient evidence, petitioner respectfully urges this Court to adopt a procedure that requires the trial court to insure that the statutory safeguards are strictly followed.

As this Court recognized in State v. Townsend, 635 So. 2d 949, 952 (Fla. 1994), the sexual abuse of children "is... one of the most heinous offenses enjoined by civilized society...." As a result, if there is even the slightest evidence of guilt, the possibility of conviction is almost certain. For that reason, it is imperative that the statutory safeguards of Section 90.803(23), Florida Statutes work effectively. This case clearly demonstrates that the safeguards do not always function as expected.

Section 90.803(23) establishes a relatively new exception to the general rule that hearsay is inadmissible as proof of guilt. Perez v. State, 536 So. 2d 206, 209 (Fla. 1988). Section 90.803(23) differs from most other exceptions to the hearsay rule in that it is not based on the circumstances that provide inherent indicia of reliability. For example, a dying declaration or excited utterance is considered inherently reliable because of the circumstances in which such a statement is made. The child victim exception does not contain inherent indicia of reliability. The legislature recognized this, and

established certain conditions precedent that must be met before child hearsay may be admitted in evidence.

In State v. Townsend, supra, at 957, this Court held that "under section 90.803(23), the trial judge must adhere to the following procedure: First, the trial judge must determine whether the hearsay statement is reliable and from a trustworthy source without regard to corroborating evidence. If the answer is yes, then the trial judge must determine whether other corroborating evidence is present. If the answer to either question is no, then the hearsay statements are inadmissible."

Similarly, in Salter v. State, 500 So. 2d 184 (Fla. 1st DCA 1986), the district court held that the trial court's impression that hearsay testimony introduced by the state pursuant to Section 90.803(23), was automatically (court's emphasis) admissible, was erroneous. The court noted:

> "Authorities indicate that in order to balance the need for reliable out-of-court statements of child abuse victims against the rights of the accused, the Legislature enacted (Section 90.803(23)) which will apply only if a number of foundation requirements have been shown to exist (court's emphasis). Ehrhardt, Florida Evidence, S. 803.23(a) (2d Ed. 1984)."

The Salter Court found that neither the state nor the court complied with the statutory requirements in that case. That is, the state failed to give the accused notice of its intent to rely on child victim hearsay, and the court failed to hold a hearing to determine whether the statements were reliable. Furthermore, the court failed to make written

findings regarding the reliability (or lack thereof) of the statements as required by Section 90.803(23)(c).

Thus, both the Legislature and the courts have recognized that a procedure is needed to safeguard against the admission of unreliable hearsay in child sex abuse cases. As the case at bar clearly demonstrates, however, the "statutory safeguards," are not self-activating. Without a procedure to trigger the operation of the statute, there is no guarantee the statutory safeguards will even be applied.

Petitioner respectfully submits that it would be both a more economical use of judicial resources, as well as a true safeguard against the risk of convicting an innocent accused, to require the trial court to schedule a hearing and to rule on the reliability of child hearsay statements once a party has served notice of its intent to rely on such testimony. See, S. 90.803(23)(a)1, Fla. Stat.

SECOND ISSUE PRESENTED

PETITIONER WAS DENIED THE RIGHT TO CONFRONT HIS ACCUSER WHEN THE COURT ALLOWED THE STATE TO PRESENT HEARSAY TESTIMONY PURSUANT TO SECTION 90.803(23), FLORIDA STATUTES, WITHOUT COMPLYING WITH THE STATUTORY CRITERIA ESTABLISHED TO INSURE THE HEARSAY WAS RELIABLE.

In Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), the Supreme Court held that the admission of hearsay statements of a child abuse victim under a hearsay exception not "firmly rooted" would violate a defendant's confrontation rights if the particularized guarantees of trustworthiness required for admission under the confrontation clause were not shown to be present. Section 90.803(23), is not a "firmly established" exception to the hearsay rule. Perez v. State, 536 So. 2d 206, 209 (Fla. 1988).

When the Florida Legislature enacted Section 90.803(23), Florida Statutes, it established two criteria to insure the "particularized guarantees of trustworthiness" described in Idaho v. Wright, supra, would be satisfied. Citing Ehrhardt, Florida Evidence, S. 803.23(a) (2d Ed.1984), the First District Court, in Griffin v. State, 526 So. 2d 752, 757 (Fla. 1st DCA 1988), observed:

> "[B]efore the trial court may admit the statement of a child who testifies during the trial under this exception, the trial court is required to (1) hold a hearing outside the presence of the jury to determine that the circumstances surrounding the making of the statement demonstrate that the statement is reliable, and (2) make specific findings of fact on the record setting forth the reasons why

the trial court determined that the statement was reliable...."

When these statutory criteria are properly satisfied, the Confrontation Clause of the federal constitution is not offended. See, eg., Perez v. State, supra, at 209. Conversely, failure to satisfy these statutory criteria before admitting hearsay testimony pursuant to Section 90.803(23), violates the accused's right to confront his accusers. See, Jaggers v. State, supra, at 325, citing, State v. Moore, supra; Weatherford v. State, 561 So. 2d 629 (Fla. 1st DCA 1990).

In the case at bar, the trial court failed to inquire into the circumstances surrounding the making of the child's statements to ascertain if those circumstances provided any indicia of reliability. Predictably, the court also failed to reduce its findings to writing. Given these shortcomings, plus the fact the child did not testify at trial, leads to one inescapable conclusion. Petitioner's constitutional right to confront his accusers was violated. U.S.C.A. Amend. 6; Art. I, S. 16, Const. of Fla. As a result, petitioner is entitled to a new trial.

CONCLUSION

Based on the foregoing arguments, reasoning, and citation of authority, this Court must quash the opinion of the First District Court of Appeal, and remand with instructions that petitioner's conviction and sentence be vacated.

In the alternative, this Court must quash the decision of the district court, and remand with instructions to vacate petitioner's conviction and sentence, and that he be given a new trial.

Respectfully submitted,

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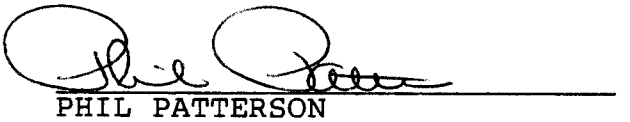
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Amelia Beisner, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, STEVEN JEROME ANDERSON, #223344, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 17th day of October, 1994.



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