IN THE SUPREME COURT OF FLORIDA

STEVEN JEROME ANDERSON,

Petitioner,

v. CASE NO. 84,345

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Steven Jerome Anderson, appellant below and defendant in the trial court, will be referred to herein as "petitioner." Respondent, the State of Florida, appellee below, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as being generally supported by the record, subject to the following additions:

1. Shannon DeVita testified at trial that when the victim ran to her from the pier and reported petitioner's actions, the child was "shaking," "very upset," and "[o]n the verge of tears" (T 69).

2. Dean Turner, the victim's father, testified that as he walked up to confront petitioner on the pier, petitioner "was pretty nervous" and he held in one hand a bottle he had retrieved from a nearby garbage can (T 80).

SUMMARY OF ARGUMENT

Petitioner claims that because the trial court admitted the child victim's out-of-court statements to Shannon DeVita and Becky Hart without first making the findings required by Section 90.803(23), Fla. Stat. (1991), the child's statements were "unreliable." Petitioner thus concludes that because these allegedly unreliable statements were the State's only evidence of his guilt, his conviction must be reversed and he must be discharged pursuant to this Court's decision in State v. Moore, infra. However, in making this argument, petitioner essentially claims that because of an alleged evidentiary error by the trial court (which petitioner presents here under Issue II), he is entitled to absolute discharge. This makes little sense. Moreover, petitioner's position here is directly contrary to the United States Supreme Court's decision in Lockhart v. Nelson, infra. Finally, because the child victim's statements were reliable and admissible as excited utterances, and because the State introduced circumstantial evidence which corroborated the child's out-of-court statements, this case differs fundamentally from State v. Moore. Petitioner's argument on this point therefore must fail, and this Court should answer the certified question in the affirmative and affirm the First District's decision.

Petitioner also claims that he is entitled to reversal of his conviction because the trial court erred in allowing the State to introduce evidence of the child victim's out-of-court

statements to DeVita and Hart without first making the findings required by Section 90.803(23), Fla. Stat. (1991). Petitioner contends that he is entitled to reversal regardless of the fact that he wholly failed to object at trial when the State introduced the victim's out-of-court statements. However, in State v. Townsend, infra, this Court held that a trial court's failure to make the findings required by Section 90.803(23) does not constitute fundamental error which is cognizable on appeal in the absence of an objection in the trial court. Petitioner's argument on this point therefore is procedurally barred. In any event, because the child's statements were admissible either as excited utterances, or as reliable statements under Section 90.803(23), the trial court's decision to allow the State to introduce those statements should be affirmed.

ARGUMENT

ISSUE I (CERTIFIED QUESTION)[1]

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?

In State v. Townsend, 635 So. 2d 949 (Fla. 1994), this Court held that

> the failure of a trial judge to make sufficient findings under the statute [Section 90.803(23), Florida Statutes], in and of itself, does not constitute fundamental error. [Hopkins v. State, 632 So. 2d 1372 (Fla. 1994)]; Seifert v. State, 616 So. 2d 1044 (Fla. 2d DCA) (a trial court's insufficient findings under 90.803(23) do not equate with fundamental error), review granted, 626 So. 2d 207 (Fla. 1993); Jones v. State, 610 So. 2d 105 (Fla. 3d DCA 1992) (issue of whether findings were sufficient under section 90.803(23) not preserved for review because no contemporaneous objection made to the findings), review denied, 620 So. 2d 761 (Fla. 1993).

Id. at 959. In the case at bar, the trial court allowed the State to introduce, without objection from petitioner (T 69-70 and 97-99), out-of-court statements the child victim made to two people shortly after petitioner committed the lewd act which is

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[1] Although he does not say so, petitioner has revised the certified question in his brief by adding at the end an assertion that "THE STATE PRESENTED NO EVIDENCE TO CORROBORATE THEM [the out-of-court statements]." Petitioner's brief at 14. Although the child victim's out-of-court statements constituted the State's only direct evidence of petitioner's guilt, the State did present circumstantial evidence which corroborated the child's out-of-court statements, as set forth below. The State therefore takes exception to petitioner's revised version of the First District's certified question.

the subject of this appeal. Because the child victim was deemed incompetent to testify at trial, her out-of-court statements constituted the State's only direct evidence of petitioner's guilt. Notwithstanding the fact that he wholly failed to object to the State's introduction of the child victim's out-of-court statements, petitioner now contends that the trial court's failure to make the findings required by Section 90.803(23) rendered the statements "unreliable." Petitioner thus concludes that because the State's only evidence of his guilt consisted of the aforementioned "unreliable" statements, his conviction must be reversed and the charge against him dismissed pursuant to this Court's decision in State v. Moore, 485 So. 2d 1279 (Fla. 1986). For the following reasons, this argument must fail.

It is apparent that in presenting this argument, petitioner has merged his claim under Issue II, infra, concerning the allegedly erroneous admission of unobjected-to out-of-court statements, with a challenge to the sufficiency of the State's evidence. Essentially, petitioner contends that although the State's evidence was sufficient to support a guilty verdict, some of the State's evidence was improperly admitted and thus was "unreliable"; and, because the State's remaining evidence was insufficient to establish his guilt, his motion for judgment of acquittal should have been granted. Petitioner thus seeks the remedy of discharge based on an alleged error by the trial court on an evidentiary issue. Clearly, however, if the child's out-of-court statements were indeed improperly admitted, as petitioner alleges under Issue II, then petitioner is not

entitled to discharge. Rather, his remedy for the alleged evidentiary error is a new trial at which the trial court will make the findings required by Section 90.803(23) and properly admit the child's statements.

The United States Supreme Court squarely addressed this issue in Lockhart v. Nelson, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). In Nelson, the court was faced with the question of whether the Double Jeopardy Clause allows retrial when a reviewing court determines that (1) a defendant's conviction must be reversed because evidence was erroneously admitted against him, and (2) without the inadmissible evidence there was insufficient evidence to support a conviction. The supreme court concluded that retrial was indeed permissible under such circumstances:

> It appears to us to be beyond dispute that this is a situation described in Burks[v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1989)] as reversal for "trial error"--the trial court erred in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction. But clearly with that evidence, there was enough to support the sentence: the court and jury had before them certified copies of four prior felony convictions, and that is sufficient to support a verdict of enhancement under the statute. . . . It is quite clear from our opinion in Burks that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause--indeed, that was the ratio decidendi of Burks, see 437 U.S., at 16-17, 57 L.Ed.2d 1, 98 S.Ct. 2141--and the overwhelming majority of appellate courts considering the question have agreed. The basis for the Burks exception to the general rule is that a

> reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence. **A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.**

Id., 488 U.S. at 40-41 (emphasis added; citation, footnotes omitted). Thus, although some evidence against Nelson was improperly admitted, and although the state's remaining evidence was insufficient to support a guilty verdict, the supreme court held that the state could retry Nelson and prove his guilt with properly admitted evidence.

It is apparent from the holding in Lockhart v. Nelson that petitioner's argument here is without merit. Again, petitioner wholly failed to object to the admission of the child's out-of-court statements when the State introduced them at trial. Thus, pursuant to this Court's decision in State v. Townsend, supra, petitioner cannot argue for the first time on appeal that this evidence was inadmissible,[2] or that the jury could not consider it in reaching its decision. Moreover, pursuant to the Nelson decision, all evidence admitted at trial (including allegedly improperly admitted evidence) is to be considered in determining the sufficiency of the evidence to sustain the trial court's ruling on a motion for judgment of acquittal. Consequently, petitioner cannot simply disregard the child's statements when addressing the propriety of the trial court's determination that

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[2] See the State's argument under Issue II, infra.

the State's evidence was sufficient to show that petitioner committed a lewd and lascivious act in the child's presence. Accordingly, because an examination of all of the evidence presented at trial, including the allegedly improperly admitted and "unreliable" out-of-court statements by the child, reveals that the State's evidence was sufficient to prove petitioner's guilt, the trial court properly denied petitioner's motion for judgment of acquittal based on the evidence before it. Hence, in order to prevent petitioner from obtaining a greater remedy via a judgment of acquittal argument than he would have received if he had objected to the allegedly erroneous introduction of the child's statements, this Court must reject petitioner's claim that the trial court erred in denying his motion for judgment of acquittal.

Notwithstanding the foregoing, petitioner claims that he is entitled to discharge pursuant to this Court's decision in State v. Moore, supra. In Moore, the State presented testimony from two adult eyewitnesses who, prior to trial, had testified under oath before a grand jury that Moore had committed a murder. When the witnesses recanted at trial and testified that they had lied before the grand jury because of police coercion, the State introduced their prior inconsistent grand jury testimony as substantive evidence of Moore's guilt pursuant to Section 90.801(2)(a), Fla. Stat. (1981). After a jury convicted Moore of second-degree murder, the Fourth District reversed Moore's conviction on direct appeal, holding "'that in the absence of some competent corroborating evidence the admittedly perjured

testimony of the witnesses did not constitute sufficient competent evidence' to support a conviction." Moore, 485 So. 2d at 1281 (quoting Moore v. State, 473 So. 2d 686, 687 (Fla. 4th DCA 1984)). This Court agreed with the Fourth District and determined, "as a matter of law, that in a criminal prosecution a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt." Id. This Court explained its holding as follows:

> We agree that the risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements. In so holding, we emphasize, as the district court below did, that we are not establishing a procedure whereby appellate courts reweigh the evidence and substitute their judgments for those of the jury. . . . [W]e have limited our response to the sufficiency of the evidence which is a legitimate concern of appellate courts. In this instance we find, for the reasons stated, that the state's proof was legally insufficient as a matter of law to prove guilt beyond a reasonable doubt.

Id. at 1281-1282 (citation omitted).

Despite petitioner's assertions to the contrary, the case at bar differs fundamentally from Moore. First, whereas the witnesses in Moore recanted at trial and disavowed the out-of-court statements on which the State based its entire case, the victim in the case at bar did not recant or otherwise indicate that her out-of-court statements were untrue. Thus, while the circumstances present in Moore provided a good indication that the witnesses' out-of-court statements were unreliable, there is nothing in the case at bar to indicate that the victim's out-of-

court statements were unreliable. To the contrary, for the reasons set forth below, the circumstances surrounding the victim's statements in the case at bar indicated that the statements were reliable.

Petitioner claims that because the Section 90.803(23), Fla. Stat. (1991) exception to the hearsay rule is not firmly rooted and "does not contain inherent indicia of reliability," Petitioner's brief at 17, "the rule articulated in Moore should apply with even greater force when the hearsay evidence is presented pursuant to Section 90.803(23)." Petitioner's brief at 16. However, because Section 90.803(23) provides that a child victim's statements must be found to be reliable before they may be introduced as substantive evidence, statements introduced pursuant to the statute are inherently reliable. Undoubtedly, the trial court's failure in this case to make the findings of reliability required by Section 90.803(23) is directly attributable to petitioner's failure to object to the State's introduction of the child victim's out-of-court statements. Hence, petitioner's contention on this point again reveals the true nature of his argument here, i.e., an attempt to bootstrap an evidentiary issue onto a judgment of acquittal issue.

In any event, petitioner's claim that he is entitled to discharge under Moore because the child victim's statements were introduced pursuant to the "new" and "less reliable" hearsay exception found in Section 90.803(23) must fail because the facts of this case reveal that the child's statements to Shannon DeVita

and Becky Hart were admissible under the more firmly rooted (and, ostensibly, more reliable) "excited utterance" exception to the hearsay rule. This exception, contained in Section 90.803(2), Fla. Stat. (1991), defines an excited utterance as

> [a] statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Additionally, this Court has stated that in order for a statement to fall within the excited utterance exception,

> (1) there must be an event startling enough to cause nervous excitement; (2) the statement must have been made before there was time to contrive or misrepresent; and (3) the statement must be made while the person is under the stress of excitement caused by the event.

State v. Jano, 524 So. 2d 660, 661 (Fla. 1988) (citing Jackson v. State, 419 So. 2d 394 (Fla. 4th DCA 1982)).

In the case at bar, the victim's statements to DeVita fall squarely within the excited utterance exception as outlined above. Here, the startling "event or condition" was petitioner's act of approaching the child and touching her with his penis. The victim ran to DeVita when DeVita called her, and the child immediately informed DeVita that there was a bad man on the pier who had "touched [her] with his winkee" (T 69-70). DeVita testified that when the child ran to her from the pier and reported petitioner's actions, the child was "shaking," "very upset," and "[o]n the verge of tears" (T 69). Obviously, then, the victim was under the stress of excitement caused by the incident when she made her statements to DeVita. Furthermore,

the victim made her statements to DeVita before there was time for her to contrive or misrepresent what petitioner had done to her. The victim's statements to DeVita fall within the excited utterance exception to the hearsay rule, and they were reliable and admissible under that exception regardless of whether the trial court followed the dictates of Section 90.803(23).

Because the child made her statements to Becky Hart at the police station some time after the incident occurred, it is less obvious that those statements were admissible as excited utterances. However, Hart testified that when she spoke to the victim, the child was still "stressed or distressed" from the incident (T 97). Consequently, the child made her statements to Hart at a time when the child was still under the stress or excitement caused by the incident. Professor Ehrhardt has noted that

> [u]nder section 90.803(2) it is not necessary that there be contemporaneity between the event and the statement. As long as the excited state of mind is present when the statement is made, the statement is admissible if it meets the other requirements of section 90.803(2). **This excited state may exist a substantial length of time after the event.** In determining whether the necessary mental state exists, the length of time between the statement and the startling event may be considered. Only in exceptional cases would a statement made more than several hours after the event be made in the stress of excitement caused by the event. Other factors that the trial judge can consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the

> characteristics of the event and the subject matter of the statements.

C. Ehrhardt, **Florida Evidence** § 803.2 at 593 (1993 ed.) (emphasis added). Thus, regardless of the fact that some time passed before the victim made her statements to Hart, those statements were admissible under Section 90.803(2); and, even if the child's statements to Hart did not qualify as "excited utterances," Hart's testimony was merely cumulative to that of DeVita. The child's out-of-court statements thus were much more reliable than was the State's evidence in Moore and, as a consequence, the concerns that were present in Moore are not present here.

Moreover, despite petitioner's assertion that "[t]here was not a scintilla of evidence to corroborate the hearsay," Petitioner's brief at 14, the State did introduce evidence in the case at bar which corroborated the child's out-of-court statements about what petitioner had done to her. At trial, Shannon DeVita testified that after the victim told her what had happened, DeVita, the child and the child's father went to the pier to see if the "bad man" was still there. As the trio approached petitioner, but before anyone said anything to him, petitioner reached into a nearby garbage can and took out a bottle which he held at his side (T 71-72). DeVita stated that petitioner acted as though "he obviously knew he done [sic] something wrong" (T 71). Similarly, Dean Turner, the victim's father, testified that as he walked up to confront petitioner on the pier, petitioner "was pretty nervous" and he held in one hand a bottle he had retrieved from a nearby garbage can (T 80).

Thus, just as guilt can be inferred from evidence of flight, the jurors could have concluded from petitioner's actions on the pier that he had done something to the child and that he had good reason to fear the child's parents. Further, the State presented evidence that when the victim's father returned to the pier after informing petitioner that he was leaving to call the police, petitioner had left the pier (T 82) and the police picked him up approximately a block and a half from the scene of the incident (T 102). This was classic "flight" evidence.

The State also presented the testimony of Officer Dereck Dempsey, who stated that after he read petitioner his Miranda warnings, petitioner told the officer that a small child had approached him on the pier to fish with him, and the child told petitioner about four white people who had molested her in the past (T 105). When petitioner made this statement, the officer had not yet told him any of the details of the charge for which he was being questioned. Id. Further, the victim's father testified that his daughter had never made to him an allegation about four or five white people molesting her, or about any type of sexual abuse (T 82-83).

Later, after the child had identified petitioner as the man on the pier, Officer Dempsey again informed petitioner of his rights and asked petitioner if he wished to make any further statements (T 108-109). At that point petitioner told the officer that while the little girl was standing on his ice chest fishing over the edge of the pier, petitioner had unzipped his trousers and removed his penis to relieve himself (T 109).

The State's evidence of petitioner's actions on the pier, of his flight from the pier when the victim's father left to call the police, and of his statements to Dempsey corroborated the child's statements about what occurred on the pier. Again, before DeVita or the victim's father said anything to him on the pier, petitioner began looking nervous and he pulled a bottle from a nearby garbage can. Further, when the victim's father returned to the pier after calling the police, petitioner had fled the scene. Each of these pieces of evidence indicated that petitioner had a guilty conscience about something he had done to the child. Moreover, the jurors could have viewed petitioner's statements to Dempsey as an attempt to evade prosecution by lying about what happened on the pier. Indeed, the jurors could have found the statements to be so unbelievable that they constituted affirmative evidence that petitioner had committed the offense alleged by the victim. The State therefore presented evidence apart from the child's statements which indicated that the offense occurred, and which corroborated the child's statements.

In Moore, this Court held that "the risk of convicting an innocent accused is simply too great when the conviction is based entirely on inconsistent statements." Moore, 485 So. 2d at 1281 (emphasis added). See also Bell v. State, 569 So. 2d 1322, 1323 (Fla. 1st DCA 1990) ("Because the only evidence presented by the state was the prior, unsworn, inconsistent, and uncorroborated statement, the state did not meet its burden of proving the elements of the crime beyond a reasonable doubt, and a judgment of acquittal should have been granted."), review denied, 581 So.

2d 1310 (Fla. 1991). In the case at bar, by contrast, the victim's out-of-court statements were not the only evidence showing that petitioner had committed a lewd act in the victim's presence, and they were not inconsistent with any other statements. Rather, as set forth above, the State presented other circumstantial evidence of petitioner's guilt, including his defensive actions as the victim's parents approached him, his flight from the pier, and his differing attempts to explain away the victim's accusations against him. The case at bar therefore does not fall within the ambit of Moore, and petitioner's argument to the contrary must fail. See Chambers v. State, 504 So. 2d 476, 478 (Fla. 1st DCA 1987) (case distinguished from Moore because other evidence presented by State "sufficiently corroborated the children's prior inconsistent statements").

To summarize, it is apparent from the First District's opinion and its certified question that the court was concerned with the trial court's failure to make the particularized finding of reliability required by Section 90.803(23). However, if this Court determines that petitioner is entitled to a judgment of acquittal due to the trial court's failure to make the requisite statutory findings, it will allow petitioner to obtain via a judgment of acquittal argument what he cannot obtain, absent an objection in the trial court, by arguing that the trial court erred in admitting the child victim's out-of-court statements. Indeed, if petitioner is successful with his current argument, he will receive a discharge, which is a far greater remedy than he would have received if he had objected when the victim's

statements were introduced at trial and then argued on appeal that the trial court failed to make the findings required by Section 90.803(23). The message to all defendants in similar cases, where the State's only direct evidence of child sexual abuse is the child victim's out-of-court statements, will be that it is better to allow the statements into evidence without objection, and then to argue on appeal that the statements are "unreliable" because the court failed to make the necessary findings of reliability, and that because the statements are unreliable the conviction cannot stand. In order to prevent this abuse of the system, and for the other reasons set forth above, this Court should answer the certified question in the affirmative and affirm the First District's decision.

ISSUE II

THE TRIAL COURT'S FAILURE TO MAKE THE FINDINGS REQUIRED BY SECTION 90.803(23), FLA. STAT. (1991), BEFORE ALLOWING THE STATE TO INTRODUCE THE CHILD VICTIM'S OUT-OF-COURT STATEMENTS DOES NOT CONSTITUTE FUNDAMENTAL ERROR.

Petitioner next contends that the trial court erred in allowing the State to introduce the child victim's out-of-court statements to Shannon DeVita and Becky Hart without first making the findings required by Section 90.803(23), Fla. Stat. (1991). Although petitioner did not object in any manner to the introduction of the child's out-of-court statements, see (T 69-70 and 97-99), he nevertheless contends that the introduction of those statements violated his constitutional right to confront his accusers, and that he therefore is entitled to a new trial. Because petitioner's argument on this point is beyond the scope of the certified question on which the Court's jurisdiction is based, this Court should decline to address it. See State v. Gibson, 585 So. 2d 285 (Fla. 1991); Stephens v. State, 572 So. 2d 387 (Fla. 1991).

Moreover, even if this Court decides to address petitioner's argument on this point, his argument must fail because he failed to preserve it for appellate review. Although he cites this Court's decision in State v. Townsend, 635 So. 2d 949 (Fla. 1994) throughout his brief, petitioner apparently has overlooked that portion of the Townsend opinion in which this Court held that "the failure of a trial judge to make sufficient findings under [Section 90.803(23)], in and of itself, does not constitute

fundamental error." Id. at 959 (citations omitted). Clearly, then, pursuant to Townsend, petitioner was required to object to the trial court's allegedly erroneous introduction of the child victim's out-of-court statements if he wished to preserve the issue for appellate review. Because petitioner wholly failed to object to the introduction of the child victim's out-of-court statements, his argument on this point is procedurally barred pursuant to Townsend.

Even assuming that petitioner's current argument is cognizable on appeal in the absence of an objection in the trial court, that argument nevertheless must fail. First, even if the child victim's statements to DeVita and Hart were not admissible under Section 90.803(23), for the reasons set forth in the State's argument under Issue I, infra, they were admissible under the "excited utterance" exception to the hearsay rule set forth in Section 90.803(2), Fla. Stat. (1991). Accordingly, the child's statements were admissible regardless of whether the trial court followed the dictates of Section 90.803(23), and the trial court's decision to admit the child's out-of-court statements should be affirmed. See State v. Jones, 625 So. 2d 821, 826 (Fla. 1993) (footnote omitted) ("[T]he State's failure to introduce the physicians' statements 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).").

Finally, if this Court should overlook the State's argument that the child's statements were admissible under a provision other than Section 90.803(23), the trial court's decision to admit the statements under Section 90.803(23) should be affirmed because the record indicates that the statements were reliable and that they were corroborated by other evidence indicating that the offense occurred. As set forth in the State's argument under Issue I, the circumstances surrounding the child's statements to DeVita reflect that those statements were reliable. Again, the child was upset and shaking, and she made the statements before she had time to reflect or misrepresent what petitioner had done to her. Also, the child remained in distress when she made her statements to Hart. Thus, the timing and circumstances of the statements, together with their content, indicate that the statements were inherently reliable and therefore admissible under Section 90.803(23). Further, although the child was deemed incompetent and did not testify at trial, the State presented circumstantial evidence which corroborated her out-of-court statements, as required by Section 90.803(23)(a)2b, Fla. Stat. (1991). The trial court's decision to admit the child victim's out-of-court statements pursuant to Section 90.803(23) therefore should be affirmed.

CONCLUSION

For the reasons set forth herein, the State respectfully requests that this Court answer the certified question in the affirmative and affirm the decision of the First District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to Phil Patterson, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 5th day of December, 1994.

Amelia L. Beisner
Assistant Attorney General

APPENDIX

Copy of First District's decision in
Anderson v. State, No. 93-362
(Fla. 1st DCA September 8, 1994).

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STEVEN JEROME ANDERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93-362

Opinion filed September 8, 1994.

An appeal from Circuit Court of Okaloosa County. Ben Gordon, Judge.

Nancy A. Daniels, Public Defender, and Phil Patterson, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

ALLEN, J.

The appellant challenges his conviction and sentence for lewd and lascivious assault upon a child. We reject his constitutional challenge to section 90.803(23)(c), Florida Statutes (1991), and his assertion that the trial court erred in admitting the hearsay statements of the child victim in this case. We write to address the appellant's claim that the trial court erred in denying his motion for judgment of acquittal. Although we affirm, we certify

to the supreme court a question of great public importance regarding the sufficiency of the evidence to sustain the conviction.

Prior to trial, the state gave notice of its intent to introduce hearsay statements pursuant to section 90.803(23), Florida Statutes (1991). Two witnesses testified at trial, without any objection, as to statements made to them by the seven year old child who was the alleged victim. When the State attempted to call the child as a witness, she could not give consistent answers as to whether she knew what it meant to tell the truth and replied affirmatively to a question as to whether she had changed her answer because she knew the prosecutor wanted her to answer the other way. The court ruled that the child was not competent to testify. The appellant's motion for judgment of acquittal on the basis that there was "no direct evidence, other than the hearsay of an incompetent witness" was denied. The defense presented no evidence but rested and renewed its motion for judgment of acquittal 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." The court again denied the motion.

The appellant argues that his motion for judgment of acquittal should have been granted because the conviction rests solely upon hearsay testimony that was never determined to be reliable and that

was wholly uncorroborated. Although we recognize that the trial court made no finding as to the reliability of the hearsay testimony and that there was no corroborative evidence of the offense, we are compelled to conclude that the evidence was sufficient to submit the issue of the appellant's guilt to the jury.

Nonetheless, we are troubled in this case by the apparent breakdown in the procedural safeguards that protect a defendant's due process and confrontation rights. As the appellant points out, the hearsay exception under which this testimony might have been admitted, had there been an objection, section 90.803(23), is not firmly rooted, Perez v. State, 536 So. 2d 206, 209 (Fla. 1988), cert. denied, 492 U.S. 923, 109 S.Ct. 3253, 106 L.Ed.2d 599 (1989), and thus the testimony is presumed unreliable and inadmissible absent a showing of particularized guarantees of trustworthiness. Idaho v. v. Wright, 110 S.Ct. 3139, 3146 (1990). In this case, the procedures for establishing the required showing of trustworthiness were completely ignored. There was no hearing on the reliability of the statements and thus no finding that the "source of the information" was trustworthy and that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." § 90.803(23)(a); State v. Townsend, 635 So. 2d 949, 957 (Fla. 1994). The child did not testify, so the appellant was not "afforded an opportunity to confront the hearsay declarant." Perez v. State, 536 So. 2d 206, 209 (Fla. 1988), cert.

denied, 492 U.S. 923 (1989). Moreover, the child was determined to be incompetent because she could not give consistent answers as to whether she knew what it meant to tell the truth and replied affirmatively to a question as to whether she had changed her answer because she knew the prosecutor wanted her to answer the other way. We acknowledge that the supreme court has determined that hearsay statements can be admitted even where the child is deemed incompetent to testify. Townsend; Perez, 536 So. 2d at 211. However, these decisions stress the importance of the findings regarding reliability and the presence of other corroborating evidence that the offense or abuse occurred:

> The fact that a child is incompetent to testify at trial according to section 90.603(2) does not necessarily mean that the child is unable to tell the truth. The requirement that the trial court find that the time, content and circumstances of the statement provide sufficient safeguards of reliability furnishes a sufficient guarantee of trustworthiness of the hearsay statement, obviating the necessity that the child understand the duty of a witness to tell the truth.

Perez, 536 So. 2d at 211 (emphasis added).

> Essentially, the other corroborating evidence requirement assures that a defendant will not be convicted solely on the basis of the hearsay testimony. This acts as a safeguard to protect the interests of the accused, which traditionally has been one of the basic underlying reasons for not allowing hearsay testimony in criminal trials.

Townsend, 635 So. 2d at 957 (emphasis added). In the present

case, both of these critical elements are missing. Thus, notwithstanding the absence of any objections to the hearsay testimony, we question the sufficiency of the evidence in this case to sustain the conviction. See State v. Moore, 485 So. 2d 1279 (Fla. 1986); Bell v. State, 569 So. 2d 1322 (Fla. 1st DCA 1990), rev. denied, 581 So. 2d 1310 (Fla. 1991); see also Everhart v. State, 592 So. 2d 352 (Fla. 3d DCA), review denied, 602 So. 2d 534 (Fla. 1992); cf. Forehand v. School Board, 600 So.2d 1187, 1191 (Fla. 1st DCA 1992). We therefore certify to the supreme court the following question 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?

Affirmed.

BENTON, J. CONCURS; BOOTH, J. SPECIALLY CONCURS WITH WRITTEN OPINION.

BOOTH, J., SPECIALLY CONCURRING:

I agree with the result of the majority's opinion.