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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

WILLIE GREEN, JR.,

Respondent.

CASE NO. 85,113

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The parties, record on appeal, transcripts, and pagination will be referenced as in Petitioner's Initial Brief on the Merits. Transcripts are designated as follows:

TVid = Transcript of video-taped interview of M A K ;

TMoL = Transcript of Motion in Limine proceedings;

TTr = Transcript of Trial proceedings;

TMoJ = Transcript of Motion for Judgment of Acquittal proceedings;

TSen = Transcript of Sentencing proceedings.

"IB" and "AB" will designate Petitioner's Initial Brief on the Merits and Respondent's [Answer] Brief on the Merits, respectively. The opinion of the First District Court of Appeal (hereinafter "DCA") will be referenced by its Florida Law Weekly citation at 20 Fla. L. Weekly D125 (Fla. 1st DCA Jan. 4, 1995)(attached as Appendix to Petitioner's Initial Brief on the Merits). Each symbol will be followed by the appropriate page number in parentheses.

Witnesses and the victim's mother will be referenced as follows:

M A = M A K , the victim;

C = C K , age 24, M A 's sister;

P = P K n, age 23, M A 's sister-in-law through P 's marriag to J K ;

E = E K , M A 's mother, C 's mother, Pe r's mother-in-law;

M A has lived with substantially all of her life;

Ms. Draughon = Julie Draughon, case coordinator for the Child Protection Team;

Dr. Mary Seay = D . Mary Seay, pediatrician who examined M A .

All bold-typed emphasis is supplied unless the contrary is indicated. Italics-typed emphasis appeared in the original document unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent is correct in his statement that "Judge Ervin proposed an additional question ...," (AB 3) but he is incorrect in later concluding that Judge Ervin certified a question: "the certified question of Judge Ervin" (AB 3). Judge Ervin only **proposed** a certified question; he did not garner the requisite two votes for a decision certifying that question.

The State disputes Respondent's assertion that it did not "present argument to this Court on either certified question, except in passing comment" (IB 3). Such a statement is argument, and, as such, it was improperly placed within Respondent's Statement of the Case and Facts. Moreover, the gravamen of the certified question was whether the evidence was sufficient to sustain Respondent's conviction. The entire argument of the State's Initial Brief (IB 22-42) focused on the essence of the certified question.

ARGUMENT

ISSUE

WHEN AN ALLEGED VICTIM OF CHILD SEXUAL ABUSE RECANTS AT TRIAL, DOES HER PRIOR INCONSISTENT STATEMENT, ADMISSIBLE PURSUANT TO SECTION 90.801(2)(A), FLORIDA STATUTES, CONSTITUTE SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION WHEN THE ONLY OTHER EVIDENCE OF THE DEFENDANT'S GUILT IS OTHER PRIOR INCONSISTENT STATEMENTS MADE BY THE VICTIM, WHICH HAVE BEEN FOUND TO BE RELIABLE AND ARE ADMISSIBLE PURSUANT TO SECTION 90.803(23)(A)? (Certified Question)

Respondent's position represents a fundamental distrust of the jury's function to credit, discredit, and assign the appropriate weight to evidence. He totally ignores the jury's distinctive position to view witnesses on the stand and evaluate the witnesses' demeanor and intonation – indicating truthfulness or untruthfulness, credibility or lack of credibility. See State v. Williams, 465 So. 2d 1229, 1231 (Fla. 1985)("unique ability [at trial court level] to make an assessment of the individual's candor and the probable certainty of his answers to critical questions presented to him"); Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981)("an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact"); Patton v. Yount, 467 U.S. 1025, 1038, 81 L.Ed.2d 847, 104 S.Ct. 2885 (1984)(determination of credibility is based upon demeanor, entitling trial-level resolution to "special deference"); McCorquodale v. Balkcom, 721 F.2d 1493, 1498 (11th Cir. 1983)(written record does not reflect strength of verbal and non-verbal communications at trial level).

Respondent's distrust is contrary to the proper standard of appellate review, in which the verdict should receive the support of all favorable evidence and favorable inferences from the evidence. See discussion and authorities at IB 22-24.

A. Respondent and the majority of the DCA ignore facts bearing upon the certified question, given the appropriate standard of appellate review.

The trial court, Judge Padovano, correctly denied Green's motion for judgment of acquittal (TTr 183-84) and rendered his judgment and sentence (R 58-63; TSen 10-12), which was based upon **all of the evidence**. This evidence included the following:[1]

- Independent of M A 's statements, witnesses placed Green at the scene of the crime in the period of the abuse. (See TTr 45, 57-58, 65)
- Independent of M A 's statements, witnesses established that during the period of his abuse, Green was the boyfriend of M A 's mother, E . (TTr 44-45, 57, 62)
- Independent of M A 's statements, results of an expert's genital examination were consistent with sexual abuse. (TTr 96-97)
- There was evidence that on **six separate occasions** (to her mother, TVid 20, 26, TMoL 66; father, TVid 20; C , TTr 50-51; P , TTr 52, 59-61; Ms. Draughon, TTr 75, TVid 1-

[1] For a more detailed discussion of the evidence, see IB 24-33.

36; and Green's trial counsel, TTr 160-67), M A stated that Green sexually abused her. There were **four distinctive evidentiary sources** of these six occasions: C , P , Ms. Draughon, and the deposition. See Perez v. State, 536 So. 2d 206, 212 (Fla. 1988)(Justice Shaw, concurring: "unlikely that the hearers (witnesses) were engaged in a conspiracy to convict").

- When M A informed E of Green's sexual abuse, E "cussed her out" (TVid 26) and threatened to whip her (TTr 161). E had previously hit M A . (TVid 15, TTr 65)[2] E drank everyday and would become belligerent, hitting M A , when drinking. (TVid 21-23) Green had hit M A (TTr 163), and he told her not to tell anyone of his abuse of her (See TVid 29).
- There was no evidence that C , P Ms. Draughon, or Green's trial-level counsel in any way "cussed out," threatened, or previously hit M A , unlike E 's cursing, threatening, and hitting her.
- In contrast to E s attempted intimidation of M A to not tell the truth, P told M A to tell the truth (TVid 35).
- Green's own trial counsel at M A 's deposition indicated E 's involvement in M A 's recantation. See IB 26-27. Accordingly, on December 27, 1990, M A

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[2] E had also previously hit one of her daughters with a shovel handle. (TTr 65)

appears to have signed a recantation affidavit in the presence of her mother, See IB 27, 31 n. 4.

- M A 's deposition provided details of Green's abuse, See IB 25-26, in contrast to her blanket, exaggerated, obviously false recantation at trial, See IB 28-31, even to the point of denying that she had previously reported the abuse in her deposition (TTr 108-109), or to C (TTr 38, 40), or to P (TTr 38), or to Ms. Draughon (TTr 110-111), and even to the point of denying that Green was her mother's boyfriend (See TTr 33-34).
- It appears that no one else was present when Ms. Draughon took M A 's statement. (TMoL 49. See TVid 2-36)
- Ma A 's statement on June 26, 1990, to Ms. Draughon was videotaped, and the jury was able to view the videotape. (TTr 80) The videotape is part of the record on appeal. (See Index to Supplemental Record on Appeal)
- The defense opened the door to expert testimony that M A 's report of Green's sexual abuse was consistent with factors pertaining to credibility and the typical stages of sexual abuse. (TTr 88-90, 90-92)
- At the deposition, which transpired approximately three months after M A first reported the abuse (Compare TTr 155 with MoL 66, R 31), M A maintained her accusation of Green's sexual abuse, even after her mother attempted to dissuade her (See TTr 168-69).

- The first public sign of M A 's recantation was on December 27, 1990, less than two weeks after Green's attorney requested a continuance of the trial (Compare R 38, 39 with R 33-34) and about two weeks prior to the January 15, 1991, trial (Compare R 38, 39 with TTr 1). Thus, one can reasonably infer that in those closing weeks prior to trial, Evelyna intensified her efforts to dissuade M A .
- The first public sign of M A 's recantation was about six months after M A 's first report of Green's abuse. (Compare MoL 66, R 31 with R 39)
- M A 's first public recantation was in the presence of her mother. (Compare R 38 with R 39)
- Her mother not only had a self-interest due to Green's boyfriend status with her but also due to her concern that, if the charges were sustained, she would lose custody of her children (See R 38, paragraph 9).

In contrast to the foregoing facts, Green infers, in violation of the appellate standard of review, that Peggy influenced M A to fabricate Green's Sexual Abuse (AB 13). Moreover, he ignores the salient fact that Green's own attorney, in the solemn setting of a deposition, formulated the questions there. Certainly, Green is not claiming that his own attorney influenced M Ar to fabricate accusations against himself. Green also ignores P 's attempt to convince C **not** to call HRS (TTr 61-62); she did not want to become involved. And, Green overlooks

the fact that Ma A 's deposition was taken months after she had ceased living with P for that single week.

Green claims that it is significant that Evelyna reported McGriff's sexual abuse (AB 14), but he again overlooks the total picture. Ev did pursue M A s accusation against McGriff, who may be a relative of E 's estranged husband (See TVid 30), whereas instead of vigorously pursuing the accusation against Green, E cursed M A and threatened to hit her, as she had done in the past. It was not necessary for C and P to report McGriff's abuse, but after a couple of days, it became evident that the only way the authorities would be alerted to Green's abuse was by reporting it themselves. Thus, although C and P were initially reticent, they did alert the authorities after only a couple of days.

These facts constitute precisely the situation contemplated by Florida's Evidence Code. Perpetrators generally are not so stupid or careless to sexually abuse children in public or in the presence of an eyewitness. They generally do their "work" in situations in which they have clandestine opportunities. They gain access to victims because of their position of authority, as in a father-in-law, or their relationship with a person in authority, as in a boyfriend of the mother of the victim, like here. They use their position or relationships to conceal their crime. Here, the victim lived with her chronically-drinking and intimidating mother during the abuse and during substantially all

of the pre-trial period, and the mother remained the girlfriend of the abuser during this entire time.

Here, Green abused M A in the middle of the night and in the privacy of her mother's home (TTr 51), at least once when the mother was not home (TTr 60-61, 163, 167). M A was abused in the context of a mother who drank regularly and heavily (TVid 17, 21-23) and looked out for her self-interest in Green. Green was not only the mother's boyfriend, but also, they were seeing each other while Green was still married (TTr 62). The mother had a very substantial interest in chilling M A 's initial report of the abuse to her and, after the initiation of prosecution, exonerating Green as his trial date neared.

In the months between Green's arrest and the trial, even though the mother threatened M A and even though M A lived with the mother almost all of this period, M A stood steadfast by her accusation of Green until immediately prior to trial, when it would become clear to even someone who frequently overindulges in alcohol that "something must be done" to further chill the prosecution.

Respondent's position is reminiscent of other passé artificial barriers to the truth-finding function of the American jury system. See § 794.022(1), Fla. Stat. (victim need not be corroborated); Marr v. State, 470 So. 2d 703, 708-712 (Fla. 1st DCA 1985)(en banc; rejected jury instruction that "where there are no witnesses to the alleged act, testimony of a rape victim should be 'rigidly scrutinized'") approved 494 So. 2d 1139 (Fla.

1986). Accordingly, Respondent ignores the wisdom of Tibbs and other cases that emphasize the trial-level's distinctive position to view the witnesses. See discussion and authorities, supra, and IB 22-24. This brings the discussion to the State's next major and related point.

B. Respondent's position would micro-manage at the appellate level decisions concerning the weight of the evidence.

Respondent raises the specter of the risk of convicting an innocent man. (AB 15) Of course, this is, and should always be, a concern of the prosecution and the courts, and the State recognizes this Court's concern for this policy goal in State v. Moore, 485 So. 2d 1279, 1282 (Fla. 1986), and Anderson v. State, 20 Fla. L. Weekly S239 (Fla. May 25, 1995). However, Respondent raises inferences against the verdict, selects some facts, and ignores others. This violates the appellate standard of review and thereby would have this Court determine that specific witnesses were not credible and which facts should weigh more than others. Moore and Anderson impose no such requirement of appellate micro-management. Instead, viewing the evidence and favorable inferences in support of the verdict, Moore and Anderson rejected that approach:

> ... as in *Moore*, we disclaim any intent to establish a procedure whereby appellate courts reweigh the evidence and substitute their judgments for those of the jury.

20 Fla. L. Weekly at S240 (citing Tibbs, supra, 397 So. 2d 1120)

Therefore, viewing Tibbs, Moore, and Anderson together, they require only a threshold of corroboration to assure that the jury's verdict is rational. Here, the facts, summarized above and provided in greater detail in Petitioner's Initial Brief on the Merits, far exceed the threshold.

C. It is well-settled that the statements were admissible.

Respondent urges expansion of this Court's review totally outside of the one question certified by the DCA (See AB 3, 4, 5-11) yet he would deny the State's right to address the gravamen of the certified question, the sufficiency of the evidence. The State respectfully submits that this Court should refuse to exercise its discretion to review the DCA's holding concerning admissibility, or, if it chooses to review it, approve the DCA majority's holding on the admissibility claim.

Respondent characterizes as "aberrational" the DCA-majority opinion's holding that the deposition was admissible as substantive evidence. (AB 6) He argues that this aspect of the majority opinion should be disapproved. (AB 6-11) He is incorrect on both points; the DCA's holding concerning admissibility comports with established precedent, and, it should not be disapproved on the merits.

Where there have been cases recently and clearly approving the admissibility of prior inconsistent statements, made under

conditions of sufficient "safeguards of reliability,"[3] See Perez v. State, 536 So. 2d at 207-210, like here, See summary of trial court's findings of reliability at IB 4-5, from a witness testifying at trial, See Perez, 536 So. 2d at 212 (Justice Overton, concurring, joined by Justices Shaw and Kogan: emphasizes trial judge personally observing the child under oath), the State respectfully submits that this Court need not address admissibility of the statements introduced through Section 90.803(23)(a), Fla. Stat. Accordingly, this Court need not address the admissibility of the deposition on the merits. See Anderson, 20 Fla. L. Weekly at S240 (implicitly reaffirming principle of admissibility of 90.803(23) hearsay as substantive evidence); Moore v. State, 452 So. 2d 559 (Fla. 1984), citing Cal. v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970), cited approvingly at 485 So. 2d at 1280-81 as "Moore II."[4] Moreover, if the Court does choose to address the claims of

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[3] Also, see McCormick, The Turncoat Witness: Previous Statements as Substantive Evidence, 25 Texas L. Rev. 573, 577-79 (1947), quoted at length at IB 36-37; State v. Freber, 366 So. 2d 426, 428 (Fla. 1978)(identification while incident fresh in witness's mind "of obvious probative value"); and, Law Revision Council Note-1976, § 90.801, in 6C F.S.A. 236, 238 (1979)("prior statement may be more reliable than the present testimony")

[4] Respondent argues (AB 6-11, 16-17) that State v. Basiliere, 353 So. 2d 820 (Fla. 1978), and Rodriguez v. State, 609 So. 2d 493 (Fla. 1992), assist his claims of inadmissibility. He is incorrect. Neither Basiliere, where the witness had died after the deposition but prior to trial, nor Rodriguez, where the witness did not appear at the trial, dealt with a situation where the rigors of Section 90.803(23), Fla. Stat., reliability-safeguards were met and where each witness to each prior inconsistent statement testified at trial.

admissibility, these cases, and the reasoning and authorities cited within them, control.[5]

CONCLUSION

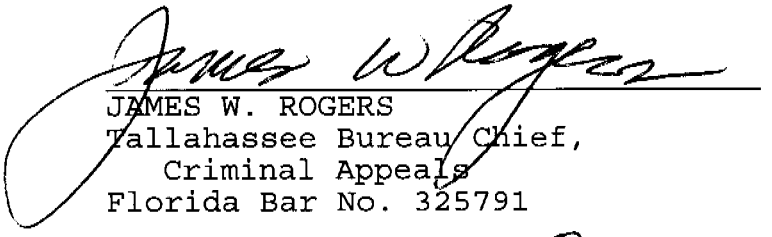
Based on the foregoing discussions and those in its Initial Brief, the State respectfully requests this Honorable Court answer the one certified question in the affirmative, as viewed in the context of all of the incriminating evidence, disapprove the decision of the First District Court of Appeal concerning the certified question, approve Judge Miner's opinion, and direct that the trial court's judgment and sentence be affirmed.

Concerning the deposition, here, not only did Green's trial-level counsel depose and thereby confront M A , but counsel also had the opportunity to cross-examine her at trial regarding her deposition and regarding her direct-examination trial testimony. Perhaps defense trial counsel's failure to probe any alleged falsity of the deposition through trial cross-examination was due to trial counsel's fear that additional questions would further highlight the falsity of her trial testimony, with additional testimony along the lines of Green not even being her mother boyfriend. Extensive defense trial cross-examination concerning the deposition would also run the risk that she would return to the truth by recanting her recantation. The crucial fact remains that Green's attorney had **the opportunity to cross-examine,** See discussion at IB 34-36, M .

[5] Also, see case citations concerning right of confrontation at IB 35.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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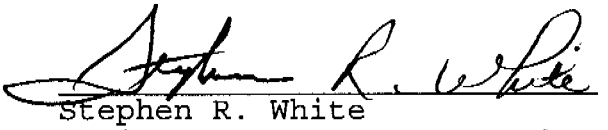
CERTIFICATE OF SERVICE

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 Ms. Carol Ann Turner, Esq., Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of July, 1995.



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