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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86,544

JAMES HEUSS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statements of the case and facts for purposes of this appeal, subject to the following additions, corrections, and/or clarifications:

When Deputy Hibbert arrived at the apartment, he was greeted at the door by Cindy [redacted] the children were in a bedroom (R 80-82, 97-98). He talked with her at the entrance of the door and had her step outside to complete the conversation (R 90, 97-98). After he spoke with each victim, Hibbert instructed them not to discuss this with anyone or answer any questions (R 91-92). The victims related what had happened to them in kids' terminology, referring to their "private parts" (R 95).

Detective Masching took taped statements of all three victims; these statements were played to the jury (R 113, 115-116, 120-121, 123). Child C told Masching that she did not know what it meant to tell the truth, but when he asked her what a lie was she replied that "It's something when you don't tell the truth." (R 782). Masching asked Child C if she called the area between her legs her private parts and she replied, "Yes" (R 784). She told Masching that Petitioner touched her with his left hand (R 784).

In Child B's statement, she told Masching that Petitioner would not take her clothes off if she was wearing skirts or

dresses, but if she had pants on he would unbutton them (R 771). Petitioner used one finger and tried to stick it inside her; it hurt when he did that (R 771-772). Petitioner took her into the bedroom when he did this (R 772). Child B said Petitioner was kind of good to her, like when he gave her candy or things, but he was bad to her when he took her in the bedroom (R 774).

In Child A's statement to Masching, she said that Petitioner took her into the bathroom, shut the door, laid her on the rug on the floor, took her pants off and licked her privates twice, putting his tongue inside her (R 777-779). Child A said that neither Child C nor Child B ever told her what Petitioner did to them (R 780). Masching testified that he had little or no conversations with any of the girls before he began taping them (R 113-114, 128). When Masching made Petitioner aware of the victims' allegations, Petitioner said that the girls were all related and that should mean something to the police (R 123-124, 140).

Prior to Child A's testimony, the trial court, while noting that Child A had testified in the prior trial, conducted another inquiry into her competency; Petitioner declined the court's offer of further inquiry (R 155-160). The court found Child A to be competent to testify, stating that she was a "bright, alert young lady, seven years of age, [who] knows the difference between

telling the truth and telling a lie" (R 160). Petitioner did not object to her testimony based on competency or any other grounds (R 160-161). Child A testified that her privates were between her legs (R 168). She further testified that her mother told her not to tell any lies when she came to court; she said she had not told any lies in court that day (R 172, 185).

Calvin [redacted], Child A's father, testified that several days before Christmas in 1989, he was taking care of Child A and her two brothers one evening while Child A's mother was at work (R 189-190). Child A and her younger brother were playing in the bedroom. Then Mr. Calvin [redacted] thought it got too quite, and he heard the door close. When Mr. Calvin [redacted] went to investigate, he found [redacted] brother on the bed with his pants down. Child A was on her knees and was just lifting her head from brother's [redacted] "private" (R 191). Child A jumped up, Mr. Calvin [redacted] yelled at them a little and had brother [redacted] put his clothes back on (R 195). Mr. Calvin [redacted] was shocked and upset, but decided to talk it over with Child A's mother before doing anything to the children (R 191). He did not discuss the matter with Child A, but did tell her mother what he had seen (R 195-196). Several days later Detective Masching came and took a statement from Child A. Child A was pretty calm and answered each of Masching's questions (R 196-197). Mr. Calvin [redacted] denied that there had ever been

any X-rated videos or magazines in their home or any conduct between him and Child A's mother from which Child A could have learned of such an activity (R 197-198). Mr. [redacted] stated that he told Child A to tell the truth when she came to court and to tell exactly what happened (R 198). Mr. [redacted] denied being told that in her deposition Child A said that Petitioner never touched her; he did not recall that Child A's mother ever discussed Child A's deposition with Child A (R 207). Mr. [redacted] explained that what he meant by Child A wavering about what happened:

> Well, what I mean by waver is like she had to think about it. Because she's forgotten what happened. Then I tell her, are you sure you -- I would say to her like this, [Child A] are you sure you remember what happened, what happened that time? She said like I forgotten. And then two seconds later she would say it.

(R 212-213).

Cynthia [redacted], Child A's mother, testified that Child A told her that Petitioner had laid her on the bathroom floor, pulled her legs apart and licked her privates (R 225). Ms. [redacted] told Child A that when Child A went to court she should remember as much as she could and answer all questions truthfully (R 235-236). When Ms. [redacted] questioned all of the children, boys and girls, she did so individually and in the bedroom with the door closed. Although

Ms. [redacted] (Cindy) sent each child out to the living room with the others after she questioned the child, Ms. [redacted] (Cindy)' sisters said the children came out and began playing Nintendo (R 228-229, 240-243).

Mary Nelson, a nurse practitioner who worked at the Sexual Assault Treatment Center, and an expert in the field of examination, testified that because the hymenal membrane on a little girl is so sensitive and painful to touch, it was very doubtful that a child would touch herself independently to such a degree that she could tear the membrane. Further, because of the location of the area, it would be difficult to touch there (R 271, 285, 292-293, 301).

Prior to Child C's testimony, the trial court conducted a competency exam. Petitioner declined the court's offer of further inquiry (R 316-319). The court found Child C to be competent to testify, stating that she was a "bright, alert, intelligent young lady, . . . [who] knows the difference between right and wrong and telling a lie" (R 319-320). Although Child C admitted she sometimes lied a little bit, she said she knew she had to tell the truth in court (R 319). Petitioner did not object to her testimony based on competency or any other grounds (R 319-321).

When asked what other apartments she played in besides her mother's, Child C replied: "Jim's" (R 328). When asked who Jim

was, Child C replied, "That man over there," and identified Petitioner (R 328-329). Initially Child C would not testify about what happened to her, and apparently she was quite emotional and cried. Child C told the court that she did not want to look at Petitioner; she simply wanted to close her eyes (R 334-340, 342-345, 349). Child C recalled telling a deputy about what happened, as well as a detective at her father's office (R 347-348, 365). Child C admitted that she did not tell the truth during her deposition when she said Petitioner had not touched her. Child C said she did so because she was scared (R 349, 352-353, 365). Although her father showed her the parts of her deposition that he thought were wrong, he did not tell her what she should answer (R 356-357). She testified her father was a little bit angry with her when she told him she did not tell the truth (R 357). Child C testified that she told her mother that Petitioner had been touching her, and that Petitioner yelled at her when he found out she had told her mother (R 361, 363).

Petitioner did not object to Dr. Reed being declared an expert in the field of child psychology, but he did question Dr. Reed's expertise in the field of child sexual abuse with respect to factors such as recantation, delay and denial. Petitioner, however, declined the court's offer to voir dire the doctor (R

416). Dr. Reed testified that in a study of 116 confirmed cases of sexually abused children, a significant portion of these children would at one point deny that the abuse had taken place (R 420-422). Another example cited by Dr. Reed as to how unreported sexual abuse is discovered is when the child is known to have had contact with a known sexual offender and upon being asked the child will admit what happened (R 424). Another factor in abused children recanting is having to repeat the allegations again and again (R 426). Dr. Reed stated that if a parent asked a child did such and such happen and the child says no, by repeatedly asking the question the child could ultimately say yes; however, Dr. Reed said the converse could happen as well (R 433-434).

Prior to Child B's testimony, the trial court conducted a competency exam; Petitioner declined the court's offer of further inquiry (R 435-439). The court found Child B to be competent to testify, stating that Child B understood the difference between right and wrong and telling a lie (R 439). Although Child B admitted she sometimes lied a little bit, she said she knew she had to tell the truth in court (R 438). Petitioner did not object to her testimony based on competency or any other grounds (R 439).

Child B testified that she called the area between her legs a "private" (R 454). When Petitioner touched her between her legs

with his fingers, it made her feel uncomfortable (R 455). Petitioner told her not to tell her mother that he had touched her. Child B wanted to call her mother, but Petitioner would not let her out of the room (R 455). Occasionally Child B slept in Petitioner's waterbed with him (R 453-454, 463-464).

Caroline [redacted], Child B's mother, testified that Petitioner offered to baby-sit for her children free of charge beginning in October 1989; in return, she cooked meals for Petitioner occasionally (R 484-488, 493, 517-519). Caroline testified that her sister Susan was pregnant for most of 1989; she said Susan was really humongous by the summertime (R 471-472, 485).

After the State rested (R 534), Petitioner moved for judgment of acquittal on all three counts, alleging that there had been no proof that Petitioner's tongue had united with the vagina of Petitioner, that there had been no proof that Petitioner's finger penetrated the vagina of Child B, and that Child C's general assertion that Petitioner touched her over her clothing constituted an indecent assault (R 535-537). The trial court denied these motions (R 538-540).

Petitioner denied ever having been in the bathroom with Child A (R 554, 564). Petitioner said he would pick up Caroline's children on Friday night because he was too lazy to get up at 6:00

a.m. on Saturday morning (R 556-557). Petitioner said he told Caroline [redacted] that one of her children would be sleeping on the waterbed, and one would sleep on the daybed. Petitioner said you could not sleep on the couch because it was too uncomfortable (R 558-559). He did not sleep on the daybed because he was too tall (R 559). Petitioner stated he had a sexual relationship with Susan [redacted], Child C's mother, which began in late September. He knew she was pregnant and said she had a small belly when he first met her (R 577, 579). Petitioner's theory was that Susan was angry with him when he told her he did not want a commitment, and that she started this (R 580-583). Petitioner admitted that Child B sometimes slept in the waterbed with him (R 593).

Petitioner rested his case after his testimony and renewed his motions for judgment of acquittal, which the court denied (R 601). On rebuttal, Susan [redacted] testified that her twin sons were born on October 24, 1989 (R 604). Child C complained that Petitioner had patted her on the buttocks once, and Susan asked if Child C had left Petitioner's apartment. Susan admitted that she did nothing about what Child C said, in part because Child C did not say anything about her private area (R 606, 613). Susan denied having a romantic relationship with Petitioner (R 606, 611-612).

SUMMARY OF THE ARGUMENT

POINT I

The opinion of the Fourth District, that an appellate court may, in its discretion, *sua sponte* apply a harmless error analysis in a case where the State has failed to make such an argument, must be affirmed because the Legislature has directed appellate courts to make such an analysis. To do so would not deprive a defendant/appellant, who has the burden of showing harmful error, of due process. Moreover, the State, unlike a defendant, has no remedy for ineffective assistance of appellate counsel.

POINT II

The trial court conducted two hearings, heard the proffered testimony, and announced its reasons for finding the statements to be reliable. While the trial court's findings may not have been as thorough as they could have been, the record in this case establishes that the trial court did consider the statutory factors in depth and properly found the victims' statements to be reliable. As found by the district court, the record establishes that the victims' taped statements given to Detective Masching were reliable and that the trial court's failure to make more specific findings with respect to these statements was harmless. Thus, those statements were properly admitted into evidence. As for the other

hearsay statements, they were merely cumulative to the properly admitted taped statements and the in-court testimony. Thus, based on the permissible evidence upon which the jury could have relied to convict Petitioner, there is no reasonable possibility that had these statements not been admitted the verdict would have been different. Consequently, this Court should affirm the district court's findings.

POINT III

The district court properly affirmed the trial court's denial of Petitioner's motions for judgment of acquittal as to counts I and II. Child B's trial testimony, corroborated by the physical evidence and her taped statement, established a prima facie case of sexual battery by digital penetration. Similarly, from the evidence adduced at trial below, the jury could reasonably infer that Petitioner made contact between his mouth and the sexual organ of Child A, thereby establishing a prima facie case of sexual battery. Consequently, this Court should affirm the district court's findings and Petitioner's convictions as to counts I and II.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT AN APPELLATE COURT MAY *SUA SPONTE* DETERMINE AN ERROR HARMLESS.

Petitioner asserts that the district court erred in holding that it could *sua sponte* apply a harmless error analysis. Specifically, Petitioner contends that where the State has failed to argue harmless error, the State has waived that argument and/or can be deemed to have conceded that the purported error is not harmless. In addition, Petitioner contends that *sua sponte* application of a harmless error analysis results in a district court losing its position of neutrality. Finally, he contends that *sua sponte* application of harmless error analysis deprives a defendant of due process of law. Respondent submits that in light of the clear legislative directive to appellate courts to affirm valid convictions unless harmful error has occurred, the Fourth District correctly held that an appellate court may *sua sponte* apply a harmless error analysis.

Initially, Petitioner argues that because the State has the burden of proving harmless error, if the State fails to argue that an error is harmless, the State should be deemed to have waived that argument and/or conceded that the purported error is harmful.

The State does not dispute that it has the burden of presenting a *prima facie* case of harmlessness, and of proving that beyond a reasonable doubt, the error did not contribute to the verdict. State v. Schopp, 653 So. 2d 1016 (Fla. 1995); Ciccarelli v. State, 531 So. 2d 129 (Fla. 1988); State v. Lee, 531 So. 2d 133 (Fla. 1988); State v. Diguilio, 491 So. 2d 1129 (Fla. 1986). Certainly, the State should present a harmless error argument each time it believes that a purported error did not affect the verdict.[1] However, in circumstances where the State's counsel has overlooked or unartfully presented a harmless error argument, and where the appellate court's review of the case convinces that court that the error is harmless, the appellate court should not be precluded from finding the error harmless. This is so because sections 59.041 and 924.33, Fla. Stats., require appellate courts to affirm convictions where no harmful error has occurred.

Moreover, because the State, unlike a defendant, has no remedy for ineffective assistance of appellate counsel, the State submits that the failure to raise a harmless error argument should not be

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[1] Respondent does not concede that it wholly failed to make a harmless error argument below, see Point II, *infra*. However, asserting that the argument was made would not further the State's position with respect to this point on appeal, i.e., that an appellate court may *sua sponte* apply a harmless error analysis.

deemed to be a waiver or concession of that issue, such that an appellate court is prohibited from affirming a conviction which the court finds has not been obtained in violation of a defendant's right to a fair trial or by harmful error. Indeed, such a holding would grant Petitioner a windfall he is not legally entitled to, as well as be directly contrary to section 924.33, which states, "It shall not be presumed that error injuriously affected the substantial rights of the appellant." See also DiGuilio, 491 So. 2d at 1134.

Petitioner cites numerous cases which hold that parties to an appeal may waive issues for appellate review either by failing to raise it in the trial court, or by failing to argue the issue on appeal, or both. Respondent does not dispute that this is the general rule. However, in criminal cases, the "stakes" are higher than in civil cases. Thus, if a criminal defendant's lawyer fails to preserve an issue in the trial court, or make an argument in the appellate court, the defendant has the right to pursue an ineffective assistance of counsel claim. Yet if the State's counsel fails to raise a harmless error argument, the state has no such remedy. Respondent submits that sections 59.041 and 924.33 were enacted, in part, to insure that, notwithstanding poor or deficient performance by the State's appellate counsel, valid

convictions are not reversed absent harmful error. Furthermore, there are no statutes, except the harmless error statutes, which require an appellate court to consider a specific issue. Thus, Respondent submits that the doctrine of waiver cannot be applied to harmless error arguments.

In DiGuilio, this Court recognized the authority of the legislature to enact harmless error statutes:

> The responsible branch of government has already established the public policy through section 924.33 that appellate courts will not reverse trial court judgements unless it is determined on the record that harmful error has occurred. This legislative determination of public policy is not constitutionally infirm. Accordingly,
>
> > [o]ur responsibility as an appellate court is to apply the law as the Legislature has so clearly announced it. We are not endowed with the privilege of doing otherwise regardless of the view which we might have an [sic] individuals.

491 So. 2d at 1137 (quoting Gordon v. State, 104 So. 2d 524, 541 (Fla. 1958).

As sections 59.041 and 924.33 are valid statutes, in order for the legislative intent of those statutes to be carried out, appellate courts must be free to apply a harmless error analysis, whether counsel for the State has made such an argument or not.

While the failure of the State's counsel to make a harmless error argument is poor practice, it should not be a **barrier** to an appellate court's complete review of a case and compliance with sections 59.041 and 924.33. As noted by this Court in Ciccarelli, while appellate briefs are essential to focus the court's attention on the issues involved, it is the judge who has the ultimate responsibility of a decision, and that decision must appropriately be left to the conscience of each individual judge. 531 So. 2d at 132. Clearly, this Court has repeatedly held that the decision to apply a harmless error analysis in the absence of such an argument by the State is a discretionary matter for appellate court judges. Thus, Petitioner's argument that a harmless error analysis **cannot** be employed by an appellate court in the absence of a harmless error argument by the State is without merit. Schopp, 653 So. 2d at 1020; Lee, 531 So. 2d at n.1; DiGuilio 491 So. 2d at 1131, 1134, 1137. See also United State v. Hasting, 461 U.S. 499, 509, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983).

Petitioner additionally argues that *sua sponte* application of a harmless error analysis results in a district court losing its position of neutrality. Simply because an appellate court has decided an issue in favor of one party or another does not mean that court has lost its neutrality. Rather, in making a harmless

error analysis of a case, the appellate court is simply performing its legislatively mandated duties under sections 59.041 and 924.33. This argument is supported by the fact that in reviewing any case in its appellate capacity, appellate courts are not allowed to reweigh the evidence or supply findings not made by the trial court, but instead must employ and apply well-defined standards of review. This Court has repeatedly cautioned appellate courts to conduct an **independent** review of the record in making its harmless error analysis.[2] Thus, it does not seem logical that an appellate court would somehow become an advocate for the State simply by performing an analysis which the Florida Legislature has directed it to consider. If appellate courts are directed to make an independent review of the record in determining whether an error is harmless or not, there is no reason to believe they would be less neutral in reviewing the record in the absence of a harmless error argument by the State than they would if the State had properly made such an argument. Indeed, it would seem that an appellate court might well be more inclined to the defendant's position, not only because the defendant will have presented an argument as to why an error is harmful, but also because the appellate court is

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[2] Ciccarelli, supra.

dissatisfied with the State for failing to fulfill its burden. Thus, Respondent submits that this argument is also without merit.

Finally, Petitioner argues that *sua sponte* application of a harmless error analysis deprives a defendant of due process of law. Specifically, Petitioner argues that *sua sponte* application of a harmless error analysis deprives him of notice and an opportunity to argue that the error is harmful. Respondent cannot conceive of a circumstance in which defense counsel would argue that error occurred without also arguing that the error was harmful, except perhaps where the particular error is *per se* harmful, reversible error. It is well established that a criminal conviction comes to an appellate court with a presumption of correctness and that an appellant has the burden of establishing that harmful error occurred in the trial court. Indeed, if an appellant cannot argue that the cited error has harmed him in some way, there would be no reason to raise it on appeal, and if his counsel fails to argue that an error is harmful when such an argument can be made in good faith, then his counsel is open to a claim of ineffectiveness. Moreover, appellants **are** on notice that an appellate court may employ a harmless error analysis because Florida Statutes direct appellate courts to do so. Undoubtedly, an appellant will have argued that an error is harmful in his initial brief; thus,

Petitioner's argument that *sua sponte* application of a harmless error will deprive him of an opportunity to address that issue cannot be sustained.

Respondent submits that there is no public policy which can be served by prohibiting an appellate court from *sua sponte* applying a harmless error analysis in cases before the court, particularly in light of the directives of sections 59.041 and 924.33, Fla. Stats., and the fact that the State has no remedy for ineffective assistance of its appellate counsel. Thus, the Fourth District's opinion below is correct and must be affirmed.

POINT II

THE ERRONEOUS ADMISSION OF CHILD-HEARSAY IS SUBJECT TO A HARMLESS ERROR ANALYSIS WHICH WAS PROPERLY APPLIED BY THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE.

Petitioner contends that even if an appellate court can employ a *sua sponte* harmless error analysis, the Fourth District's determination that admission of the victims' out-of-court statements was harmless error was incorrect. Respondent submits that the Fourth District's opinion, while perhaps unartfully worded, was correct.

Initially, the Fourth District found that the trial court erred by making only "boiler plate" findings with respect to the reliability of the child-victims' out-of-court statements. Heuss v. State, 660 So. 2d 1052, 1057 (Fla. 4th DCA 1995). However, in accordance with this Court's decision in Hopkins v. State, 632 So. 2d 1372 (Fla. 1994), the district court further held that the failure to make adequate findings pursuant to section 90.803(23) was subject to a harmless error analysis. 660 So. 2d at 1057. Petitioner asserts that in determining whether the error was harmless, this Court should determine whether admission of the victims' hearsay statements could have affected the verdict. Assuming for the moment that the trial court's findings were

inadequate, Respondent submits that the analysis which was employed by the district court, and the analysis which should be employed, is actually a two-fold inquiry. Initially, this Court should determine whether the trial court's failure to make findings was harmless because the record establishes that the time, content and circumstances of the victims' statements provide sufficient safeguards of reliability. If not, then this Court should proceed to determine, after a review of all the properly admitted evidence, whether beyond a reasonable doubt admission of these statements did not affect the verdict. Here, the district court found that the victims' taped statements were properly admitted, notwithstanding the trial court's "inadequate findings," and that the remainder of the out-of-court statements was harmless in light of the properly admitted evidence.

Section 90.803(23), Fla. Stat. (1991), allows into evidence hearsay statements made by children under the age of 11 which describe acts of sexual abuse if the trial court finds that the time, contents, and circumstances of the statements provide sufficient safeguards of reliability. Factors a court may examine in determining the reliability of these statements include

> the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the

> child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; . . .

§ 90.803(23)(a)(1), Fla. Stat. (1991). See also Perez v. State, 536 So. 2d 206 (Fla. 1988), cert. denied, 492 U.S. 923 (1989). While the statute requires the trial court to make specific findings of fact concerning the reliability of the hearsay statements, there is no requirement, statutory or decisional, which requires the trial court to recite each factor and the evidence the trial court believes supports each factor. Indeed, there is no requirement that each factor set forth in the statute be met before the hearsay is admitted into evidence. Perez, 536 So. 2d at 210. Rather, it is sufficient that the trial court conduct a hearing, hear the proffered testimony, and announce its reasons for finding the statements to be reliable. Myles v. State, 582 So. 2d 71, 72-73 (Fla. 3rd DCA 1991); Woodfin v. State, 553 So. 2d 1355, 1356 (Fla. 4th DCA 1989); Stone v. State, 547 So. 2d 657, 660 (Fla. 2nd DCA 1989). See also Glendening v. State, 503 So. 2d 335 (Fla. 2nd DCA 1987), affirmed, 536 So. 2d 212 (Fla. 1988); Cook v. State, 531 So. 2d 1369 (Fla. 1st DCA 1988). Respondent submits that while the trial court's findings may not have been as thorough as they could have been, the record in this case establishes that the trial court

did consider the statutory factors in depth and properly found the victims' statements to be reliable.

In the trial court, there were two hearings regarding the admissibility of the victims' out-of-court statements. The first hearing concerned the admissibility of Child A's mother's testimony and the victims' taped statements taken by Detective Masching (SR 1-113). The second hearing concerned the testimony of Deputy Hibbert (SSR 3-16). While the findings made by the trial court at the second hearing may arguably be insufficient (SSR 13-14), the State submits that the findings made at the first hearing, at least with respect to the taped statements, were sufficient to support their admission into evidence.

At the first hearing, Cynthia [redacted] the mother of Child A, and Detective Masching testified about the circumstances surrounding the victims' recitation of their allegations against Petitioner to those witnesses. After hearing the testimony of Cynthia [redacted], John, [redacted] and Detective Masching, the trial court found that each of the victims' physical, mental, and emotional developmental ages were less than 11 years. Petitioner agreed that the victims did not look over the age of 11 (SR 80, 83-84). The court further found that the victims were ages 5, 6, and 7, at the time of the incident, and that children of that age normally did

not have a feeling for time and dates (SR 80, 84). The court noted that as the victims were testifying, Petitioner would have the opportunity to cross-examine them regarding their statements (SR 84-85). The trial court then stated as follows:

> Well, I further find that the reliability of these assertions, as much reliable as they can be under the circumstances, appear to be reliable on the questions asked of them other than perhaps the leading question regarding the one mother issue as she refers to Jim as opposed to other individuals. That was of some concern; but I think that not of a sufficient nature as things were presented to this court.

(SR 87). In response to Petitioner's argument that the statements were not reliable because it could not be determined how much time had elapsed between the assaults and their being reported, the court stated that it was "long recognized in the sexual crimes area that victims will hold back their response to the thing." (SR 88). The court further stated:

> Well, I would find at this time, Counsel, that given the fact that we are dealing with young children, and I had a chance to observe the demeanor of the witnesses, the mother in one case, the father in the other case, and would find that it would be normal to have the children react or make comments about this kind of thing only when, or at least we are talking about terms of first available times when they are confronted with this kind of situation as opposed to voluntarily presenting it on their own.

> I would venture to say even if it was a six month period or a six-and-a-half month period, whatever it is, seven month period, if we want to say, that that would be a relatively early period of time. They were confronted, as I understand this, this all began with the father of one child seeing her in a personal position with her brother; . . . And so that certainly would appear to be the first available time for a, we don't want to say normal average child to go ahead and start talking about this type of activity with a parent, so I don't have a particular problem with this not being, what you call an adult, might call the first available time after the incident. . . . I think it is the first available time.

(SR 89-90). The court noted that when the evidence was first presented to the family, they had no idea who might have done this, but Petitioner's name was the name first presented by the child (SR 92). The trial court found that the State had met its burden of showing the reliability of the statements and that under the particular circumstances of this case, the statements were sufficiently reliable to be presented to the jury (SR 92).

The State submits that the record clearly establishes that the trial court did consider the factors enumerated in section 90.803(23) in determining the victims' hearsay statements to be reliable. Here, as in Woodfin, supra, although the trial court's findings may not be a model of clarity, they are more than sufficient to establish that the statute was complied with. See

also Myles, supra; Stone, supra; Glendening, supra. Clearly, the trial court made these findings after thorough consideration of the statutory criteria, and based upon the specific facts and circumstances under which these statements were made. As found by the district court, the record establishes that the victims' taped statements given to Detective Masching were reliable and that the trial court's failure to make more specific findings with respect to these statements was harmless. Thus, those statements were properly admitted into evidence.

Petitioner contends, however, that the victims' in-court testimony was inconsistent and that there was doubt as to their veracity; thus, admission of the hearsay statements could not have been harmless. Contrary to Petitioner's assertions, none of the victims' in-court testimony was inconsistent; each victim made the same allegations on cross that were made on direct.[3]

While Child A and Child C admitted that they denied any abuse and did not tell the truth during their depositions, Child C testified that she did so because she was scared (R 349, 352-353). Each child testified that she knew she had to tell the truth in

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[3] Indeed, with the exception of their deposition testimony, each victim gave the same account of what Petitioner did to them to Detective Masching, to Deputy Hibbert, and to their parents.

court (R 172, 175, 319). Further, these children did not say their parents told them to change their testimony; they stated that their parents had told them to tell the truth (R 172, 185, 356-357).

With respect to Petitioner's assertion that Child C testified in an uncommunicative manner, the record reflects that initially Child C did not want to testify about what happened to her, and apparently she was quite emotional and cried. Child C told the court that she did not want to look at Petitioner; she simply wanted to close her eyes (R 334-340, 342-345, 349).

Moreover, each victim's trial testimony was totally consistent with the statement they gave to Detective Masching. Consequently, as the other two hearsay statements admitted into evidence at trial were merely cumulative to the victims' in-court testimony and their taped statements, and as Child B's testimony was further buttressed by the nurse's testimony that she found a tear in the child's vagina which was consistent with a finger touching the hymen (the act which Child B said Petitioner committed on her), it is clear that admission of their out-of-court statements to Deputy Hibbert and to Child C's mother did not affect the verdict. Thus, for the above-stated reasons, the Fourth District's opinion that admission of this evidence was harmless error is correct and must be affirmed.

POINT III

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

The test on appeal of a denial of a motion for judgment of acquittal is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis but that of guilt, but whether the jury might reasonably so conclude. Perez v. State, 565 So. 2d 743 (Fla. 3d DCA 1990); Fratello v. State, 496 So. 2d 903 (Fla. 4th DCA 1986); Grant v. State, 474 So. 2d 259 (Fla. 1st DCA 1985). In moving for a judgment of acquittal, a defendant admits not only all facts introduced into evidence, but also admits every conclusion favorable to the State that a jury might fairly and reasonably infer from the evidence. Garmise v. State, 311 So. 2d 747 (Fla. 3d DCA 1975), cert. denied 429 U.S. 998 (1976); Proko v. State, 566 So. 2d 918, 920 (Fla. 5th DCA 1990); Fratello, supra. The purpose of a motion for judgment of acquittal is to challenge the legal sufficiency of the evidence, and where the State has set forth evidence to support each element of the crime, the trial court should not grant the motion unless there is no legally sufficient evidence on which to base a verdict of guilt. Law v. State, 559

So. 2d 187, 188(Fla. 1989); Arroyo v. State, 564 So. 2d 1153, 1155 (Fla. 4th DCA 1990); Peacock v. State, 498 So. 2d 545 (Fla. 1st DCA 1987).

However, the State is not required to conclusively rebut every possible variation of events which can be inferred from the evidence, but only to introduce evidence which is inconsistent with the defendant's theory of events. Perez, supra; Arroyo, supra. An appellate court may not retry a case or reweigh the evidence. In a case where the evidence is legally sufficient, even if conflicting, the appellate court should affirm the trial court's denial of the motion. Clark v. State, 379 So. 2d 97 (Fla. 1979); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), affirmed 457 U.S. 31 (1982).

A. THE EVIDENCE ESTABLISHED PETITIONER COMMITTED A DIGITAL SEXUAL BATTERY ON CHILD B.

Petitioner asserts that the evidence was insufficient, as a matter of law, to sustain his conviction for sexual battery on Child B by digital penetration, arguing there was no direct evidence that vaginal penetration occurred. The State submits that the evidence, including the victim's taped statement which was properly admitted, see Point II, was not only sufficient to submit the case to the jury, it was also sufficient to sustain the jury's

verdict of guilt.

Below, Child B testified that Petitioner touched her between her legs, in her private area, with his fingers, and that it was uncomfortable (R 454, 455). The nurse who examined Child B testified that Child B's hymenal hole was larger than normal and that there was a tear in the hymenal membrane. The nurse stated that the tear was suspicious (R 291-292, 296, 301). Child B told Deputy Hibbert that Petitioner had put his finger into her private (R 73-74). Child B also told Detective Masching that Petitioner had put his finger inside her and that it hurt (R 771-772). Apparently, unlike the other victims, Child B did not deviate from this story during her deposition. Clearly, Child B's trial testimony, corroborated by the physical evidence and her taped statement, established a prima facie case. This evidence was sufficient as a matter of law to allow the case to go to the jury.

Here, unlike the circumstances in J.W.C. v. State, 573 So. 2d 1064 (Fla. 5th DCA 1991), and Bell v. State, 569 So. 2d 1322 (Fla. 1st DCA 1990), cited by Petitioner, Child B's out-of-court statements were neither uncorroborated nor the sole evidence of penetration. Here, as in Davis v. State, 569 So. 2d 1317 (Fla. 1st DCA 1990), there was physical evidence which established penetration and supported Child B's out-of-court statement. See

also Owen v. State, 300 So. 2d 70 (Fla. 1st DCA 1974). While Child B's descriptions of her private parts may have been imprecise, as noted by the Second District in Stone v. State, 547 So. 2d 657 (Fla. 2nd DCA 1989), it should not be "incumbent upon parents to teach their toddlers the sexual vocabulary of **Gray's anatomy** in order to protect them from the lifelong psychological damage of sexual battery." Id. at 659. As this court may not reweigh the conflicting evidence, but must limit its consideration to whether there was substantial, competent evidence to support the jury's verdict, and as there was substantial, competent evidence to support the jury's finding of penetration below, Petitioner's conviction for sexual battery of Child B must be affirmed.

B. THE EVIDENCE ESTABLISHED PETITIONER COMMITTED AN ORAL SEXUAL BATTERY ON CHILD A.

Petitioner likewise contends the evidence was insufficient to established he committed a sexual battery on Child A. Again, the State submits the evidence adduced below was sufficient to support the jury's verdict of guilt as to this assault. Child A testified at trial that Petitioner placed her on the mat on the floor of the bathroom and licked her private parts. Child A testified that her private parts were between her legs (R 168). Child A had previously told Deputy Hibbert, Detective Masching, and her mother

the same story (R 70, 225, 777-779).

As noted by Petitioner, under this count, the State was only required to prove that Petitioner's mouth united with Child A's vagina. Section 794.011(1)(h), Fla. Stat. (1991). The State submits that Child A's testimony at trial was far more precise than that of the victim in Stone, supra, and there the defendant's conviction was affirmed. Indeed, as noted in Firkey v. State, 557 So. 2d 582, 585 (Fla. 4th DCA 1989), the Legislature maintained the "private parts" concept of rape in enacting the sexual battery statute. Under the statute, all the State is required to show is that the defendant's mouth united with the vagina of the victim. Stone, supra at 658; Dorch v. State, 458 So. 2d 357 (Fla. 1st DCA 1984). Clearly here, from the evidence adduced at trial below, the jury could reasonably infer that Petitioner made contact between his mouth and the sexual organ of the victim. As there was competent, substantial evidence to support the jury's verdict of guilt, Petitioner's conviction must be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court UPHOLD the District Court's opinion below **affirming** the judgment and sentence entered in the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been furnished by Courier to: IAN SELDIN, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 14th day of May, 1996.

Michelle Hanzy
Of Counsel