IN THE SUPREME COURT OF FLORIDA

RICK BEBER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC03-1765
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

AMENDED BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF CASE AND FACTS

The State charged Rick Beber (petitioner) with two counts of sexual battery (fellatio) of a minor (Counts 1 and 4), three counts of lewd or lascivious molestation (masturbating a minor, Counts 2, 5, and 6), soliciting masturbation by a minor (Count 3), lewd or lascivious exhibition (masturbation in the presence of a minor, Count 7), and two counts of providing obscene material to a minor (Counts 8 and 9) arising from events that occurred between June 9, 2000 and June 8, 2001. R. 98, vol. 1. The matter was tried to a jury in June 2002.

The State filed a pretrial notice of intent to present child hearsay statements made to the child's mother, [NAME REMOVED TO PROTECT THE CHILD VICTIM], and to the child protection team caseworker, Gayna Hansen. R. 109,

vol. 1. At the hearing on the motion, [NAME REMOVED TO PROTECT THE CHILD VICTIM] testified that in June 2001 her son, [NAME REMOVED TO PROTECT THE CHILD VICTIM], was spending the night with a friend. When [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s husband put the other children to bed, he found a note under [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s pillow. The note read, "I love Ashley [and another girl's name]. I will always love you forever. I want to have sex with you." [NAME REMOVED TO PROTECT THE CHILD VICTIM] immediately called and told [NAME REMOVED TO PROTECT THE CHILD VICTIM] to come home. TR. 6.

When [NAME REMOVED TO PROTECT THE CHILD VICTIM] came through the door, [NAME REMOVED TO PROTECT THE CHILD VICTIM] asked, "What's this letter about?" [NAME REMOVED TO PROTECT THE CHILD VICTIM] responded, "I don't know, Mommy. I don't know." [NAME REMOVED TO PROTECT THE CHILD VICTIM] continued to question [NAME REMOVED TO PROTECT THE CHILD VICTIM] about the note, asking who taught him about sex. [NAME REMOVED TO PROTECT THE CHILD VICTIM] initially responded, "No one, Mommy," but eventually named petitioner, his grandmother's live-in boyfriend, and stated that petitioner "touched

his private." TR. 7-9. The State introduced a videotape of [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s interview with Hansen, and petitioner introduced [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s deposition which counsel stated contained numerous conflicting allegations. The trial court found the hearsay admissible pursuant to section 90.803(23)(a), Florida Statutes. TR. 43-45.

At trial [NAME REMOVED TO PROTECT THE CHILD VICTIM] testified that petitioner pulled down his ([NAME REMOVED TO PROTECT THE CHILD VICTIM]'s) pants and touched his ([NAME REMOVED TO PROTECT THE CHILD VICTIM]'s) penis once in his grandmother's living room and once in the bathroom. TR. 267, 269, vol. 2. He further testified that petitioner touched his own penis and shook it up and down. TR. 269-80, vol. 2. [NAME REMOVED TO PROTECT THE CHILD VICTIM] did not know how many times petitioner touched him, but stated that petitioner never touched him with anything but his hand. TR. 285, vol. 2.

Over petitioner's objection the State introduced the CPT videotape at trial. TR. 335, vol. 3. On the tape [NAME REMOVED TO PROTECT THE CHILD VICTIM] stated that petitioner put him on the living room floor, took off his pants and underwear and touched his penis and "went like that." TR. 362-63, vol. 3. He

then stated that through a partially open shower curtain he observed petitioner masturbating. TR. 364-66, vol. 3. When asked if appellant touched his penis with his mouth, [NAME REMOVED TO PROTECT THE CHILD VICTIM] responded, "Yeah, he put my private in his mouth. TR. 371, vol. 3.

At the conclusion of the State's case petitioner moved for a judgment of acquittal on Counts 1 and 4 on the ground that [NAME REMOVED TO PROTECT THE CHILD VICTIM] denied fellatio in court and that the only evidence of fellatio, the hearsay in the CPT video, directly contradicted the in-court testimony. The trial court denied the motion.[1] TR. 433-44, vol. 3. The trial court sentenced petitioner to life on Counts 1 and 4, 15 years on Counts 2, 3, and 7, and 30 years on Count 5, consecutive.

On appeal petitioner argued, inter alia, that the trial court erred by denying his motion for judgment of acquittal on Counts 1 and 4 where the sole evidence of fellatio was the out-of-court statement in the CPT interview that was recanted at deposition and at trial. The district court concluded that an out-of-court statement,

[1]The trial court granted petitioner's motion for judgment of acquittal on Count 8, and the jury acquitted appellant on Count 6. The Fifth District Court of appeal reversed petitioner's conviction on Count 9. TR. 444-45, vol. 3, R. 213, vol. 2, opinion of the Fifth District Court of Appeal annexed hereto, marked Exhibit A, and by reference made a part hereof.

standing alone, is sufficient to sustain a criminal conviction if admissible under section 90.803(23). Petitioner timely invoked the jurisdiction of this court.

SUMMARY OF ARGUMENT

The State charged petitioner, inter alia, with two counts of sexual battery of a minor by "placing his mouth, tongue on or in union with" the minor's penis. The only accusations of fellatio occurred during a CPT interview. After a pretrial hearing the trial court found sufficient safeguards of reliability and admitted the videotape of the interview pursuant to section 90.803(23), Florida Statutes.

At deposition and at trial the child denied fellatio. Once the State introduces exculpatory testimony, as it did during the direct examination of the child, the inculpatory prior unsworn statement cannot constitute the sole evidence of guilt. The statement becomes nothing more than evidence of prior inconsistent statements of a testifying witness that must comply with all applicable rules of admissibility.

A prior inconsistent statement may serve many purposes and may be admissible pursuant to well-established rules of evidence. It cannot, however, serve as the sole basis for a criminal conviction. Other corroborating evidence is essential. The risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements. The State presented no evidence of fellatio other than an out-of-court statement that was recanted at deposition and at trial. Absent corroborating evidence, the State failed to establish

guilt beyond a reasonable doubt, and the record contains no substantial competent evidence to support the verdict. The decision of the district court is in direct conflict with the decisions of other district courts and of this court and must be reversed.

ARGUMENT

THE DISTRICT COURT ERRED BY AFFIRMING PETITIONER'S CONVICTIONS WHERE THE ONLY EVIDENCE OF FELLATIO IS THE CHILD'S UNSWORN OUT-OF-COURT STATEMENTS THAT DIRECTLY CONFLICT WITH SWORN DEPOSITION AND TRIAL TESTIMONY.

Standard of Review

This court has jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of this court on the same question of aw. Article V, section 3(b)(3), Florida Constitution.

In criminal law, a finding that the evidence is legally insufficient means that the prosecution failed to prove guilt beyond a reasonable doubt. The concern on appeal is whether, after all conflicts in evidence and all reasonable inferences have been resolved in favor of the verdict, there is substantial competent evidence to support the conviction. Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

Background

In Counts 1 and 4 the State charged that petitioner committed a sexual battery by "placing his mouth, tongue on or in union with" [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s penis. R. 98, vol. 1. In the CPT

interview [NAME REMOVED TO PROTECT THE CHILD VICTIM] stated that petitioner touched his ([NAME REMOVED TO PROTECT THE CHILD VICTIM]'s) private and "went like that" in either the bedroom or living room and that he observed petitioner masturbating through a partially open shower curtain. TR. 354, 359, 362-63, 366, vol. 3. Later in the interview Hansen asked:

Q: Did he ever touch his private with something else?

A: Uh-uh.

Q: Besides his hand? Not his mouth or his private?

A: Wait. Yeah, he put my private in his mouth.

TR. 370-71, vol. 3.

The accusations of fellatio in the CPT interview directly conflict with [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s deposition and trial testimony.

The following in-court testimony was presented:

Q: Okay. Did he touch you in the bathtub?

A: Yes.

Q: Did he touch your private with his mouth in the . . .

[Petitioner's objection sustained.]

Q: Did he touch your private with anything besides his hand?

A: I don’t know.

TR. 270, vol. 2.

Q: How many times did it happen, just the one time that he touched your privates.

A: No.

Q: How many times?

A: I don’t remember.

Q: Well, how many times did it happen in the living room?

A: I don’t know.

Q: How many times did it happen in the bathroom?

A: I don’t know.

TR. 277-78, vol. 2.

Q: Did he touched [sic] you with his hands, right?

A: Yes.

Q: Anything else. He ever touch you with anything else?

A: No.

Q: Are you sure?

A: Yes.

Q: You swear?

A: Yes

Q: Pinky finger?

A: Yes

TR. 285, vol. 2.

The Fifth District acknowledged that at trial [NAME REMOVED TO PROTECT THE CHILD VICTIM] often answered the prosecutor's questions with "I don't know," or "I don't remember," and that he denied fellatio at deposition and at trial. The district court further acknowledged that the State adduced no true corroborating evidence of fellatio and that [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s in-court testimony directly conflicts with the videotape. Nonetheless, the district court concluded

> [T]hat the out-of-court statement of the child, admitted pursuant to section 90.803(23), is sufficient to sustain Beber's conviction of sexual battery, even though there is no true corroborating evidence other than the child's in court testimony that Beber perpetrated various other sexual crimes on him, and even though the child contradicted his videotaped statement in court, where the circumstances of the taped interview were surrounded with multiple safeguard of reliability, and nothing in this record objectively suggests a basis for this court to lack confidence in the criminal conviction.

Merits

In Counts 1 and 4 the State charged that petitioner committed sexual battery by placing his mouth, tongue on or in union with [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s penis. The record on appeal contains no corroborating evidence of fellation other than the evidence of other sexual crimes and the inference that fellatio may have also occurred. The district court admitted that such an inference is "quite a stretch" given the State's high burden of proof. Nonetheless, the district court concluded when admitted pursuant to section 90.803(23), an unsworn out-of-court statement, standing alone, is sufficient to sustain a criminal conviction.

Section 90.803(23)(a), Florida Statues, provides:

> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination,

> the court may consider 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[.]

The trial court found that [NAME REMOVED TO PROTECT THE CHILD VICTIM], [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s mother, and Hansen, the CPT caseworker, were credible sources of information, that the methods of questioning the child were trustworthy, that the language of the child was consistent with his age, that there was no evidence he was coached, conditioned, or interviewed too many times, and that the circumstances surrounding the videotaped interview offered sufficient safeguards of reliability to merit admission and consideration as substantive evidence at trial. Petitioner contends that the out-of-court statement was rendered unreliable and inadmissible as substantive evidence by subsequent events.

Out-of-court statements contradicted by trial testimony are nothing more than prior inconsistent statements that may not be used substantively as the sole evidence of guilt. Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988). In Jaggers the defendant was charged with three counts of sexual battery by digital penetration of the vagina. The State introduced videotaped depositions of the

three victims during its case in chief. In the videos the children specifically denied digital penetration which contradicted prior statements to several persons.[2] Over objection, the State presented the prior inconsistent statements through those persons. The Second District concluded that the State's attempts to remedy the negative trial testimony with the unsworn, out-of-court statements was nothing more than evidence of prior inconsistent statements of a testifying witness. Once the State introduces the exculpatory testimony, the inculpatory prior unsworn statements cannot constitute the sole evidence of guilt. Evidence offered under section 90.803(23) must, like any other evidence, comply with all applicable rules of admissibility. Jagger at 324-25, citing State v. Moore, supra; see also, Williams v. State, 560 So.2d 1304 (Fla. 1st DCA 1990); State v. Moore, 485 So.2d 1279 (Fla. 1986). The holding in Jaggers is consistent with opinions of this court and other district courts of appeal.

In State v. Moore, 485 So.2d 1279 (Fla. 1986), this court held, 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. Although a prior inconsistent statement may be used to corroborate evidence which is otherwise

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[2]The record on appeal contains no indication that [NAME REMOVED TO PROTECT THE CHILD VICTIM] made accusations of fellatio to any person other than the CPT caseworker.

inconclusive, to fill in gaps in the reconstruction of events, or to provide valuable detail which would otherwise have been lost through lapse of memory, it cannot be used to meet the burden of proof beyond a reasonable doubt. The risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements.

Nine years after Moore this court addressed prior inconsistent statements in a child hearsay context. In State v. Green, 667 So.2d 756 (Fla. 1995) the victim reported sexual offenses to her sister, her sister-in-law, and a CPT worker. An examination by a CPT pediatrician revealed a vaginal opening consistent with penetration. Although the child implicated the defendant at deposition, at trial she recanted her earlier accusations and identified another man as the perpetrator. Over objection the trial court allowed the State to read the deposition testimony, and, after extensive findings of reliability, allowed testimony from the sister and sister-in-law regarding the accusations, and admitted the videotaped interview with the CPT caseworker. This court held that prior inconsistent statements may be admitted pursuant to section 90.803(23) and 90.801(2)(a), but that in a criminal

prosecution, such statements, standing alone, are insufficient as a matter of law to prove guilt beyond a reasonable doubt.[3]

In Dept. of Health and Rehabilitative Services v. M.B., 701 So.2d 1155 (Fla. 1997), a dependency case, the child told her teacher, a guidance counselor, a CPT coordinator, and a CPT nurse practitioner that her stepfather had sexual intercourse with her and forced her to perform fellatio. A medical examination yielded physical findings consistent with the statements. After the State filed a dependency petition, the child told investigators that she no longer remembered who abused her. A psychologist attributed this inconsistency to child sexual abuse accommodation syndrome where a child whose story is distrusted eventually retracts the accusation to restore the family system. In response to a certified question from the district court, this court held that section 90.803(23) permits the admission of out-of-court statements as substantive evidence even where the statements are inconsistent with trial testimony if the trial court finds that the circumstances of the out-of-court statements provide sufficient safeguards of reliability. This court emphasized, however, that the holding applies to

[3]This court cited with approval the holding in Jaggers v. State, 536 So.2d 321 (Fla. 2d DCA 1988).

dependency cases where the burden of proof is a preponderance of the evidence and the issue is the protection of the child and not the punishment of the accused.

In Mikler v. State, 829 So.2d 932 (Fla. 4th DCA 2002) a videotape of the child's interview with detectives was admitted as substantive evidence pursuant to section 90.803(23). The Fourth District found that the victim's out-of-court statement did not directly conflict with her trial testimony and that the State introduced corroborating evidence through a DNA test, a physical examination of the child, and the defendant's statements to the police that made it "likely" fellatio occurred.[4] Unlike Mikler, here there is no corroborating evidence of fellatio other than the unsworn out-of-court statement and an inference from the other sexual acts.

In a more recent case the First District confronted the question of whether a child's out-of-court hearsay statements alone can sustain a conviction for capital sexual battery. Baugh v. State, 2003 WL 22459116 (Fla. 1st DCA Oct. 31, 2003). In Baugh the substantive evidence consisted almost exclusively of pretrial unsworn statements admitted pursuant to section 90.803(23) which directly conflicted with the victim's in-court testimony. Noting that the inconsistent

[4]In the tape the child described fellatio; at trial she testified to various other sexual acts but did not mention fellatio and was not cross-examined about fellatio.

statements should not be considered any more reliable than any other inconsistent statements simply because they are admitted pursuant to section 90.803(23), the court found that under Green the statements alone cannot sustain a conviction. Other corroborating evidence is essential. The court has certified the issue as a question of great public importance.

To prove the charged offense, the State must establish beyond a reasonable doubt that petitioner placed his mouth or tongue on [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s penis. The State failed to meet this burden where the sole evidence of guilt is [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s unsworn out-of-court statement to the CPT caseworker.

As noted by the district court [NAME REMOVED TO PROTECT THE CHILD VICTIM] often answered the prosecutor's questions with "I don't know" or "I don't remember." The State presented no evidence of fellatio other than the out-of-court statement that [NAME REMOVED TO PROTECT THE CHILD VICTIM] recanted at both deposition and trial. The opinion of the district court conflicts with decisions of this court and other district courts and must be reversed.

CONCLUSION

Based upon the authorities cited and the argument presented this Court should reverse the opinion of the Fifth District Court of Appeal and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Rick Beber, DC#923373, Martin Correctional Institution, 1150 S.W. Allapattah Rd., Indiantown, FL 34956 this 22nd day of January 2004.

MICHAEL S. BECKER for

_____
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Assistant Public Defender

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14pt.

MICHAEL S. BECKER for

_____
Dee Ball
Assistant Public Defender

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Exhibit A