IN THE SUPREME COURT OF FLORIDA

RICK BEBER,

Petitioner,

v. CASE NO. SC03-1765

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

This court, in Department of Health and Rehabilitative Services v. M.B., 701 So. 2d 1155 (Fla. 1997), did not recede from State v. Green, 667 So. 2d 756 (Fla. 1995). Green does not permit the conclusion reached by the District Court in this case.

This court should continue to hold, as it did in Green, that a hearsay statement admitted under Section 90.803(23), Florida Statutes, is insufficient, without corroboration, to support a conviction. Whether pursuant to the rule of Green or not, this court should quash the decision and opinion under review, since the hearsay in this case was not shown to be reliable enough to meet the State's constitutional burden of proof.

ARGUMENT

IN REPLY: THE DECISION AND OPINION AFFIRMING PETITIONER'S CONVICTIONS FOR CAPITAL SEXUAL BATTERY ARE INCONSISTENT WITH GREEN v. STATE and MOORE v. STATE. THE ONLY EVIDENCE SUPPORTING THOSE CONVICTIONS IS THE ALLEGED VICTIM'S UNSWORN OUT-OF-COURT STATEMENTS, WHICH DIRECTLY CONFLICT WITH HIS SWORN TESTIMONY.

The State argues that this court should not exercise its jurisdiction in this case because the District Court's decision and opinion are consistent with this court's prior caselaw. The Fifth District's decision is in fact inconsistent with State v. Green, 667 So. 2d 756 (Fla. 1995), and its opinion misinterprets Department of Health and Rehabilitative Services v. M.B., 701 So. 2d 1155 (Fla. 1997). This court should quash the decision and opinion under review and restore clarity to the progression of cases which governs the issue raised here.

The Fifth District states in this case that this court, in M.B., receded from its earlier decisions in Green and State v. Moore, 485 So. 2d 1279 (Fla. 1986). Beber v. State, 853 So. 2d 576, 581 (Fla. 5th DCA 2003). M.B. is consistent with Green, and indeed carefully distinguishes it. M.B., 701 So. 2d at 1162. Both M.B. and Green stand for a rule that a statement found reliable and admissible under Section 90.803(23), Florida Statutes, may be admitted as substantive evidence. M.B., 701 So. 2d at 1162; Green, 667 So. 2d at 761. Green further holds that hearsay introduced

under that subsection is insufficient on its own to establish a necessary element of the State's proof on any criminal charge, because criminal defendants have the right to confront the witnesses against them.[1] 667 So. 2d at 760. The District Court's holding that this court receded from Green in M.B. does not survive a close reading of the two opinions. See also Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002) (Florida Supreme Court does not *sub silentio* abandon earlier holdings.)

The District Court's conclusion, that Green (as receded from by M.B.) permits it to uphold the capital sexual battery convictions in this case, is similarly wrong. [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s trial testimony did not tend to establish that any act constituting capital sexual battery ever took place; neither did any other aspect of the State's proof, except for [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s taped hearsay interview with the CPT investigator. That taped statement was of course profoundly discredited by [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s abandoning, on cross-examination, the sole accusation that could have supported the capital charge. Means v. State, 814 So. 2d 1136, 1138 (Fla. 1st DCA 2002), relied on by the State in its merits brief, is distinguishable on a crucial point:

[1] The federal and Florida constitutions both protect criminal defendants' right to confront the witnesses against them. Perez v. State, 536 So. 2d 206, 209 nn. 2, 3 (Fla. 1988). Those protections are coextensive. Perez at n. 4. Petitioner relies on both protections in this case.

there the descriptive details of a capital sexual battery victim's testimony were inconsistent with the details given in her pretrial hearsay statements, but at trial *"she did provide testimony ...sufficient to submit the union element...to the jury."* Here *only* hearsay was introduced on the union element of the capital sexual battery counts, and denying the defense's motion for judgment of acquittal violated the constitutional principle announced by this court in State v. Green.

This court held in Green that a hearsay statement, admitted as reliable under 90.803(23), as a matter of constitutional law cannot form the basis of a jury verdict unless other "proper corroborating evidence" is admitted. 667 So. 2d at 761. The District Court in this case admitted that the only corroborating aspect of the State's case was the fact that [NAME REMOVED TO PROTECT THE CHILD VICTIM], in his trial testimony, stuck to his *other* accusations regarding lesser lewd and lascivious acts. The District Court further admitted, at one point in its opinion, that as a reason to deny a motion for judgment of acquittal as to capital sexual battery, reliance on [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s consistency in accusing the defendant of *other* crimes is "quite a stretch." Beber v. State, 853 So. 2d 576, 581 (Fla. 5th DCA 2003). Each count of a criminal charging document must, of course, stand on its own. Davis v. State, 371 So. 2d 721, 722 (Fla. 1st DCA 1979); Fla. Std. Jury Instr. (Crim.) §3.12(a).

That the District Court's "quite a stretch" admission is true is highlighted by the unconvincing nature of the argument now resorted to by the State: "It is highly unlikely that Beber did not put his mouth on the child's penis [given the nature of the child's other accusations, which he again asserted at trial.]" (Merits brief at 13.)

The District Court's reasoning, as well as the State's, on this point appears to have been borrowed from Mikler v. State, 829 So. 2d 932 (Fla. 4th DCA 2002). Mikler was charged with raping an eleven-year-old girl and with committing various other sexual offenses against her; the rape charge was supported by DNA evidence. At trial the State neglected to ask the victim about one of the sexual acts, which involved oral intercourse, and that charge was not addressed during her cross-examination. The victim's pretrial hearsay statement, admitted at trial, did include her accusation on the oral-intercourse offense. Mikler challenged the sufficiency of the evidence as to the oral-intercourse count; the Fourth District affirmed, holding that the hearsay statement was sufficient to support that count given the fact that the victim's testimony as to her other, related allegations was well-corroborated. Petitioner contends that both the decision under review and Mikler were incorrectly decided, since as this court has held, a criminal defendant should never be convicted where the central allegations against him are proved by hearsay alone. State

v. Townsend, 635 So. 2d 949, 957 (Fla. 1994). If this court disagrees, and would approve Mikler, it should quash the decision under review and distinguish Mikler, based on the fact that there was no evidence whatever introduced in this case to corroborate the hearsay that contained the capital sexual battery accusations.

The District Court's specific holding in this case was that [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s statement to the CPT investigator

> 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 safeguards of reliability, and nothing in this record objectively suggests a basis for this court to lack confidence in the criminal conviction*.

853 So. 2d at 581 (emphasis added). This analysis is inconsistent with Green, which reversed a conviction in the absence of "proper" evidence corroborating a hearsay accusation. The District Court's analysis in this case is also inconsistent with the constitutional right to due process of law, protected by the federal and Florida constitutions. The burden of proof beyond a reasonable doubt remains with the State as to every element of every criminal case, as a matter of due process. In re Winship, 397 So. 2d 358 (1970); Burttram v. State, 780 So. 2d 224 (Fla. 2d DCA 2001). That burden cannot be said to have been met where, as here, the sole proof on

an essential element of a criminal charge is a hearsay statement *which is expressly abandoned by the declarant at trial.* Green, supra; Baugh v. State, 862 So. 2d 756 (Fla. 2d DCA 2003), *rev. granted,* no. 04-21 (Fla. 2004); United States v. Bahe, 40 F. Supp. 2d 1302 (D. N. M. 1998).

This court's opinion in Green is cited with approval in Bahe, supra, which collects cases from dozens of jurisdictions holding that a recanted statement, without more, is insufficient to prove beyond a reasonable doubt a criminal charge that involves child sexual abuse. United States v. Bahe, 40 F. Supp. 2d at 1310; see id. at 1305-07. United States v. Orrico, 599 F. 2d 113 (6th Cir. 1979), which was relied on by this court in State v. Moore, is also cited with approval in Bahe. See Moore, 485 So. 2d 1279, 1281-82; Bahe, 40 F. Supp. 2d at 1309. The Orrico court held, in the context of the then-new federal evidentiary rule that allows prior inconsistent statements as substantive evidence, that while hearsay may be sufficient to show "a purely technical element of a crime" such as a dollar amount or transportation in interstate commerce, it is not sufficient "as the sole evidence of a central element of the crime charged." 599 F. 2d 113, 118-19.

Even if this court is disposed to hold that in some case, a hearsay accusation which is abandoned on cross-examination could constitutionally, without more, support a conviction, the hearsay statement introduced in this case has not been shown to be reliable

enough to meet the State's constitutional burden of proof.[2] Hearsay is not *admissible at all* against a criminal defendant, consistent with his right of confrontation, unless it either falls into a "firmly rooted" exception to the general rule against admitting hearsay, or else bears particularized guarantees of reliability. Conner v. State, 748 So. 2d 950, 956 (Fla. 1999), citing Idaho v. Wright, 497 U.S. 805, 821 (1990). The statutory child hearsay exception, Section 90.803(23), is not "firmly rooted" in the common law but is instead a codification of the "particularized guarantees of reliability" required by Wright. Perez v. State, 536 So. 2d 206, 209 (Fla. 1988). The indicia of reliability cited in this case by the trial court, where they are specific, are negative: the trial court found no affirmative evidence that the child was interviewed repeatedly, and no affirmative evidence that he was in any other way improperly influenced. 853 So. 2d at 578. As this court held in State v. Townsend, 635 So. 2d 949 (Fla. 1994), criteria that should also be examined by the courts when weighing the reliability of a child's hearsay should include whether the statement was

[2] Petitioner acknowledges that in the direct appeal of this case, counsel acting on his behalf did not challenge the *admissibility* of [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s hearsay statement accusing him of capital sexual battery, but only its *sufficiency* to support his convictions on that charge. That omission should not be ruled to procedurally bar him from now arguing that the hearsay statement is affirmatively shown by the record to be too unreliable to support his conviction, both under the confrontation clauses, see Green, and as a matter of due process.

spontaneous or was instead elicited in response to questions; the child's ability to distinguish reality from fantasy; and whether the accusation has been consistent. 635 So. 2d at 957-58. Accord Idaho v. Wright, supra, 497 U.S. at 821-22 ("spontaneity and consistent repetition" are significant factors in reliability calculus.) The State in its brief admits that [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s statement to the CPT investigator was the result of "prompting" (Merits brief at 9), and the record in no way permits a conclusion that there was consistency on [NAME REMOVED TO PROTECT THE CHILD VICTIM]'s part as to the capital sexual battery allegations. Given those facts, the negative indicia found by the trial court together make up too slender a reed to bear the weight of the State's constitutional burden of proof.

This court should continue to hold, as it did in Green, that hearsay statements introduced under Section 90.803(23) are not sufficient, in the absence of proper corroboration, to support a conviction. See Baugh v. State, supra, 862 So. 2d at 764 ("[the victim's] inconsistent statements should not be considered any more reliable than any other inconsistent statements simply because they were admitted pursuant to section 90.803(23)."). See also United States v. Bahe, supra, 40 F. Supp. 2d at 1313 ("any rational trier of fact would necessarily retain doubt, a reasonable and rational doubt, as to...guilt," where the hearsay evidence solely relied on by the government was recanted.) If this court does not continue to

hold that hearsay must be corroborated to support a conviction, it should nevertheless quash the decision and opinion under review, since the record does not support the State’s argument that it met its constitutional burden of proof on the capital sexual battery charges in this case.

CONCLUSION

The petitioner requests this court to quash the decision and opinion of the District Court of Appeal, and to vacate his convictions for capital sexual battery.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing reply brief has been served on Assistant Attorney General Robin Compton, of 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by way of the Attorney General's in-box at the Fifth District Court of Appeal, this 26th day of February, 2004.

_____
Nancy Ryan
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Courier New 12-point font.

_____
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