IN THE SUPREME COURT OF FLORIDA

RAYMOND BAUGH, **Petitioner,** **v.** **STATE OF FLORIDA,** **Respondent.**	**Case No. SC04-21**

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The record on appeal contains seven volumes. The first three are the court's record, including transcripts of pre-trial hearings. These records are stamped sequentially on the lower right of the page and will be referred as (R __). The next four volumes contain the trial transcript. This will be referred to as (T __), using the printed number on the upper right of the page. Please note that the transcript is out of order in the volumes, with volume VII containing testimony that actually occurred between the end of volume V and the beginning of volume VI.

STATEMENT OF THE CASE AND FACTS

In the opinion below, Baugh v. State, 862 So. 2d 756 (Fla. 2nd DCA 2003) the Second District found the following:

> Raymond Baugh appeals from his conviction for capital sexual battery upon the seven-year-old daughter of his former girlfriend, for which he received a sentence of life in prison. The substantive evidence against him at trial consisted almost exclusively of pretrial unsworn child hearsay statements admitted pursuant to section 90.803(23), Florida Statutes (2000), which directly conflicted with the victim's in-court testimony. The question we face in this case is whether, given the child victim's in-court testimony that there was never any sexual abuse, the child's out-of-court hearsay statements alone can sustain the defendant's conviction for capital sexual battery. We hold that the prior statements alone cannot sustain the defendant's conviction. However, in this case there was some other evidence that would give rise to the inference that Mr. Baugh committed the crime of which he was accused. In light of that other corroborative evidence, we affirm Mr. Baugh's conviction.
>
> The State has also cross-appealed the trial court's decision to instruct the jury to consider the child hearsay testimony as impeachment rather than direct evidence. Although we hold that the court erred in giving that instruction, the cross-appeal is moot in light of our decision affirming the conviction.

Baugh v. State, 862 So. 2d 756, 757 (Fla. 2 DCA 2003)

The District Court issued a detailed rendition of the facts:

> The trial of this case took place about six months after the alleged molestation.

The State's first witness was the child victim, C.P., who described a time when the defendant, her mother's live-in boyfriend, came into her room and closed the door. C.P.'s mother had sent her to her room for "bugging" her while she was ordering lobsters from Publix on the phone, and the defendant, whom she referred to as her daddy or Ray, came into her room to yell at her, closing the door behind him. The door was then accidentally locked because C.P. had fiddled with it earlier.

The defendant was wearing only a towel because he had just come from the shower. After he finished yelling at her, he picked up some mice from a cage so that he could feed them to the pet snake. C.P. denied that Ray ever opened up his towel, at that moment or any other time. However, C.P. had seen some "very gross" pictures when she was snooping around in her mother's bedroom. The significance of that comment would emerge when the child hearsay statements were later admitted, because C.P. told investigators that the defendant had shown her pictures to teach her how to perform oral sex.

When her mother began knocking on the door, C.P. opened it immediately, and her mother asked her what was going on. In response C.P. told a "fib"--that Ray made her suck his private--"but that was not true."

The prosecutor pressed the child about why she told this fib, and C.P. maintained that she made the story up because her older brother, who did not live with them, had told her about a similar event that had happened to him when he was about eight years old--that "a guy" (not the defendant or anyone involved in this case) made him suck the guy's private. C.P. thought of telling that lie because she wanted to get Ray in a "little, but not that much trouble," because sometimes he made her mad. She thought that it took her a couple of minutes to think of this lie before she told her mother,

although the prosecutor questioned why she had not previously told him that she had thought about it for a few minutes before blurting it out.

According to C.P., the repercussions of her statement to her mother were immediate. There was a lot of yelling; her mother called the police; and the defendant took some razor blades and went into the bathroom and slashed at his wrists. C.P. recalled for the prosecutor that she did not speak to the police until a day or so later, when they went to the station and talked to Detective Venero. She told the detective that "it happened," that her daddy made her suck his private. She admitted that she told the detective that she had done it with Ray twelve times previously and that white stuff came out, which tasted bad; on the stand, however, she denied that it happened and stated she did not know how it tasted, but her brother had told her about it.

The prosecutor continued to press C.P. about her motivation to lie about this event and to continue to lie about it. C.P. basically said that she knew that she would get in trouble for lying that she did not want to get in any more trouble, and that she was afraid that the detective would tell her mother. Her mother scares her when she lies. Even though she was lying, C.P. knew the difference between a lie and the truth all along. One night when she was watching TV, however, she decided to tell her mother the truth because she thought maybe she could deal with getting in trouble. She was sad because her family had been broken apart and she thought it would help if she told the truth. C.P. also consistently insisted that she had not talked with her mother about these matters or about Ray except for the time when she decided to finally tell the truth.

Another line of inquiry pursued by the prosecutor, over defense objection, delved

into some new rules C.P.'s mother had instituted for her household, most of which concerned wearing appropriate clothing and not locking doors. The inference the prosecution sought from this testimony was that C.P. would not be afraid to have the defendant back in their household because these rules would prevent a further recurrence of this behavior. C.P., however, asserted that she was not afraid of him because he had never molested her in the first place. Although likening this testimony to evidence of subsequent remedial measures prohibited in some civil contexts, the trial court admitted the evidence because it was inextricably intertwined with the credibility of each witness that the jury was going to have to evaluate.

On cross-examination the defense attorney elicited from C.P. that she had originally told the lie because she was mad at her mother and Ray for yelling at her, and she kept repeating it because she was afraid of her mother. She ultimately told the truth, though, because she was sad that her family was broken apart and she felt bad that her lie had gotten them into this situation, and, she thought, "maybe I can deal with the pressure." It was a difficult decision, one she had to think about a long time. She again recounted that the story she had heard from her brother had stuck in her mind and supplied the details. Also, in nosying around her mother's room she had come across one picture that she should not have seen, and that, too, was difficult to erase from her mind. As for the new rules, they made her feel safe, but Ray never had asked her to do anything naughty or showed her naughty pictures. She was afraid of him, though, because when he does not take his medication he hurts himself. Finally, the defense elicited from C.P. that she does not like her mother's former friend, Kristin, and that she would never tell her a secret.

At the conclusion of C.P.'s testimony, the State had demonstrated that the alleged

victim had first accused the defendant of molesting her, repeated that story to a number of different people, and then changed her story. C.P. was asked to identify the towel that Ray wore that night. She did so, but no physical evidence was ever obtained from that towel. The child protection team worker testified that her examination of C.P. revealed no evidence of abuse. Pornographic pictures were eventually recovered from the home, but there was never any direct testimony that the defendant had shown them to C.P. The detective, the child protection worker, and virtually every other witness repeated C.P.'s hearsay statements, but there was never any direct evidence demonstrating that events unfolded the way C.P. initially said they had.

Other than the child's prior inconsistent statements, the most damning piece of evidence was elicited from the mother. She testified that after she finished calling Publix about lobsters, she attempted to enter C.P.'s room but found that the door was locked. Within a few seconds--fewer than thirty, according to her estimate--someone opened the door. She saw Raymond standing there, wrapped up in his towel, with white mice in his hand, and her daughter behind him. Both denied knowing the door was locked, but she wanted to find out what had happened, so she separated them. She took C.P. to her bedroom, asked what was going on, and the child's exact words were, "He made me suck on his dick." The mother immediately confronted Ray, spouting what she described as "colorful metaphors," slapping him several times, and insisting that he leave immediately. During their heated argument Raymond said, "I want her to suck my dick, I want you to watch, and then I want to fuck you after."

C.P.'s mother testified on direct that Raymond made this remark in the heat of an argument to anger her, which it did. In fact, the first time the mother had indi-

cated that she thought Raymond was less than serious when he made this remark, that he was describing what he wanted rather than what he did, was at the bond hearing, and by that time her daughter had changed her story and the mother was doing all she could to have Raymond released from jail.

On cross-examination the mother testified that she believed C.P. when she changed her story, because her behavior had changed for the better after she received the attention she desired, so she assumed that C.P.'s motivation for telling the initial lie was simply to get attention. She denied that her daughter had ever acted out sexually, but she had caught her "playing doctor" with her brother. She described her daughter as extremely nosy, which explained her finding the pornographic pictures.

As for the blow-up that occurred once the bedroom door was unlocked, the mother admitted that when she became angry, it "was not a pretty sight," and she was mad at everyone before the door was even opened--at C.P. for being a pest and at Raymond for insisting on buying lobster for dinner when they could not afford it. Once C.P. accused Raymond of molesting her, she immediately believed what her daughter said was true and thought that Raymond was being serious when he described his desires toward her daughter. However, she noted that he did not have an erection when she walked into the room, and when they cleaned C.P.'s room the next day, she found no evidence of semen or sexual activity.

As for the suicide attempt, C.P.'s mother explained on direct that Raymond had attempted to take his life by slashing his wrists once before, when the phone had been cut off for nonpayment. She admitted that he needs significant counseling, but once she realized that her daughter had lied, she wanted him out of jail.

The statement the defendant made to the mother, whether seriously or in jest, about what he desired to do to C.P., undoubtedly bolstered the prosecution's case against him. The prosecution made further inroads into C.P.'s credibility when it had the investigating detective repeat what the victim and her mother had told him two days after the incident. A number of details conflicted with C.P.'s testimony at trial.

Detective Venero detailed what the mother had told him during his initial investigation, which conflicted in several respects with her trial testimony. [FN1] For instance, she told him that she was off the phone in a matter of moments, went to the bedroom door, listened for a few minutes but did not hear anything, then knocked on the door. Raymond said, "The mice are out--hang on a minute." The mother then banged on the door, did not see the mice out, and did not think he had time to put them away. Her daughter looked as if she had been caught doing something wrong. Therefore, she took C.P. to another room where her daughter said that her daddy made her suck his privates. This enraged the mother, leading to the verbal and physical confrontation with Raymond, who began packing his things and then went into the bathroom and slit his wrists and arms. The mother also relayed to Detective Venero the statement the defendant had made about what he wanted to do, which occurred at the beginning of their protracted altercation, and she also said that he never at any point denied that he had done what he was accused of doing.

Over objection, the detective recounted C.P.'s hearsay statements concerning the event. According to C.P., when Ray opened his towel or other clothing and looked down, she knew that she was to perform oral sex on him. She knew how to do it because he showed her a picture, and she described with particularity where she put her hand, what she did, what came out of his penis, and how the white stuff tasted. She was "fairly articulate" about the white stuff--when it came out and when it did not. C.P. was pretty certain that she had done this twelve times in the past. Then, a few days after his interview with C.P., the mother called Detective Venero and told him that she had found photographs of a woman performing oral sex on a man.

The detective further testified that

C.P.'s examinations revealed no physical evidence of abuse or venereal disease. The defendant's towel was examined for semen but none was found, nor did forensic examination of C.P.'s room reveal any evidence of semen.

A child protection team registered nurse practitioner related C.P.'s statements to her: that Ray made her suck his private, that white stuff came out, and that he had made her do this twelve times. She found no physical manifestations of sexual abuse or of venereal disease. However, in the case of oral sex, it is highly unlikely that there would be any forensic material to be discovered.

A final line of questioning explored the credibility of C.P. and her mother concerning the child's decision to change her story. A jail inmate present when two women and a child came to visit the defendant testified that he overheard some of their conversation. He claimed that the defendant told the women that they had to get the little girl to "recamp" her story because otherwise he was looking at life in prison. Furthermore, approximately two days before this visit the inmate overheard the defendant's end of a telephone conversation in which the defendant said something about a towel, suggesting that they could claim that both he and the little girl had used the same towel after bathing. This inmate had been convicted of seven felonies and was on sex offender probation at the time of trial, but the prosecutor had not promised him anything for his testimony.

A former family friend, Kristin, testified last. This was a person C.P. did not like, who had been thrown out of their home by the mother after the child recanted. Kristin testified about events the night of the incident as well as the circumstances under which C.P. changed her story. According to this former friend, C.P. told her that "it really did happen" but her mother

wanted her to change her story. On the night that C.P. confessed that she had been lying, however, Kristin overheard the mother yelling at her child in the bathroom, exhorting her to tell the truth and warning that she would beat her within an inch of her life if she was lying.

At the conclusion of the State's case, the defense moved for judgment of acquittal, contending that the prosecution had adduced no direct evidence that C.P. had been sexually abused. Instead, the evidence compiled against Mr. Baugh consisted of C.P.'s prior hearsay statements, which were repeated by her mother, the detective, and the child protection worker. In addition, the prosecution introduced the defendant's statement, made to the mother, about how he would like to sexually molest the child and have the mother watch, but this was not really an admission but a statement of desire. Although no photographs were introduced at trial, both the detective and the mother testified that a photograph depicting an act of oral sex was found in the home. The child and her mother both testified about new rules that were introduced concerning clothing and locked doors, which the prosecution hoped would convince the jury that the mother believed C.P.'s original story; however, the mother explained that, initially, she did believe the first story. The defendant's cutting of his wrists and arms almost immediately after the accusation was characterized by the prosecution as evincing his consciousness of guilt but was explained by the defense as demonstrative of the defendant's unbalanced mental state: he had done the same thing when the telephone was turned off. Two witnesses were introduced to suggest that the mother had influenced the child to change her story, but both the jail inmate and Kristin had damaged credibility. Finally, C.P.'s exclamation to her mother--that her daddy had made her suck his dick-- was characterized by the prosecution as a spontaneous statement, which enshrouded

> it with greater evidentiary value than a section 90.803(23) child victim hearsay statement made under other circumstances.
>
> Baugh at 757-761.

The Second District certified the following question of great public importance:

> IF A CHILD VICTIM OF SEXUAL ABUSE TOTALLY REPUDIATES HER OUT-OF-COURT STATEMENTS AT TRIAL, AND THE PROSECUTION ADDUCES NO EYEWITNESS OR PHYSICAL EVIDENCE OF ABUSE, MUST THE TRIAL COURT GRANT A JUDGMENT OF ACQUITTAL EVEN IN THE FACE OF OTHER EVIDENCE CORROBORATING THE OUT-OF-COURT STATEMENTS AND THE DICTATES OF THE CONFRONTATION CLAUSE?
>
> Baugh at 767.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal properly affirmed the trial court's determination that the child hearsay was properly admitted even though the child testified contrary at trial. There was corroboration for the child's story presented, sufficient to send the case to the jury.

ARGUMENT

ISSUE

THE SECOND DISTRICT COURT OF APPEAL PROPERLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT THE CHILD HEARSAY WAS PROPERLY ADMITTED EVEN THOUGH THE CHILD TESTIFIED CONTRARY AT TRIAL (RESTATED).

The standard of review for determining whether the trial court improperly denied the Petitioners motion for judgement of acquittal is de novo.

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. See Tibbs v. State, 397 So. 2d 1120 (Fla.1981). Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. See Donaldson v. State, 722 So. 2d 177 (Fla.1998); Terry v. State, 668 So. 2d 954, 964 (Fla.1996). If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. See Banks v. State, 732 So. 2d 1065 (Fla.1999). However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. See Orme v. State, 677 So. 2d 258 (Fla.1996). Because the evidence in this case was both direct and circumstantial, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases. See Wilson v. State, 493 So. 2d 1019, 1022 (Fla.1986).

Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002)

F.S. § 90.803(23), The child hearsay exception, states:

> (23) Hearsay exception; statement of child victim.--
>
> (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; and
>
> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

> (b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.
>
> (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

The trial court entered a detailed order regarding the admission of the child hearsay. (R 62-75) In that order the trial court said, in part:

> ... The Court got a sense that Carly would indeed be fearful of getting in trouble for admitting to lying, but one then has difficulty understanding why she would have done so in the first place. Further, if, as the child's mother testified the allegations where in fact based solely on Colby's experience years earlier, one would think these allegations would have been made much earlier if they were in fact untrue. In summary, and as supported by subsequent testimony discussed below, the Court is inclined to believe that Carly was telling the truth in her initial allegations, and later recanted untruthfully in an effort to satisfy her mother's concern about the Defendant, and her desire to have him back home and in their lives.
>
> (R 65)

The trial court concluded the safeguards designed to protect a defendant from improper and highly prejudicial child vic-

tim hearsay testimony has been fully observed and considered. The testimony of Sandra Shulman, Kristin Roth and Detective Peter Venero sought to be admitted by the State against the Appellant may be admitted, as they are sufficiently trustworthy and reliable in accord with applicable legal standards. (R 74-75)

Petitioner argues since the victim testified at trial and recanted her prior statements (including her testimony at the pre-trial hearing to determine the admissibility of 803(23) statements), her statements made shortly after the event are converted into inconsistent prior statements and are no longer admissible under 803(23). However, there is no explanation presented as to why this is so. The requirement for admission of the statements were met under 803(23). The statements came in as substantive evidence.

As Department of Health and Rehabilitative Services v. M.B., 701 So. 2d 1155, 1160-1163 (Fla. 1997) notes, if the legislature intended to use the modifier "consistently" with the word "testifies," it could have said so. Nor did the legislature say prior statements become non-admissible if the child's inconsistency at trial reaches the level of recantation. The legislature did not so say. It is reasonable to assume the legislature had this very scenario in mind when they crafted the language of the section.

> Turning to the merits of the petition, subsection 90.803(23) is a hearsay exception

> for child victims of sexual or other abuse who are eleven years of age or younger. It was added to the Evidence Code in 1985, see ch. 85-53, § 4, Laws of Fla., and placed within section 90.803--a group of hearsay exceptions which may be invoked whether or not the hearsay declarant--in this case, the child--is available to testify at trial. As a statutory matter, the text of subsection 90.803(23) explicitly provides that the child's hearsay statements qualify for the exception if the child testifies. Id. § 90.803(23)(a)(2). In the present case, once the court determined that the criteria of subsection 90.803(23) had been satisfied, the hearsay rule was overcome and the child's statements to the three specific individuals could not be excluded on the ground that they are hearsay.
>
> State v. Pardo, 582 So. 2d 1225, 1227 (Fla. 3d DCA 1991)

The thrust of the issue on the admission of child hearsay turns then on whether the trial court held an adequate pre-trial hearing and made findings to support the conclusion the prior statements were sufficiently trustworthy and reliable. A review of the trial court’s fourteen page order satisfies that question.

The Petitioner moved for judgement of acquittal at the end of the State’s case. The thrusts of the Petitioner’s argument were the prior inconsistent statements of the victim cannot be used as substantive evidence when the victim recants at trial. The State argued corroboration. (T 478-499)

Neither the trial court, nor the district court reached the

question of whether the child hearsay, properly admitted, could stand alone and support a conviction.

The District Court, in its opinion, took great pains to analyze the evidence presented at trial.

We have detailed the trial testimony so extensively in an attempt to paint a picture of the significant problem this case presents. Here, the prosecution's star witness testified solely about what did not happen and gave a plausible explanation for how she came to know of things no seven-year-old child should ever have to know and why she accused the defendant of those acts. The State's burden was to tear that story down bit-by-bit, and it did so by repeated introduction of the version of events that the child was repudiating at trial. In addition, the State highlighted discrepancies between the child's and the mother's testimonies--as well as between the in-court and out-of-court versions of events--concerning small details, such as whether Ray had mice in his hand when the door was opened, how long it took for the door to be unlocked, and how C.P. was punished for initially lying once she decided to tell the truth. All of the evidence the State presented was intended to corroborate the statements introduced through section 90.803(23).

At the outset, we note that the trial court did an exemplary job in its conduct of the pretrial hearing to determine whether the "time, content, and circumstances of the statement provide[d] sufficient safeguards of reliability." § 90.803(23)(a)(1). The court entered a detailed order finding that the statements C.P. made to the detective, the child protection worker, and to Kristin evidenced a sufficient degree of trustworthiness and reliability and, based upon the child testifying at trial, were admissible as a hearsay exception under section 90.803(23). The court concluded that the State could introduce the child hearsay statements without undue or unlawful prejudice to the defendant. In reaching those conclusions after the pretrial hearing, however, the court admitted that it was left with "some nagging concerns" about C.P.'s testimony at the hearing, which was appropriately responsive to non-leading

> questions. Her demeanor did not change when she testified about her original allegations and the fact that they were lies. Essentially, however, based upon the picture of the family dynamic that was drawn in the testimony of C.P., the mother, and the family friend, the court concluded that the child did not receive much positive attention from her mother, that she would indeed be fearful of getting in trouble for lying, and that she told the truth in her initial allegations but later untruthfully recanted to "satisfy her mother's concerns about the Defendant, and her desire to have him back home and in their lives. "Thus, the trial court's decision to allow the hearsay statements was influenced to some degree by its own decision concerning C.P.'s credibility.
>
> Baugh at 761-762

The Fourth District, in Mikler v. State, 829 So. 2d 932, 935-936 (Fla. 4th DCA 2002) said:

> If a statement is admissible under section 90.803(23), it may be "considered as substantive evidence by the trier of fact." Dep't of Health & Rehab. Services v. M.B., 701 So. 2d 1155, 1160 (Fla.1997). Consideration of a statement admitted under section 90.803(23) "as substantive evidence by the trier of fact does not require that the child's testimony at trial be consistent with the out-of-court statements." Id.; see Williams v. State, 714 So. 2d 462, 466 n. 5 (Fla. 3d DCA 1997) (expressing the view that a "child victim hearsay statement is sufficient, on its own, to sustain a conviction if the statement is determined to carry the 'sufficient safeguards of reliability' ... required by section 90.803(23)"). In M.B., the supreme court agreed with Professor Ehrhardt's conclusion that a statement admitted under a section 90.803 hearsay exception is "surrounded by circumstantial guarantees of reliability" to allow use of the statements as substantive evidence. 701 So.

2d at 1161 (quoting CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 803.23, at 702 (1996 ed.)).

In M.B., the supreme court clarified the scope of its previous decisions in State v. Green, 667 So. 2d 756 (Fla.1995), and State v. Moore, 485 So. 2d 1279 (Fla.1986). In Green, the court held that a "prior statement of the child victim, directly conflicting with the victim's trial testimony, standing alone, was insufficient to sustain a criminal conviction." M.B., 701 So. 2d at 1162. The supreme court referenced the language in Green that the opinion did ' "not mean that inconsistent statements admitted under section 90.803(23) can never be used as substantive evidence when other proper corroborating evidence is admitted." ' Id. (quoting Green, 667 So. 2d at 761). The supreme court identified the special facts in Green--the child victim had an IQ of 50; before accusing Green she had accused another; she testified at trial that Green had never abused her; she identified a different abuser at trial--and concluded: "In essence, we determined [in Green] that the reliability of the child's statement identifying Green had been so diminished by the child's other testimony that we could not have sufficient confidence in the criminal conviction to allow it to stand." Id.

The supreme court also discussed State v. Moore in M.B. Moore was a homicide case where the only evidence of guilt was two witnesses' testimony before the grand jury that the defendant had killed the victim. The witnesses appeared at trial and testified that they had lied to the grand jury. The supreme court reversed a second degree murder conviction, holding that a prior inconsistent statement was not sufficient to sustain the conviction when the prior statement was the only substantive evidence of guilt. Moore, 485 So. 2d at 1281-82.

Discussing Green and Moore in M.B., the

supreme court wrote:

> Our rulings in Green and Moore were primarily concerned with the minimum standard of evidence required to sustain a criminal conviction and the potential miscarriage of justice that could occur if that standard was not maintained. We were also concerned, of course, about the constitutional rights of the accused in a criminal proceeding.
>
> M.B., 701 So. 2d at 1162. The court concluded that Green and Moore did not control the dependency proceeding at issue there. Id.
>
> This case is a criminal proceeding, so we must still confront Green and Moore, as explained in M.B., to decide this case. Moore is distinguishable and does not control. That case involved only the use of prior inconsistent statements as substantive evidence. Unlike section 90.803 exceptions to the hearsay rule, which are traditionally received as substantive evidence, prior inconsistent statements are not "surrounded by circumstantial guarantees of reliability." M.B., 701 So. 2d at 1161 (quoting EHRHARDT, Two factors distinguish this case from Green. FLORIDA EVIDENCE § 803.23, at 702).
>
> Mikler at 935-936

Though the District Court below, and Mikler talk extensively about Green, it must be remembered that Green did not involve 803(23) evidence.

In addition, Mikler, like the case at bar, did not reach the question of whether the child hearsay, when recanted, could stand on its own to support a conviction, since there was ample corroboration and in that case no recantation, only details left out.

In the case at bar, there was also sufficient corroboration, as the Second District found, to support the conviction, if this Court determines corroboration is necessary in a criminal case to support recanted child hearsay.

The question before the trial court at the motion for judgement of acquittal was whether there was evidence corroborating the victim's hearsay statements introduced through Detective Venero, Sandra Shulman, and Kristin Roth. Appellant states the only substantive evidence to support the Petitioner's guilt was the child hearsay. This is not correct.

In addition to the child hearsay, the State presented evidence the Petitioner, upon being confronted by the victim's mother (Rachel Atkins) with what the victim claimed he did, stated, "I want her to suck my dick, I want you to watch, and then I want to fuck you after." This statement, made immediately after the event the victim complained of, shows his state of mind at the time, and is tantamount to an admission of what took place.

Section 90.803(3), Florida Statutes allows statements of the declarant reflect the declarant's state of mind to be admitted. Morales v. State, 768 So. 2d 475 (Fla. 2d DCA 2000) In this case, the declarant of the statement was the Petitioner himself and was admissible against him.

Additionally, Petitioner's actions shortly after the accu-

sation was made, slitting his wrists, is the ultimate means of escape. The act of cutting his wrists and copious amounts of blood was directly witnessed and testified to, as was his intention to die transmitted to the police officer who was trying to help him. Baugh told Arrison he didn't want help, he wanted to die.

> The law is well settled that "[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." Straight v. State, 397 So. 2d 903, 908 (Fla.1981). However, we have held that in order to admit this evidence, there must be a nexus between the flight, concealment, or resistance to lawful arrest and the crime for which the defendant is being tried in that specific case. See Escobar v. State, 699 So. 2d 988 (Fla.1997). Moreover, such an interpretation should be made with a sensitivity to the facts of the particular case. See Bundy v. State, 471 So. 2d 9 (Fla.1985) (citing United States v. Borders, 693 F.2d 1318, 1325 (11th Cir.1982)).
>
> Looney v. State, 803 So. 2d 656, 666-667 (Fla. 2001)

In addition, Atkins, nine days after the event, found the picture or pictures which the victim had told Venero the Petitioner used to teach her what to do. Atkins confirmed with the victim they were the pictures and called Venero about them.

> She [Carly] said that she was shown a picture almost a year ago, she said, when she lived at a one bedroom cottage-type home

> that she was shown a picture and Raymond told her that this was the proper way of doing this and this is what she needed to do.
>
> (T 360)

On January 22nd, Atkins called Venero and told him she had found photographs of a woman performing oral sex on a man. Atkins indicated she had shown the pictures to Carly. Carly had said they were the pictures. (T 363)

At trial Carly indicated she had told Detective Venero the white stuff tasted bad. (T 220) She stated her brother had told her that and it didn't happen to her. (T 222) However, her child hearsay statement to the detective was quite detailed and indicated not that it tasted bad, but that it made her choke and she spat it out. After that she was told to swallow it fast. (T 361)

Carly testified at trial that one night, while she was watching TV, she told her mother, out of the blue, what she had said about the Petitioner was a fib. She had been thinking about it while watching TV. At the time, she was lonely. She missed the Petitioner. Her mother was telling her she missed the Petitioner. She felt sad for her family. She agreed she was now saying this stuff to get Ray out, because her family is broken apart, and she wants the family back. She thought this would help. (T 229-232) Carly stated the only time she talked to her mother about the case was when she told her it was a fib.

(T 246)

Rachel Atkins testified at trial she banged hard on the door three times. She threatened to come through the door if they didn't open it. It may have taken close to thirty seconds to open it. (T 280) Raymond was closest to the door when it opened. He was standing there with white mice in his hand and Carly was standing behind him. (T 281) Carly was quiet, looking down at her feet. She took her daughter into her bedroom and asked her what was going on. Her exact response was "He made me suck his dick." (T 282) The trial court indicated this was a spontaneous statement and came in as substantive evidence or was what it meant when it denied the JOA. (T 602)

Atkins indicated she got the story in bits and pieces from the time she went to the police station the day after until she went to the State Attorney's Office. (T 290)

Petitioner argues corroboration was insufficient, the jury had to stack inference upon inference. He then came to the conclusion what the jury had to do was speculate. This is not correct. In the first place, it must be noted the child hearsay statements admitted into evidence were sufficient, if believed by the trier of the facts, to prove guilt beyond a reasonable doubt. The question then became whether there was sufficient corroboration to survive the motion for judgment of acquittal because the victim recanted.

The very nature of the jury function is to accept evidence and draw conclusions therefrom. If this were not the case, circumstantial evidence would not be admissible. The very nature of circumstantial evidence, as the name implies, is to take facts and draw reasonable conclusions from them. As an example, the Petitioner cut his wrists shortly after being confronted with what he did with the child victim. There can always be another, alternative explanation for flight after an event. Calling it speculation does not mean a reasonable trier of fact could determine this was a consciousness of a guilt act.

The same can be said for the testimony about the Petitioner's attempt to influence testimony. There is no direct evidence of this (except for the overheard conversation by the jail inmate[1]). This does not mean the attempt, here successful according to the juries finding of guilt, was not accomplished through a third party.

Whether the Petitioner's statement to the victim's mother when confronted about what the daughter said had just happened, was an admission of what he did, what he wanted to do, or had done in the past. It in no way vitiates its relevance to the issue of what he stated he wanted to do with the victim.

The same can be said about the pictures found under the

[1] The witness had multiple felony convictions. This only means the jury could discount his testimony if they so chose, not that they must.

bed. They do not prove what the victim said happened immediately after the event did happen, but they do support, circumstantially, the victim was initially telling the truth.

> She [Carly] said that she was a shown a picture almost a year ago, she said, when she lived at a one bedroom cottage-type home that she was shown a picture and Raymond told her that this was the proper way of doing this and this is what she needed to do.
>
> (T 360)

As the Second District Court of Appeal opined it is the collective impact of these various things which lend corroboration to the child hearsay. The district court's comments on the corroboration evidence are also misconstrued by the Petitioner. What Petitioner is doing is looking at the evidence and then construing it in a light most favorable to the Petitioner, which is not the standard. When there is inconsistent evidence, it is the trier of the fact that must determine where the truth lies. The district court did say the "admission" by the Petitioner was not an admission at all. But they also said the jury could have inferred past conduct from the statement. The court went on to say "The fact that the Defendant slashed his wrists almost immediately after the charges were made, when viewed, as required, in the light most favorable to the State, is suggestive of guilt, even though his action is equally susceptible of an interpretation that he was despondent over the accusation and was

in need of intensive psychotherapy.”

The victim’s state of mind while testifying is an issue. She can hope her family will be put back together and is not afraid of the Appellant because there are new rules in place at home. This evidence was probative to the question, central to the case of whether Carly told the truth initially or at the trial.

This was a question of fact for the jury’s determination. The trial court did not err in allowing the case to go to the jury so they could make the findings the law entrusts upon them.

CONCLUSION

Petitioner respectfully requests that Respondent's conviction and sentence be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to James T. Miller, Special Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33831-9000, this 27th day of February 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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