IN THE SUPREME COURT OF FLORIDA

JUAN PANTOJA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC08-1879

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as the State. Petitioner, Jaun Pantoja, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"IBM" will designate Petitioner's Initial Brief on the Merits. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts appellant's statement of the case and facts as being generally accurate for purposes of the instant appeal when considered in light of the following additions and/or corrections.

Pretrial Rulings

Pretrial, the State argued its motion to preclude a character attack on the victim regarding the alleged sexual abuse of her by Tommy Day on the grounds that character attacks are limited to community reputation. (SI, 35). The prosecutor also noted that the rule contained no exceptions, but that the Second District Court ignored the limitation of the rule and permitted impeachment with prior acts of misconduct involving false

accusations. (SI, 36). The prosecutor asked for a proffer since the allegations in the motion may not be true, as the child never recanted, but other people did not believe her allegation and made claims she recanted. (SI, 37). Appellant argued that he sought to introduce the fact that V.R. made allegations against her uncle, but that her grandmother did not believe her and that it was appropriate on that basis to cross-examine V.R. as to whether she previously accused someone. (SI, 42). Appellant conceded that when interviewed by Maria Flores of DCF, the child confirmed that her uncle had molested her, but that she recanted to Mary Van Tassel and her aunt. (SI, 42-43).

The court granted the motion in limine at that time, asserting that if the defense wanted to explore the issue with anyone other than V.R., the evidence would need to be proffered and in the meantime it would review the case law so as to be prepared to rule at trial. (SI, 46-48).

Pretrial Proffers of Evidence

V.R. was eleven years old and in the sixth grade where her grades were ok. (TI, 11). She knew the difference between the truth and a lie and knew she got in trouble for lying. (TI, 12). Appellant was her mother's boyfriend and would stay at the house sometimes. (TI, 12). She told Ms. Ellis the truth in her video tape about what happened between her and appellant. (TI, 13). When appellant started doing things to her, she did not tell anyone about it because she was afraid of appellant who told her that he would take her out to the forest and hurt her real bad.

(TI, 14). In June of 2003, appellant left the home and she told her aunt Michelle about what was happening. (TI, 14). Michelle told her grandmother who called some people. Melia Flores was the first to come to talk to her; later she talked to Ms. Ellis. (TI, 14-15).

On cross-examination, V.R. stated she talked to Ellis twice; during the second conversation, she told Ellis about appellant sexually molesting her. (TI, 15). V.R. also stated that she did not recall in which conversation she made the revelation. (TI, 16). She recalled that Ellis asked her about what happened to her sister, S. and whether appellant had been mean to her and her siblings at that time. (TI, 16). She told Ellis that appellant had been mean, yelled at them, and hit them. (TI, 16-17). Appellant was arrested around June of 2003 in reference to her sister's death; she was aware the State was trying to file charges against him. (TI, 17). V.R. was also aware of some instances of domestic violence by appellant against her mother and that appellant had also hit her grandmother. (TI, 17).

She was aware of a conversation between her mother and grandmother that Crystal Pantoja was helping appellant, but did not know he had been released from jail. (TI, 18). At that time, she decided to tell her aunt what happened because she wanted to tell the truth, not because she wanted appellant back in jail. (TI, 18). She told her aunt; she did not tell her grandmother. (TI, 19).

V.R. previously made an allegation against her uncle Tommy Day. (TI, 19). She did not lie about it and did not tell her grandmother that she lied about that allegation. (TI, 19, 23, 24). She did not tell her aunt that she lied about that allegation. (TI, 19). She never told her mother that she lied about her uncle. (TI, 24). She did not recall talking to Mary Van Tassel about her uncle touching her. (TI, 25).

Melia Flores, a child protective team investigator, is a first responder, on abuse and neglect cases. (TI, 28-29). She had an open report on the family at the time and during the course of that investigation, allegations of sexual abuse came up on June 16th, V.R.'s ninth birthday. (TI, 29). V.R.'s maternal grandmother, Jeanette Day told her of a disclosure of sexual abuse by V.R. (TI, 29). Prior to that time, Flores had contact with the child regarding an investigation relating to her sister. (TI, 30).

On June 16, she responded to the home, approximately 1 ½ hours after receiving the call from Day, where she received information from V.R. that she had been sexually abused by appellant. She arranged a formal CPT interview of the child that was conducted on June 23rd. (TI, 30, 33). She talked to V.R. alone, asking her if there was something she had to tell her. V.R. stated that appellant used to touch her and asked if little children could be touched like that. When Flores asked touched like what, V.R. disclosed that appellant touched her on her private parts while she was unclothed and that he licked her down

there, pointing to her vaginal area. (TI, 31). She could not recall exactly when the acts took place. V.R. was afraid that appellant would kill her. She had seen appellant's private parts when he was undressed. V.R. knew the difference between the truth and a lie. (TI, 32). She stated that she had more to tell Flores, who responded that she would not have to talk about it then. (TI, 32). Flores also asked the family not to discuss it with her. (TI, 33).

On cross-examination, Flores stated that she received a report during the early morning hours of June 10 relating to S.; it was 4 a.m. when Flores arrived at the house so she did not speak to the children. (TI, 34). During the time between June 10 to the 16th, Flores was involved with transporting the children with regard to the investigation of S.'s death and the viewing held for the child. (TI, 35). There was also an allegation that S. had been sexually abused as well that came either from law enforcement or the hospital; after the autopsy, it was no longer an allegation. Because V.R. was at home at the time her sister was taken to the hospital, she was interviewed by CPT on June 11th. (TI, 36). Flores did not believe that allegations about appellant were forthcoming during that interview. (TI, 37).

Kimberly Ellis, program supervisor for CPT, interviewed V.R. prior to June 25th with regard to her sister's death. (TI, 43). She also interviewed V.R., videotaping the exchange, reference to allegations in this case. (TI, 44).

On cross-examination, Ellis stated that at the time she interviewed V.R. on June 11th she was not aware of allegations that S. had been sexually abused. (TI, 46-47). V.R. gave her some information regarding appellant's abuse of one of the other children and gave details of how appellant was physically abusive towards them. (TI, 48). She did not say anything to her about appellant sexually molesting her. (TI, 48).

Her questions to V.R. about abuse by appellant were in broad general terms; V.R. responded by discussing how appellant spanked and slapped them. (TI, 49).

On re-cross, Ellis stated that on June 25, V.R. also told her something concerning her sister A. that was sexual in nature. (TI, 50).

Appellant proffered, via stipulation with the State, that on June 10, 2003 appellant was served with a warrant for the domestic batteries. The following day, he was arrested for the battery of Jeanette Day and on June 14, he was again bonded out of jail. (TI, 51-52).

Appellant called Jeanette Day, who testified that V.R. was her granddaughter; Tommy Day was her son. (TI, 66). Day stated that V.R. had accused Tommy of sexual molestation because they were playing and Tommy threw her up and she got mad. The allegation was made the same day. (TI, 66). About a week later, V.R. told her that she lied about Tommy, when she got onto V.R. about it, telling her that they would tell her mother. (TI, 66-67). V.R. was eight years old at the time. (TI, 68).

V.R. told her that appellant had sexually molested her; Day was shocked because she could not believe that he would do anything like that. (TI, 67). Day denied talking to Melia Flores about appellant bonding out of jail. (TI, 68).

Appellant called Wendy Day. V.R. was her daughter; Tommy Day was her brother. (TI, 69). V.R. never told her that Tommy had molested her and Day never heard it from anyone else, so she never questioned V.R. about it. (TI, 70). V.R. never reported sexual abuse by appellant to her. (TI, 70).

Day was upset when appellant bonded out of jail; she never communicated her upset to anyone, but she believed it was noticed. (TI, 71).

Michelle Day first testified that V.R. never talked to her about allegations against Tommy Day, then later stated that she thought that on one occasion V.R. mentioned it. (TI, 73). V.R. allegedly told her that she lied about Tommy because she was mad at him because he would not let her clean up her grandmother's house. (TI, 73).

The allegation against Tommy was made long before appellant became involved in the family. (TI, 74).

Trial

V.R. testified that during the time appellant lived with them, there were times when her mother was not present in the apartment with them. (TII, 129). Appellant touched her on more than one occasion. (TII, 129-30). Not all of the incidents took place in the home and not all took place when her mother was

absent from the home. (TII, 133-34). She told the truth to Ms. Ellis and Ms. Flores and was telling the truth in court. (TII, 143-44). Appellant got on top of her twice, once in her room and once in her mother's room. (TII, 146).

With regard to the proffer of V.R.'s testimony, appellant argued that he should be permitted to go into the question of the child's allegations against her uncle because it went to her credibility. (TII, 171). The court made the following findings:

> Based upon ... 90.610, excuse me, on impeachment, prior acts of misconduct by the witness, there's at least three reasons why I'm not allowing this in. One, it's improper impeachment under that rule, under 90.610 and I'm looking at Erhardt here.
>
> Two, there is no evidence by this witness that she has recanted this charge against Tommy, and as I said earlier, that the other people who have testified, first of all, it would be hearsay. I don't think you can get it in under that guise. Second of all, this witness has clearly said that she, that she accused him of it and that she hasn't recanted it. Other people have said that she did. And I'll note again that those are family members that well could have the motive of trying to protect Tommy Day.
>
> So given all that and my reading, reviewing of the Jaggers case ... and ... Cliburn from the Second DCA. And also Reeves v. State from the First DCA, which basically criticizes the rulings in Jaggers and Cliburn.
>
> Also, as in Reeves, there is no evidence in this case that, there's no admissible or credible evidence in this case that, there's no admissible or credible evidence that the child ever recanted the charge against Tommy. Therefore, it cannot be brought up by the defense to impeach her testimony. (TII, 171-72).

Melia Flores did not state, in regards to her prior contact with V.R. on June 9th, what the substance or nature of the contact was about. (TII, 178). V.R. told her that she had been touched on her privates by appellant "and that without

clothes...” (TII, 187-88). She also testified that appellant had not been living in the home as of June 9th. (TII, 191).

Out of the presence of the jury, the State proffered the CPT report of October 24, 2003 of the interview of V.R. in which she said Tommy Day touched her private parts. (TII, 215). Defense counsel objected, not realizing it would not be submitted to the jury. (TII, 216). V.R. related that she had never recanted that allegation and that her grandmother did not believe her. (TII, 217). The court agreed that the document would be included in the court file. (TII, 217).

The CPT Report states that the grandmother, through whom Day had access to the children, reported that V.R. stated that Day had touched her ‘private’ and kissed her in the mouth but recanted and that she had recently stated that V.R. had told her about the touching, but “she did not believe the child.” (SII, 199). CPI Flores spoke with V.R. who stated that Day had touched her private part and kissed her in the mouth, that she told her grandmother about it, and her grandmother was angry and called her a liar, but also threw Day out of the house. (SII, 199-200). The report goes on to state:

> V. stated that her grandmother still does not believe that Tommy touched her. When asked how she knows this, V. explained that her grandmother had been “fussing” at her about it and she stated that her son would never do that. V. stated that it makes her feel sad that her grandmother does not believe her. V. denied that she has ever said that the touching did not happen.” (SII, 200).

On cross-examination, Melia Flores testified that she was first told of the allegations against appellant during the June 16th phone conversation with Jeanette Day. (TIII, 324-25). V.R. did not tell her mother because she was scared that appellant would kill her. (TIII, 325).

Shawn Yao, crime analyst testified that in examining the vehicle, he was looking for a substance, riboflavin contained in seminal fluid which fluoresced; riboflavin and seminal fluid, like any other organic material, degrade over time. (TII, 245, 247).

During cross-examination of the proffer of Ms. Van Tassel's testimony, Van Tassel testified that V.R. told her that her uncle, Tommy Day, had touched her; she did not deny that it occurred. (TIII, 334-35). Only when asked about appellant did V.R. drop her head and stop making eye contact. (TIII, 335). Her conversation with V.R. was prompted by the change in her and her siblings' demeanor and it took place about three months prior to June 9th. (TIII, 336). The court found that the deposition testimony showed that V.R. was asked about appellant and Day together in context. (TIII, 345).

Wendy Day testified that after she left the trailer where she and her children resided with appellant, she moved back in with her mother. (TIII, 356). During the time she dated appellant, he was separated from his wife, Crystal. (TIII, 361). On cross-examination, she stated that she was told it was ok to say she did not remember something if she did not. (TIII, 367).

There were times that appellant would be alone with the children when she was working, at the store or at the laundromat. (TIII, 368-69). She did not get V.R. to lie about the allegations because she was angry that appellant had bonded out of jail. (TIII, 373).

On cross-examination, Mary Van Tassel stated that she had a good relationship with V.R. (TIV, 396). Her conversation about the abuse took place three months prior to June 9, 2003. (TIV, 397). At that point in time appellant was in and out of the household. She never conducted a visit while he was present because Wendy Day always canceled visits when he was home. (TIV, 397). She had limited contact with appellant, but on occasion she could hear him yelling at the children in the background while she was on the phone with Wendy. (TIV, 397, 405).

Van Tassel initiated the conversation with V.R. when she asked if appellant had touched her. (TIV, 398). When V.R. responded she would not look Van Tassel in the eye and said no. (TIV, 398). Previously when V.R. wanted to talk to her she would sit on her lap and look into her face; she was not her normal self that day. (TIV, 399). V.R. appeared to her to be very scared. (TIV, 406).

On re-direct, Van Tassel stated that V.R.'s change in demeanor was not the result of appellant having moved into the household or the birth of her younger brother. (TIV, 409-10). V.R. changed towards everyone in the family. (TIV, 410).

Appellant again raised the issue of V.R.'s allegation against her uncle, and the court ruled that the State had not opened the door to the question and that appellant should have moved, outside the presence of the jury, to make a proffer because of the previously ruled on motion in limine. (TIV, 414-15). In arguing against imposition of sanctions by the court for his violation of the pretrial ruling, appellant argued that he was entitled to introduce the evidence since the State elicited testimony about the child's change in demeanor and thus "misled the jury because there was another perpetrator, a third person, Tommy Day, who had inappropriately touched V." pursuant to the Florida Supreme Court's ruling in Rodriguez. (TIV, 416). The court found that the allegation against Day referred to conduct which took place a year earlier and declined to allow the evidence because the allegation was not in close proximity to the events at issue and did not involve similar conduct. (TIV, 418-19).

SUMMARY OF ARGUMENT

Before this Court, Petitioner asserts that the trial court's ruling precluding evidence that the child victim had previously made an unrelated accusation of sexual abuse against someone, other than Petitioner, was error. He asserts that this evidence was admissible regardless of whether the accusation was true or false as either a general attack on credibility or a particular attack on credibility by specific instance of conduct, so that the trial court violated his constitutional rights to a fair trial, to present a defense, and to confront the witnesses against him. The State disagrees.

The Respondent also submits that Jaggers is distinguishable from the instant case. There, the State conceded that the prior accusation at issue was indeed a false report. Here, the evidence showed that the victim never recanted and always maintained that the prior accusation was true. Other witnesses with motives to lie, only reported that the child had recanted.

The judicially created false accusation exception created by the Second District Court in Jaggers violates the Doctrine of Separation of Powers and runs afoul of basic principles of statutory construction, since the plain language of Section 90.610, Florida Statutes, does not provide for such an exception. For this reason alone, it is not "good law."

The lower court properly rejected the Jaggers Court holding that evidence that a witness has falsely accused a person of sexual abuse must be admitted when the defendant is being tried

for a crime of sexual abuse and there is no independent evidence of the abuse and the defendant's sole defense is either fabrication or mistake on the part of the alleged victims because such evidence is "relevant to the possible bias, prejudice, motive, intent, or corruptness" of the witness. No provision in the Florida Evidence Code permits evidence of 'corruptness' as a means of impeaching a witness.

The First District Court also properly rejected Petitioner's assertion that the evidence was otherwise admissible pursuant to Section 90.405(2), Florida Statutes, because the instant case did not fail into that rare category of cases in which character of the victim is not an essential element of the charge, claim or defense.

Petitioner has also failed to establish that his due process or confrontation rights were violated by the limitation imposed on cross-examination. Florida's rules regarding the admission of evidence are neither arbitrary or disproportionate to the interest they serve. Nor was Petitioner prevented from presenting a defense.

Application of the Section 90.403, Florida Statutes, balancing test also supports the lower court's ruling because the prejudicial value of the evidence sought to be admitted substantially outweighed its marginal relevance.

No miscarriage of justice resulted in this case. The Respondent submits respectfully that this Court should affirm the decision below.

ARGUMENT

ISSUE I

WHETHER THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN JAGGERS V. STATE, 536 SO.2D 321 (FLA. 2D DCA 1988)? (Restated)

Before this Court, Petitioner asserts that the trial court's ruling precluding evidence that the child victim had previously made an unrelated accusation of sexual abuse against someone, other than Petitioner, was error. He asserts that this evidence was admissible regardless of whether the accusation was true or false as either a general attack on credibility or a particular attack on credibility by specific instance of conduct, so that the trial court violated his constitutional rights to a fair trial, to present a defense, and to confront the witnesses against him. The State disagrees.

Standard of Review

The admissibility of evidence is within the sound discretion of the trial court and its ruling will not be reversed absent a showing that the trial court abused its broad discretion in this area. Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); Lott v. State, 695 So. 2d 1239 (Fla. 1997). Furthermore, "relevancy determinations are within the trial court's discretion and absent a clear abuse of discretion, such rulings will not be overturned." Howard v. State, 616 So. 2d 484, 485 (Fla. 1st DCA 1993).

Burden of Persuasion and Presumption of Correctness

Appellant bears the burden of demonstrating prejudicial error. According to statute:

> In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Section 924.051(7), Fla. Stat. (2000); see also, Savage v. State, 156 So. 2d 566, 568 (Fla. 1st DCA 1963) (Judgments are presumed to be correct and appellants carry the burden of demonstrating harmful error arising from actions of the trial judge.)

Preservation

Pretrial, appellant filed a response to the State's motion in limine to preclude questioning of the victim regarding the prior allegation of sexual abuse against Tommy Day, asserting that the evidence was admissible pursuant to Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988), and Cliburn v. State, 710 So. 2d 669 (Fla. 2d DCA 1998), as a judicially created false reporting exception to Section 90.610, Florida Statutes. (PH, 38-44; TII, 11). Appellant did not present a confrontation, right to present a defense or due process argument.

On appeal to the First District Court, appellant for the first time argued that his right to confrontation and to due process were violated, a point made by the State in its brief to

that court. Having never articulated the confrontation/due process argument to the trial court, only the Jaggers/Cliburn argument that the testimony was admissible via an exception to Section 90.610, Florida Statutes, impeachment is preserved for review. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

Additionally, for the first time, before this Court, appellant makes the argument that regardless of the truth or falsity of the child's allegation against Tommy Day, the evidence was admissible. Heretofore, appellant has steadfastly maintained that the child's allegation was false, therefore, Petitioner's argument is limited to that prong of the argument. Steinhorst v. State, supra.

Merits

Applicable Statutory provisions

Section 90.402, Florida Statutes, provides that a defendant's right to present relevant evidence is not unlimited, but is instead subject to other legitimate interests in the criminal trial process, so long as those interests are neither arbitrary or disproportionate to the interest served. Furthermore, Section 90.403, Florida Statutes, provides that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. A large measure of discretion rests in the trial judge to determine whether the probative value of the evidence is substantially outweighed by

any of the enumerated reasons. See Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1991) ("The weighing of relevance versus prejudice or confusion is best performed by the trial judge who is present and best able to compare the two."). The court must weigh the logical strength of the proffered evidence to prove a material fact or issue against the other facts in the record and balance it against the strength of the reason for exclusion. See Fernandez v. State, 730 So. 2d 277, 282 (Fla. 1999). In McDuffie v. State, 970 So. 2d 312, 327 (Fla. 2007), this Court held that:

> In performing the balancing test to determine if the unfair prejudice outweighs the probative value of the evidence, the trial court should consider the need for the evidence, the tendency of the evidence to suggest an emotional basis for the verdict, the chain of inference from the evidence necessary to establish the material fact, and the effectiveness of a limiting instruction. The trial court is obligated to exclude evidence in which unfair prejudice outweighs the probative value in order to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt.

Prejudice may be to either the defendant or the victim, and where a claim is made that evidence runs afoul of Section 90.403, Florida Statutes, the court must conduct a weighing process to determine admissibility of the evidence. See Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988).

Section 90.404(b), Florida Statutes, provides that evidence of a victim's character, or a trait of character, is inadmissible to prove action in conformity therewith on a particular occasion,

except 1) as provided in Section 794.022,[1] Florida Statutes, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or 2) evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor. As recognized in Ivey v. State, 586 So. 2d 1230, 1233 (Fla. 1st DCA 1991), Black's Law Dictionary defines character evidence as "evidence of a person's moral standing in the community based on **reputation**," so that "Character" "relates to the attributes of a person which may be **gleaned from a consistent pattern of behavior**. See generally, Ehrhardt, Florida Evidence § 90.404." (Emphasis added). Only where one of the elements of the cause or defense is whether the person possessed a particular character trait, is character an essential element of the case. If character is offered as circumstantial evidence of a fact or issue to be determined, character is not an essential issue or operative fact. See Ehrhardt, Florida Evidence, § 404.2 (West 2008). Only in rare instances does the substantive law or pleadings define a person's character as an element of a claim or defense.

If character evidence is admissible, Section 90.405, Florida Statutes, sets forth the methods whereby character may be proven. Proof of character may be made by testimony about a person's

[1] This statutes prohibits the introduction of evidence of a sexual battery victim's reputation in the community for prior sexual conduct.

reputation. Additionally, where evidence of the character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of his conduct. "This section recognizes the traditional rule that specific acts of an individual are generally inadmissible to prove the individual's character. Evidence of specific actions **may not be offered as the basis of an inference that because a person acted in that manner in the past, the person acted in the same manner on the occasion in question.**" Ehrhardt, Florida Evidence, § 405.3 (West 2008), citing Wright & Graham, Federal Practice and Procedure, Evidence, § 5266. (Emphasis added).

The rationale behind this prohibition is the recognition that evidence of specific acts may be given an inordinate amount of weight by the jury and to allow such evidence would subject a person to inquiry regarding specific acts of misconduct throughout the person's lifetime. See McCormick, Evidence, § § 185, 190 (4th Ed. 1992); Wigmore, Evidence, § § 54, 70, 193, 202-03 (3d Ed. 1940).

Section 90.405(2), Florida Statutes, only permits evidence of specific instances of conduct to prove facts **other than character**, such as identity and intent. See Ehrhardt, Florida Evidence, § 405.3. Examples of those rare types of cases where character is an essential element of a case, as recognized by Professor Erhardt are an action: where someone is charged with negligently entrusting a motor vehicle to an incompetent driver,

where a plaintiff's character in a defamation action is in issue because the defense asserted is one of truth, or when an employer is sued for the selection of an allegedly incompetent employee. See Ehrhardt, Florida Evidence, § 405.3.

Section 90.608, Florida Statutes, sets forth five means by which any party may attack the credibility of a witness by:

1) introducing statements of the witness which are inconsistent with the witness's present testimony,

2) showing that the witness is biased,

3) attacking the character of the witness in accordance with the provisions of Section 90.609, Florida Statutes, or Section 90.610, Florida Statutes,

4) showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified, or

5) proof by other witnesses that material facts are not as testified to by the witness being impeached.

Evidence sought to be introduced of bias, prejudice or interest is subject to a Section 90.403, Florida Statutes, balancing and is inadmissible when its unfair prejudice to a witness or defendant substantially outweighs its probative value. Dennis v. State, 817 So. 2d 741, 758 (Fla. 2002) (Evidence that witness who burned her car which was used by defendant to commit a crime in order to destroy evidence inadmissible to show bias since its unfair prejudicial values outweighed its probative value).

Section 90.609, Florida Statutes, provides that a party may attack the credibility of a witness by evidence in the form of reputation except that: "1) the evidence may refer only to character relating to truthfulness and 2) evidence of a truthful character is admissible only after the character of the witness for truthfulness is attacked by reputation evidence."

Finally, Section 90.610, Florida Statutes, the section to which the Jaggers Court created a false accusation exception, as relied upon by Petitioner, provides that:

> (1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:
>
> .....
>
> (b) Evidence of juvenile adjudications are inadmissible under this subsection.
>
> .....
>
> (3) Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.

The statute thus did not contemplate an attack on credibility based upon proof that the witness committed specific acts of misconduct which did not end in a criminal conviction. See Jackson v. State, 545 So. 2d 260, 264 (Fla. 1989); Roebuck v. State, 953 So. 2d 40 (Fla. 1st DCA 2007).

The Exception Created by the Second District Court of Appeal Violates the Doctrine of Separation of Powers and Principles of Statutory Construction

When construing the meaning of a statute, we must first look at is plain language. Montgomery v. State, 897 So. 2d 1282, 1285 (Fla. 2005). "'[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and ordinary meaning.'" Id. (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)).

The statute at issue, Section. 90.610, Florida Statutes, is clear as to its provisions and the State submits that there is no need to resort to interpretation, as did the Second District, to create an exception to the statue not contemplated by the Legislature. Courts have "no authority to change the plain meaning of a statute where the legislature has unambiguously expressed its intent." Graham v. State, 472 So. 2d 464 (Fla. 1985). The Second District's decision, which purports to construe the intent and meaning of the statute ignores the quoted plain language of the statute thus judicially legislating an exception to it. See Florida Real Estate Com. v. McGregor, 268 So. 2d 529, 530 (Fla. 1972). "Without legislative approval, such an exception ... does violence to the plain language of the statute" and has the effect of creating ambiguity where none previously existed. "Courts should not add additional words to a statute not placed there by the legislature." In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1137 (Fla. 1990).

Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the legislature has not chosen to do so. See Florida Dept. of Revenue v. Florida Mun. Power Agency, 789 So. 2d 120 (Fla. 2001). Had the Florida Legislature intended to carve out the exception to the statute improperly created by the Second District, clearly it would have expressly done so. As recognized by the First District Court in Roebuck v. State, 953 So. 2d 40 (Fla. 1st DCA 2007), review dismissed, 982 So. 2d 683 (Fla. 2008), Professor Erhardt, a noted expert on Florida Evidence, had explained,

> Occasionally decisions ignore the limitation and permit impeachment with prior acts of misconduct of a witness when the involve prior false accusations of a crime by the witness... The drafters of the Code specifically intended **not** to adopt provisions similar to Federal Rule 608(b) because it did not reflect the existing Florida law and because they felt the possibility for abuse of this type of evidence was great. 953 So. 2d at 42.

Thus, the exception created by the Second District runs afoul of basic principles of statutory construction and is unsupportable.

The Jaggers Case Is Distinguishable

In Jaggers v. State, supra, Jaggers was charged with capital sexual battery of his daughter and step-daughter and for injuring the sexual organ of his niece. At trial, the State conceded that the witness had charged her father of sexual abuse and then recanted the charge as false. Jaggers sought to elicit testimony regarding one of the alleged victims' previous incident of false reporting in which the child accused her father of sexual abuse and later recanted that statement. The Jaggers Court held:

> From the state's argument at trial in support of its objection to that cross-examination testimony, it appears that the state concedes that the witness did make such a charge against her father and then admit to its falsity. The trial court sustained the state's objection and refused to allow the attempted impeachment of that critical witness by the proffered testimony. That restriction on cross-examination was both erroneous and highly prejudicial. The state succeeded in persuading the trial court to restrict appellant's cross-examination on the basis of the very broad general principle of law that the credibility of a witness may not be impeached by proof that the witness has committed specific acts of misconduct . . . . However, for every broad general principle of law, there seems to be an exception applicable to particular circumstances. Section 90.405(2), Florida Statutes (1985) allows proof of specific incidents of conduct where that evidence is offered to prove a particular trait of character. In this case, that trait of character was that the witness may be inclined to lie about sexual incidents and charge people with those acts without justification.
> . . . Evidence that is relevant to the possible bias, prejudice, motive, intent or corruptness of a witness is nearly always not only admissible, but necessary, where the jury must know of any improper motives of a prosecuting witness in determining that witness' credibility. Jaggers, 536 So. 2d at 327.

The Second District reversed and in so doing, created its false accusation exception to Section 90.610, Florida Statutes.

Here, in contrast to Jaggers, the victim testified on proffer that she **never** recanted her allegations against Tommy Day. The CPT report regarding the allegations showed that Jeanette Day, the child's grandmother **reported** that V.R. told her that Tommy Day had touched her and that V.R. later recanted the allegations. (SII, 199). Thus, the victim in this case maintained throughout that Day had molested her and never recanted her accusation. The only people who claimed she did recant were her aunt Michelle and her grandmother, whose testimony was totally

lacking in credibility. On proffer, Michelle Day testified that V.R. never talked to her about allegations involving Tommy Day, but then stated that she **thought** that on one occasion the child had "mentioned" it. (TI, 73). Thus Michelle was uncertain that a recantation even took place. The reason that Michelle gave for the child purportedly lying about Tommy was nonsensical as well- that the child was angry because he would not let her clean up her grandmother's house. (TI, 73). Jeanette Day gave an equally absurd reason for V.R.'s "lie" against Tommy- that she was mad at him for throwing her in the air. (TI, 66). Jeannette also stated that V.R. purportedly said that she had lied about the allegation about a week later, when Day got onto her about it. (TI, 66-67). Significantly, both Michelle and Jeanette Day had motive to fabricate a recantation by V.R. Appellant was Michelle's brother and Jeanette was his mother.

The CPT report of October 27, 2003 also shows the correctness of the court's ruling. It indicates that Jeanette Day did not believe the victim when she reported that Tommy had acted inappropriately with her, calling her a liar and getting onto her about it. V.R. again repeated her allegations about Tommy to the CPT worker. While Day did not believe the child, it is significant to note that the report states that following the allegations, Tommy Day was thrown out of the house by his mother. (SII, 199).

Thus, this case did not involve a false report by the victim, because the victim did not in fact recant and it is

factually distinguishable from Jaggers. The First District Court, in Reeves v. State, 862 So. 2d 60 (Fla. 1st DCA 2003), declined to find that the exception to the impeachment rule created by the Second District applied to the case where the victim did not recant. The Reeves Court, however, did not address the question of whether the exception was in fact valid.

The Decision Below

The holding of the First District Court of Appeal below is predicated upon Roebuck. There, Roebuck claimed that the trial court erred in preventing him, during his sexual battery trial, from introducing evidence that the victim had previously falsely accused her brother of injuring her physically to establish that the victim had a tendency to make false reports. Id. at 41. The Roebuck Court rejected this claim, first recognizing that the Legislature, in enacting Section 90.610, Florida Statutes, did so with the intention of barring all character impeachment based on prior misconduct that did not involve a criminal conviction and the plain language of the statute authorized impeachment with only prior convictions, with no exception to the rule articulated. While the comparable Federal Rule of Evidence 608(b), specifically allows character impeachment by prior misconduct without conviction, the Florida Legislature specifically chose not to adopt that language into the Florida Evidence Code. This was because it did not reflect existing Florida law and because the Legislature recognized that the potential for abuse of evidence of this type. Roebuck, 953 So. 2d

at 43; See also Ehrhardt, Florida Evidence, § 610.8. The Roebuck Court found that the statute as written properly implemented legislative intent, and it was not the court's role to add unwritten provisions to the statute when it was clear on its face. Roebuck, 953 So. 2d at 43. The First District therefore held that pursuant to Section 90.610, Florida Statutes, the credibility of the victim could not be attacked by proof that she had committed specific acts of misconduct which did not end in a criminal conviction.

The Roebuck Court also noted that in Jaggers, the court created the false accusation exception without articulating a specific legal basis for its creation. Roebuck 953 So. 2d at 44. The Court recognized the existence of other statutory provisions that would allow the evidence notwithstanding that contained in Section 90.610, Florida Statutes. These included the use of the false reporting evidence (1) to establish bias or motive pursuant to Section 90.608(2) Florida Statutes; or (2) when character or a trait of character of a person is an essential element of a charge, claim, or defense pursuant to Section 90.405(2), Florida Statutes. Roebuck, 990 So. 2d at 43.

The Roebuck Court found that neither of the provisions applied because the previous false accusation involved A.B.'s brother, not Roebuck, the false report concerned a dissimilar crime, and the proffered evidence did not establish a motive on A.B.'s part to lie about the charged offense. Id. The Court also rejected the claim that the evidence could be admitted based upon

the victim's character because A.B.'s character was not an essential element of the defense or charge, acknowledging that cases in which character is actually at issue are rather rare and do not impede upon the traditional rule that specific instances of misconduct are generally not admissible to prove character. Id. at 43-44. The Roebuck Court concluded that "[w]ere this court to expand the narrow application of section 90.405(2)'s character at issue provision to all cases in which the veracity of a witness is pertinent to the proceedings, section 90.610's confinement of impeachment evidence to only prior convictions would be rendered meaningless." Roebuck, 953 So. 2d at 44.

While conceding that based upon the facts of a particular case, due process may require germane cross-examination of a witness regarding a prior incident of false reporting, no violation of due process was established and the Roebuck Court held that Section 90.403, Florida Statutes (2004), authorized the exclusion of otherwise relevant evidence where the evidence's prejudice outweighs its probative value and that such a balancing test was authorized and did not violate due process. See Id. 953 So. 2d at 44. Applying the balancing test to the facts, the court noted that the prior incident of false reporting did not involve appellant and was not made concerning allegations of sexual abuse. Id. As such, the evidence lacked the necessary relevance needed to amount to a due process violation. Id. See also, Section 90.403, Fla. Stat.; Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991) (quoting Olden v. Kentucky, supra for the proposition

that the trial court may limit examination of a witness "to take account of such factors as 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant."

The Roebuck Court certified conflict with Jaggers and Cliburn v. State, 710 So. 2d 669 (Fla. 2d DCA 1998), and the case was appealed to this Court in case number SC07-807. This Court accepted jurisdiction and the cause was fully briefed with oral argument held. On May 15, 2008, however, this Court dismissed the appeal finding that jurisdiction was improvidently granted.[2]

The First District, in Pantoja, correctly recognized that impeachment of witnesses is strictly controlled by the provisions of the Florida Evidence Code and that no other means of impeachment may be utilized, citing to Rose v. State, 472 So. 2d 1155, 1157-58 (Fla. 1985), which held that the trial court may properly refuse to allow impeachment by any means not listed in Section 90.608, Florida Statutes. Pantoja, 990 So. 2d at 629. It further found that while Section 90.609(1), Florida Statutes, permitted credibility attacks in the form of evidence that a witness has a poor reputation for truthfulness, it did not permit proof of the witness' character for truthfulness or

[2] The court below noted this fact and found several possible reasons: 1) that this Court expressly distinguished Jaggers and Cliburn, 2) that the Roebuck Court acknowledged that "based on the facts of a particular case, due process may require germane cross-examination of a witness regarding a prior incident of false reporting," or 3) that this Court did not interpret the cases as creating a general exception to the Evidence Code.

untruthfulness by evidence of specific acts of misconduct. Id. Other than the limited exception provided for in Section 90.610, Florida Statutes, the Evidence Code simply did not provide for impeachment by evidence of prior acts of misconduct. Id.

The First District Court acknowledged that the Jaggers Court called this evidentiary rule a "broad general principle of law," to which it developed "an exception applicable to particular circumstances." Pantoja, 990 So. 2d at 630. The First District Court also noted that while the Jaggers court did not precisely define the parameters of its exception, it specifically held that evidence that a witness has falsely accused a person of sexual abuse must be admitted when the defendant is being tried for a crime of sexual abuse and "there is no independent evidence of the abuse and the defendant's sole defense is either fabrication or mistake on the part of the alleged victims." Pantoja, 990 So. 2d at 630. The court below also noted that the Second District Court reached this holding after concluding that such evidence is "relevant to the possible bias, prejudice, motive, intent or corruptness" of the witness, Id.

Recognizing that evidence that is relevant to a witness' bias is admissible under Section 90.608(2), Florida Statutes, and that prejudice, motive to testify, and intent in testifying are all ways of showing the witness' bias, and, thus, are also proper grounds for impeachment under Section 90.608(2), Florida Statutes, the Pantoja Court properly found that there is no provision in the Florida Evidence Code allowing general evidence

of "corruptness" as a means of impeaching a witness. Pantoja, 990 So. 2d at 630. The only such admissible evidence is evidence of a prior conviction under Section 90.610, Florida Statutes, or evidence that the witness has a poor reputation for truthfulness under Section 90.609, Florida Statutes. Pantoja, 990 So. 2d at 630. Accordingly, the lower court found that it could not agree with the Second District that a witness' prior false accusation of sexual abuse against a person other than the defendant always constitutes grounds for impeachment. Id.

The lower court also considered Petitioner's assertion that the evidence was otherwise admissible pursuant to Section 90.405(2), Florida Statutes, which provides that "[w]hen character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may be made of specific instances of that person's conduct." Pantoja, 990 So. 2d at 630-31.

Section 90.405(2), Florida Statues, "recognizes the traditional rule that specific acts of an individual are generally inadmissible to prove the individual's character. Evidence of specific actions **may not be offered as the basis of an inference that because a person acted in that manner in the past, the person acted in the same manner on the occasion in question.**" Ehrhardt, Florida Evidence, § 405.3 (West 2008), citing Wright & Graham, Federal Practice and Procedure, Evidence, § 5266.

The rationale behind this prohibition is the recognition that evidence of specific acts may be given an inordinate amount of weight by the jury and to allow such evidence would subject a person to inquiry regarding specific acts of misconduct throughout the person's lifetime. McCormick, Evidence, § § 185, 190 (4th Ed. 1992); Wigmore, Evidence, § § 54, 70, 193, 202-03 (3d Ed. 1940).

Only in those rare cases where one of the elements of the cause or defense is whether the person possessed a particular character trait, is character an essential element of the case. These cases "do not impede on the traditional rule that specific incidents of misconduct are generally not admissible to prove character." Roebuck, 953 So. 2d at 43-44. If character is offered as circumstantial evidence of a fact or issue to be determined, character is not an essential issue or operative fact. Ehrhardt, Florida Evidence, § 404.2 (West 2008). Examples of those rare types of cases where character is an essential element of a case, as recognized by Professor Erhardt are: an action where someone is charged with negligently entrusting a motor vehicle to an incompetent driver, where a plaintiff's character in a defamation action is in issue because the defense asserted is one of truth, or when an employer is sued for the selection of an allegedly incompetent employee. Ehrhardt, Florida Evidence, § 405.3.

Here, the lower court correctly found that the victim's character was not an essential element of the charge, claim, or defense, rejecting Petitioner's assertion that her character was

critical to the defense because its position was that the child was lying. Pantoja, 990 So. 2d at 631. Petitioner sought to show that because the child allegedly lied before, she was lying now, thus it was improperly sought to be introduced to show conformity of action. Furthermore, Petitioner's intended use of character evidence was offered as circumstantial evidence of a fact or issue to be determined, so that the child's character was not an essential issue or operative fact. The court properly rejected Petitioner's argument because if his position was accurate, then the victim's character, or that of any witness, would be an essential element of the defense in almost every case, something clearly not contemplated by this rule of evidence.

The lower court also provided solid analysis of whether the rights to due process or confrontation were violated in this case. Florida's rules regarding the admission of evidence are not contrary to or an unreasonable application of federal constitutional law as set forth by the United States Supreme Court. In United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 1264, 140 L. Ed. 2d 413, 418-19 (1998), the Court held that

> **A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions**. See Taylor v. Illinois, 484 U.S. 400, 410, 98 L.Ed.2d 798, 108 S.Ct. 646 (1988); Rock v. Arkansas, 483 U.S. 44, 55, 97 L.Ed.2d 37, 107 S.Ct. 2704 (1987); Chambers v. Mississippi, 410 U.S. 284, 295, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973). A defendant's interest in presenting such evidence may thus "'bow to accommodate other legitimate interests in the criminal trial process.'" Rock, supra, at 55 (quoting Chambers, supra, at 295); accord Michigan v. Lucas, 500 U.S. 145, 149, 114 L.Ed.2d 205, 111 S.Ct.

> 1743 (1991). As a result, **state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.** Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." Rock, supra, at 56; accord Lucas, supra, at 151. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. See Rock, supra, at 58; Chambers, supra, at 302; Washington v. Texas, 388 U.S. 14, 22-23, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967).

(footnote omitted)(emphasis added).

In Delaware v. Fensterer, 474 U.S. 15, 16, 106 S. Ct. 292, 292, 88 L. Ed. 2d 15, 17 (1985), the Court reviewed a case in which the Delaware Supreme Court reversed the conviction of a defendant on the basis that the trial court had admitted a prosecution expert's testimony when the expert could not recall the basis of his opinion in violation of the Sixth Amendment's confrontation clause. The Court determined that the Delaware court had misconstrued the confrontation clause. See id. The Court noted that there are two types of confrontation clause cases: "cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." Fensterer, 474 U.S. at 18, 106 S. Ct. at 294, 88 L. Ed.2d at 18.

The Court noted that the second type of cases is exemplified by its decision in Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347, 354-55 (1974). In Davis, the Court stated:

> although some cross-examination of a prosecution witness was allowed, the trial court did not permit

> defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."

Fensterer, 474 U.S. at 19, 106 S. Ct. at 294, 88 L. Ed. 2d at 19 (quoting Davis, 415 U.S. at 318, 94 S. Ct. at 1111, 39 L. Ed. 2d at 355). The Fensterer Court continued that it "has recognized that Confrontation Clause questions will arise because such restrictions may 'effectively... emasculate the right of cross-examination itself.'" Id. (quoting Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 750, 19 L. Ed. 2d 956, 959 (1968)). The Court continued:

> 'The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*.'" Id., at 315-316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)). **Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.**

Fensterer, 474 U.S. at 19-20, 106 S. Ct. at 294, 88 L. Ed. 2d at 19 (emphasis added). The Court further stated

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Fensterer, 474 U.S. at 21, 106 S. Ct. at 295, 88 L. Ed. 2d at 21.

In Delaware v. Van Arsdall, 475 U.S. 673, 674, 106 S. Ct. 1431, 1432, 89 L. Ed. 2d 674, 680 (1986), the Court reviewed a case in which the Delaware Supreme Court reversed the defendant's conviction "on the ground that the trial court, by improperly restricting defense counsel's cross-examination designed to show bias on the part of a prosecution witness" had violated the defendant's confrontation rights. The Court concluded that the Delaware Supreme Court correctly determined that the trial court erred, the Delaware court "was wrong when it declined to consider whether that ruling was harmless in the context of the trial as a whole." Id. In that case, the trial court barred defense counsel from impeaching a witness by questioning the witness regarding the dismissal of a criminal charge against him after he agreed to talk to prosecutors regarding the crime committed in the case. See Van Arsdall, 475 U.S. at 676, 106 S. Ct. at 1433-34, 89 L. Ed. 2d at 681.

> The Court concluded:
> Of particular relevance here, "[we] have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis, supra, at 316-317 (citing Greene v. McElroy, 360 U.S. 474, 496 (1959)). It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, **trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.** And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-

> examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original).

Van Arsdall, 475 U.S. at 678-79, 106 S. Ct. at 1435, 89 L. Ed. 2d at 683 (bold emphasis added).

The Court further explained:

> As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one. E.g., United States v. Hasting, 461 U.S. 499, 508-509 (1983); Bruton v. United States, 391 U.S. 123, 135 (1968). In Chapman[v. California, 386 U.S. 18 (1967)], this Court rejected the argument that all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction. The Court reasoned that in the context of a particular case, certain constitutional errors, no less than other errors, may have been "harmless" in terms of their effect on the factfinding process at trial. Since Chapman, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. E.g., United States v. Hasting, supra (improper comment on defendant's silence at trial); Moore v. Illinois, 434 U.S. 220, 232 (1977) (admission of identification obtained in violation of right to counsel); Harrington v. California, [395 U.S. 250 (1969),] *supra* (admission of nontestifying codefendant's statement). The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, United States v. Nobles, 422 U.S. 225, 230 (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, The Riddle of Harmless Error 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it").

Van Arsdall, 475 U.S. at 681, 106 S. Ct. 1436, 89 L. Ed. 2d at 684-85. The Court held that "constitutionally improper denial of

a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis." 475 U.S. at 684, 106 S. Ct. at 1438, 89 L. Ed. 2d at 686; see also Fry v. Pliler, 551 U.S. 112, 127 S. Ct. 2321, 2328, 168 L. Ed. 2d 16, 17 (2007)(holding that in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the "substantial and injurious effect" standard set forth in Brecht v. Abrahamson, 507 U.S., 113 S. Ct., 123 L. Ed. 2d (1993), whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

In the case at bar, Petitioner has failed to show that the limitation imposed on cross-examination was arbitrary or capricious. In fact, the United States Supreme Court has repeatedly acknowledged in cases such as Chambers and Scheffer the ability of the states and courts to impose reasonable restrictions on the presentation of relevant evidence. The limitations simply cannot be arbitrary or disproportionate. See Scheffer, supra. Given the marginal relevance of the evidence in this case, the district court properly concluded that no constitutional violation had occurred.

The limitations placed upon Petitioner under the Florida Rules of Evidence are not similar to the limitations faced by the defendants in Chambers and Olden. In Chambers v. Mississippi, 410

U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297, 308 (1973), the court, through application of Mississippi's evidentiary rules, prevented the defendant from cross-examining an adverse witness and presenting witnesses who would have discredited the repudiation of adverse witness' confession and demonstrated the witness' complicity in the crime. As a result, the Court concluded that Chambers had been denied due process. See Chambers, 410 U.S. at 302-03, 93 S. Ct. at 1049, 35 L. Ed. 2d at 313.

In Olden v. Kentucky, 488 U.S. 227, 228, 109 S. Ct. 480, 481, 102 L. Ed. 2d 513, 517 (1988), the defendant had been indicted for rape, kidnapping and forcible sodomy. The jury convicted the defendant, a black man, of forcible sodomy. See Olden, 488 U.S. at 230, 109 S. Ct. at 482, 102 L. Ed. 2d at 519. The victim in the case, a white woman, gave inconsistent statements regarding the crime. See Olden, 488 U.S. at 229-30, 109 S. Ct. at 481-82, 102 L. Ed. 2d at 517-19. The defendant sought to impeach the victim theorizing that she had a motive to lie because her paramour, a black man, with whom she was living saw her leave with one of the co-defendants. See Olden, 488 U.S. at 230, 109 S. Ct. at 482, 102 L. Ed. 2d at 518. The trial court precluded the admission of the impeachment evidence involving the cohabitation because the evidence may have created prejudice against the victim. See Olden, 488 U.S. at 231, 109 S. Ct. at 482, 102 L. Ed. 2d at 519. The Court found that the evidence in the case was not overwhelming, as a result, the Court could not

conclude beyond a reasonable doubt that the inability of the defendant to confront the witness regarding his theory was harmless. See Olden, 488 U.S. at 232, 109 S. Ct. at 483, 102 L. Ed. 2d at 520-21.

In this case, the record below simply fails to support Petitioner's claim that the victim was biased against him and motivated to lie. As the lower court properly concluded,

> Even assuming Appellant could show that the victim's prior allegation against her uncle was false, this showing would not tend to prove that she had a motive to make an accusation against Appellant. Even though the evidence would relate to the victim's propensity to lie about sexual molestation specifically, it is still general propensity evidence under Davis, as it does not relate to this defendant in particular or the facts of this case in particular.

Pantoja v. State, 990 So. 2d at 632.

Furthermore, appellant had ample opportunity at trial to both engage in meaningful cross-examination of the victim and to establish any alleged motive to lie both through her testimony and that of other witnesses. There is no similarity between the limitations faced by Petitioner and the defendants in cases such as Chambers and Olden. Throughout the trial, Petitioner sought to prove the child was not only not a credible witness but a liar who fabricated her claim.

The lower court recognized that its holding that there is no constitutional error in prohibiting cross-examination of a witness regarding an alleged false prior accusation against someone other than the defendant was supported by rulings from a

number of federal courts of appeal, citing to Boggs v. Collins, 226 F.3d 728, 739 (6th Cir. 2000) (concluding that a defendant who was convicted of rape was not constitutionally entitled to cross-examine the victim regarding an alleged prior false accusation of rape against another person, as his sole basis for such cross-examination was to show that if she lied once, she would do it again); Hogan v. Hanks, 97 F.3d 189, 192 (7th Cir. 1996) (upholding a state court's decision to disallow questioning of a rape victim regarding two alleged prior false accusations where state law required evidence that the prior reports were "demonstrably false" before permitting such questioning); see also State v. Raines, 118 S.W.3d 205, 213 (Mo. Ct. App. 2003) (noting that the majority of the federal appellate courts that have addressed the issue have found no violation of the Confrontation Clause where a trial court has prevented cross-examination for the sole purpose of showing that a witness has a "tendency to lie, based on a pattern of past lies"). Pantoja, 990 So.2d at 631. The Pantoja Court stated,

> Applying Davis, the Seventh Circuit held that impeachment with evidence of a prior false report constitutes a general credibility attack for which there is no constitutional entitlement. Boggs, 226 F.3d at 739. The following language from Boggs is instructive:
>
> > No matter how central an accuser's credibility is to a case-indeed, her credibility will almost always be the cornerstone of a rape or sexual assault case . . . -the Constitution does not require that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct. . . . Under Davis and its progeny, the Sixth Amendment only compels cross-examination if that examination

> aims to reveal the motive, bias or prejudice of a witness/accuser.
>
> Id. at 740. The Sixth Circuit, in Hogan, noted that the Supreme Court had never held "or even suggested" that a prohibition against using specific acts of misconduct to impeach a witness posed constitutional problems. 97 F.3d at 191.

Pantoja v. State, 990 So. 2d at 632. Nor was Petitioner denied his right to present a defense. As previously stated, a defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. Taylor v. Illinois, supra,; Rock v. Arkansas, supra; Chambers v. Mississippi, supra. A defendant's interest in presenting such evidence may thus "'bow to accommodate other legitimate interests in the criminal trial process.'" Rock, supra, at 55 (quoting Chambers, supra, at 295); accord Michigan v. Lucas, supra. Florida has broad latitude under the Constitution to establish rules excluding evidence from criminal trials and such rules do not abridge an accused's right to present a defense because they are neither "arbitrary" or "disproportionate" to the purposes they are designed to serve.

Application of the Section 90.403, Florida Statutes, balancing test also establishes the correctness of the lower court's ruling. Assuming arguendo that the evidence was relevant and otherwise admissible, clearly the probative value of the evidence was overwhelmed by its prejudicial value given the fact that the jury would have concluded that the because the child

lied about sexual abuse by a third party, she doing the same thing now.

Finally, application of the Chapman/ State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) harmless error test also supports this Court's affirmance. Here, Petitioner was able to conduct lengthy cross-examination of the child, as well as other witnesses, to support his theory of defense that the child fabricated the charge against him. Given this the State submits that the conviction was not "substantially swayed by the error." Kotteakos v. United States, 328 U.S. 750, 759, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946). Section 59.041, Florida Statutes (2009), provides in pertinent part that:

> "[n]o judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of... the improper admission or rejection of evidence unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has **resulted in a miscarriage of justice**. This section shall be liberally construed.

No such miscarriage of justice resulted in this case.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court decline to exercise jurisdiction or to affirm the decision of the First District Court of Appeal below.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kathleen Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on May _____, 2009.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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APPENDIX TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

Pantoja v. State, 990 So. 2d 626 (Fla. 1st DCA 2008).