IN THE SUPREME COURT OF FLORIDA

JAMES RICHARD COOPER,	:	
Petitioner,	:	
vs.	:	Case No. SC09-1169
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM L. SHARWELL
Assistant Public Defender
FLORIDA BAR NUMBER 0908886

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

ARGUMENT
ISSUE I

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED BY USING THE WRONG STANDARD TO FIND ADMISSION OF NUMEROUS ACTS OF UNCHARGED SEXUAL MISCONDUCT TO BE HARMLESS?

The opinion below improperly substitutes "strong evidence" in the State's case for proof beyond a reasonable doubt that the error of admitting numerous acts of uncharged sexual misconduct was harmless. Respondent's argument that Second District Court of Appeal applied the correct standard by considering whether the error "did or did not contribute to the verdict..." is legally wrong. This Court has recently made it crystal clear that the standard announced by DiGuilio is still the standard for analysis of harmless error when it held the Third District Court of Appeal erred by using an "overwhelming evidence" test to find an error harmless in Ventura v. State, SC08-483, (Fla. Feb. 18, 2010).

This Court repeated the correct standard for harmless error analysis in Ventura:

> [H]armless error analysis *must not* become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or *even overwhelming based on the permissible evidence.* ...
>
> *Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict*

> *reached,* for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.
>
> ....
>
> The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of *did not contribute to the verdict* or, alternatively stated, that there is *no reasonable possibility that the error contributed to the conviction.* Application of the test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an *even closer examination of the impermissible evidence which might have possibly influenced the jury verdict* ....
>
> ....
>
> ... The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. *The test is not* a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, *or even an overwhelming evidence test.* Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. *The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.* The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Ventura, Slip Op. at 2-3 (quoting DiGuilio, 491 So.2d at 1136, 1138-39).

This Court held the Third District Court of Appeal was wrong in Ventura because:

> The district court noted only *one* factor in the harmless error analysis (i.e., permissible evidence of guilt), but that one factor is not the determinative test. We have explicitly rejected the overwhelming evidence test as a proper analysis of harmless error. Specifically, the decision of the Third District does not address a proper analysis and does not discuss whether there is a reasonable possibility that the constitutional error affected the verdict. Our colleague in dissent suggests that our decision is based on an erroneous assumption that the district court failed to give consideration to the correct harmless error analysis. We cannot assume that an analysis was conducted or review that which remains hidden behind the written opinion. In other words, the decision does not reflect *any* consideration by the appellate court of whether the impermissible comments *contributed to* the conviction, as required in an analysis of harmless error. Instead, as written, the appellate court appears to have "substitute[d] itself for the trier-of-fact by simply weighing the evidence" instead of focusing on the " *effect of the error on the trier-of-fact.*" DiGuilio, 491 So.2d at 1139 (emphasis supplied). It is important for the test to be "conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review." *Id.*

Ventura v. State, Slip. Op. at 8.

The analysis of the Third District Court of Appeal rejected by this Court read:

> "The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict ..." State v. DiGuilio, 491 So.2d 1129, 1138 (Fla.1986). We conclude that the detective's testimony was

> improper, but harmless beyond a reasonable doubt given the overwhelming evidence of guilt.

Ventura v. State, 973 So. 2d 634, 637 (Fla. 3d DCA 2008).

The analysis of the Second District Court of Appeal which Respondent asks this Court to uphold reads:

> As to whether the error of allowing the State to present evidence of extensive abuse did or did not contribute to the verdict, we note that if the case had been presented as six distinct acts as charged, the State's presentation of its case would have necessarily been different. On the other hand, the jury heard a taped statement where Cooper admitted engaging in sexual acts with the victim. Because the taped statement is strong evidence of Cooper's guilt, we conclude that the error of allowing the State to present evidence of multiple sexual acts did not affect the verdict and was harmless in this case. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Cooper v. State, 13 So. 3d 147, 149 (Fla. 2d DCA 2009).

There is little difference between the analysis of the Second District Court of Appeal in Cooper and the harmless error analysis rejected by this Court in Ventura. The opinion below finds the error harmless because of "strong evidence" of guilt. It is the equivalent to the error of using "overwhelming evidence" to find an error harmless beyond a reasonable doubt which was rejected by this Court in Ventura.

This Court ordered a reversal in Ventura because the Third District applied the wrong standard, and failed to analyze all evidence to determine whether there was a reasonable possibility that the error affected the verdict. In this case, the Second

District Court of Appeal applied the wrong standard to find harmless error, and did not analyze all of the evidence to determine whether there was a reasonable possibility that the verdict was affected. A reversal should be ordered in this case as was done in Ventura for failing to comply with DiGuilio.

The opinion below correctly notes that that the State's proof would have been different at trial without the introduction of numerous uncharged acts of sexual misconduct. However, there was no analysis of the effect of the error on the trier-of-fact. Mr. Cooper did make a taped statement to police but it did not match the testimony of R.L.C. as to the acts committed or the frequency of sexual incidents.

The jury as trier-of-fact had to decide whether R.L.C. told the truth at trial or was motivated by other considerations. R.L.C. told the D.C.F. investigator a few days before police got involved that nothing had taken place with his father after he made the initial allegation of abuse because he was mad after arguing with his father over something he wanted. (v3:T313)

The jury also had to consider whether R.L.C. was telling the truth at trial or because he stood to improve his living situation by moving to be with his mother and her boyfriend. R.L.C. told Detective Beymer that he did not originally move out with his mother because he didn't think he would be able to get the same stuff as if he stayed with his father. (v3:T295) R.L.C. later learned that this meant living in a house with no money, water, or power that was also full of fleas. (v3:T242, 296) By moving to be

with his mother, R.L.C. gained a nicer place to stay with power and water where he could shower. (v3:T242)

By applying the analysis mandated by this Court in DiGuilio, this Court should find that the highly prejudicial nature of the uncharged misconduct evidence caused it to effect the jury's decision in this case. Although the taped statement is damaging evidence it is not the end of the required analysis.

The jury first heard of the incidents of uncharged misconduct during the prosecutor's opening statement. Thus, the evidence colored the jury's view of all other admissible evidence during the trial. At the end of the trial during closing argument, the prosecutor told the jury that the uncharged acts could be used as proof of the charged acts:

> But the bottom line is, you heard what R.L.C. told you that his father did to him over the course of four years, the sexual contact that they had over the course of four years. Once a week maybe, once every other week, once every couple of days.
>
> These kinds of things would happen. He said it was pretty much every time it was the same thing. They would masturbate each other, perform oral sex on one another. They would—defendant would try and attempt to perform anal sex on R.L.C., R.L.C. would perform anal sex on him.

(v3:T338)

By commingling the charged acts and uncharged acts of sexual misconduct the State made the difficult task of evaluating the effect of the error on the verdict impossible. The State has not shown the error was harmless beyond a reasonable doubt. Absent the

error of admitting the uncharged misconduct evidence, which is presumed to be harmful, Appellant may have been convicted on less than all counts, or none at all. Appellant should be given a new trial. This matter should be remanded back to the Second District Court of Appeal.

The State Is Not Allowed To Introduce Numerous Uncharged Acts of Sexual Misconduct Without Notice.

This case is not about a procedural error or any error in the charging document. It is about the introduction of numerous acts of uncharged sexual misconduct into evidence without any notice. The prosecutor told the judge that Section 90.404, Florida Statutes, or Williams rule did not apply because she was not introducing evidence of other acts. Instead, she said "This is the same act that just occurred over a long period of time." (v2:T192) The prosecutor (after consulting her supervisor during a recess) did not offer any other reason as to why the evidence should be admitted in this case.

The prosecutor's argument below that the lengthy time period alleged in the information was sufficient to imply that "it could have occurred more than once" and that "the information itself doesn't state that he did it once" should be rejected because a criminal defendant should not have to guess or infer about what he or she will face at trial when the information is clear and unambiguous. Similarly, because the information clearly and unambiguously charged one occurrence of each sex act there was no

need to file a motion for statement of particulars. Requiring such guesswork violates the due process clauses of the State and Federal Constitutions and flies in the face of Fla. R. Crim. P. 3.140(o).

This case did not involve an alleged victim who was a small child of tender years. The alleged victim was thirteen years old at the start of the period alleged in the information. By the ending date he was seventeen years old. He was old enough to be prosecuted as an adult for certain offenses. He was not being asked to recall incidents from a decade earlier.

Petitioner does not allege that the State was required to use any magic or specific words in the information. He did not allege in the trial court or on appeal that there were any defects or deficiencies in the information filed by the State. Instead, he argues that in the absence of any other notice, he should be allowed to rely on the clear and unambiguous language in the information which does not in any way, shape, or form allege multiple occurrences of each sex act.

The State cannot have it both ways. The information alleges six separate and distinct sexual acts occurred during the time period alleged. The information does not put Mr. Cooper on notice that the State would attempt to use multiple instances of each distinct sexual act as proof of the charged counts. The prosecutor denied that the uncharged acts were Williams rule or other acts under Section 90.404, Florida Statutes. Had the prosecutor elected to proceed under Section 90.404(2), Florida

Statutes, the evidence of uncharged acts might have been admissible if it was ruled relevant and survived the balancing test of Section 90.403, Florida Statutes.

In Wightman v. State, 982 So. 2d 74 (Fla. 2d DCA 2008), the Second District Court of Appeal rejected the State's attempt to justify admission of uncharged crimes evidence under Section 90.404(2)(b)(1), Fla. Stat. because the prosecutor did not give the required notice under Section 90.404(2)(c)(1), Fla. Stat. :

> This section expressly makes admissible other crimes or acts of child molestation. But in order to invoke this section at trial, the State was required to give the defendant ten days before trial "a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information." § 90.404(2)(c)(1). And, any collateral crime evidence admitted under section 90.404(2)(b) is subject to a section 90.403 analysis for the danger of unfair prejudice. See McLean v. State, 934 So.2d 1248, 1262 (Fla. 2006) (discussing the trial court's responsibilities when admitting evidence of prior acts of molestation when offered to corroborate the victim's testimony). Because Wightman was not given the pretrial notice and the other due process safeguards discussed in McLean were not employed, the State cannot invoke section 90.404(2)(b) to justify the admission of other-crime evidence in this case.

Wightman v. State 982 So.2d 74, 76-77 (Fla. 2d DCA 2008).

The Wightman case is not the ogre that the State says it is. Wightman does not deny the State anything if it complies with established rules of law. The prosecutor in this case did not think compliance with any rule of notice was required. Contrary

to assertions of Respondent, Wightman does not encourage defense counsel to wait until the jury is sworn to challenge wording of the charging document. These defects are typically waived long before the swearing of the jury. Instead, Wightman encourages compliance with clearly established rules designed to ensure a fair trial and which require notice prior to introduction of other incidents of uncharged misconduct.

Petitioner disputes the argument that, "the Wightman decision creates an automatic rule of inadmissibility of otherwise relevant evidence due to a failure to abide by a procedural notice requirement even where a defendant has actual notice and his or her due process rights were not violated." (Answer Brief at 25) Defense counsel below did know of other incidents of alleged sexual misconduct. However, the record is unclear as to exactly what he knew. More importantly, he had no idea the State planned to introduce any other incidents and he had no idea which other incidents would be introduced because the State failed to give the required notice.

The evidence which the State complains is barred by Wightman is not automatically admissible if the State gives proper notice. This Court's decision in McLean v. State, 934 So.2d 1248, 1262 (Fla. 2006), makes it clear that such evidence is subject to exclusion pursuant to Section 90.403, Fla. Stat. if the probative value is outweighed by the danger of unfair prejudice. Like the defendant in Wightman, Mr. Cooper was denied the pretrial notice and protections designed to insure a fair trial outlined in

McLean. Respondent suggests that Petitioner should have objected on relevance grounds or pursuant to Section 90.403, Fla. Stat. Yet, because the prosecutor insisted the uncharged acts were not subject to notice for use as corroboration pursuant to Sec. 90.404(2)(c), defense counsel was never informed of the specific acts or the State's theory of relevance to enable a precise objection.

This Court has never expressly issued an opinion allowing the state to charge "representative counts." In Dell'Orfano, this Court rejected a per se rule based upon length of time alleged in an information and held the State should be given an opportunity to show it has "exhausted all reasonable means of narrowing the time frames further. In State v. Generazio, 691 So. 2d 609 (Fla. 4th DCA 1997), the Court allowed the state to use an information alleging that a specific sex act occurred on "one or more occasions" when the State showed the victim was too young to remember the specific dates where ongoing acts of abuse occurred.

The State did not even attempt to make similar showings in this case. More, importantly the State never provided any notice of intent to introduce evidence of other crimes which would have put the trial court on notice of a potential issue, and alerted defense counsel that he might have to confront these other incidents at trial. Defense counsel's knowledge that other incidents of misconduct occurred should not be equated with knowledge that the State would introduce the other incidents.

If the State may charge "representative counts" of multiple acts within a given time frame, then Section 90.404(2)(b)(1) still requires notice of intent to use such evidence. Therefore, Generazio and Dell'Orfano are not dispositive in this case. Moreover, apart from the arguments on the merits raised above, this Court should resolutely reject the representative count theory. The State did not present it to the Second District Court of Appeal.

Respondent makes the argument to this Court that the failure to strictly comply with notice provisions in Section 90.404(2)(c) should be treated as a Richardson violation as was done in Barbee v. State, 630 So. 2d 655 (Fla. 5th DCA 1994). In contrast to Barbee where the notice was a day late, this case involves a complete failure to comply where the prosecutor below argued she was not required to give any notice. If the prosecutor had provided even a late notice and argued the matter should be treated as a Richardson violation then this Court as well as the Second District Court of Appeal would have had a proper record to address this issue.

The issue in this case is not whether the State may charge a discrete count which may involve ongoing sexual abuse. The issue is whether if the State alleges and attempts to prove such charges, it must give notice of the intent to use proof outside the discrete and specific charges in the information. Otherwise, Section 90.404(2)(b)(1) would be meaningless and superfluous. The Second District Court of Appeal implicitly and correctly found

that Section 90.404(2)(b)(1) requires the filing of a notice even if the State uses the representative count theory.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITAL ON COUNT SIX BECAUSE THE STATE FAILED TO PROVE UNION OR PENETRATION OF THE ANUS?

It is without dispute that Respondent is entitled to any reasonable inference from the testimony presented at trial. However, Respondent is not entitled to pyramid or stack inferences. "An impermissible pyramiding of inferences occurs where at least two inferences in regard to the existence of a criminal act must be drawn from the evidence and then stacked to prove the crime charged; in that scenario, it is said that the evidence lacks the conclusive nature to support a conviction." Graham v. State, 748 So.2d 1071, 1072 (Fla. 4th DCA 1999).

Respondent asks this Court to pyramid inferences to find that competent substantial evidence that Appellant's penis touched R.L.C.'s anus. R.L.C. did seem to distinguish between touching and penetration of the "butt" when being asked about what he did to his father's "butt." The problem that remains with using this to infer that Appellant's penis touched R.L.C.'s anus is the definition of "butt" was never clarified by the prosecutor.

The term "butt" could mean the buttocks. Penetration or touching of the "butt" could mean the area between the buttocks

or either individual buttock. Appellant’s taped statement is equally unclear as to whether his penis touched R.L.C.’s anus. Therefore, this Court should find that the evidence was insufficient on this Count.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Bill McCollum, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2010.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

WILLIAM L. SHARWELL
Assistant Public Defender
Florida Bar Number 0908886
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

wls