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IN THE SUPREME COURT OF FLORIDA

ROBERT LUNDBERG,)
)
Petitioner,)
)
v.) No. SC13-66
)
STATE OF FLORIDA,)
)
Respondent.)
)

On Discretionary Review from the District Court of Appeal,
Fourth District of Florida

PETITIONER'S INITIAL BRIEF ON THE MERITS

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REFERENCES USED IN BRIEF

This brief refers to the record as follows:

"R" The record of post-conviction proceedings, including the transcript of the post-conviction hearing, followed by volume and page numbers.

FSR The first supplemental record filed in February 1, 2011 and containing the final order denying post-conviction relief, followed by page numbers.

SSR The second supplemental record filed on October 15, 2012 and containing a transcript of the trial, followed by volume and page numbers.

STATEMENT OF THE CASE AND FACTS

This case involves the denial of post-conviction relief as to the defendant's convictions for attempted sexual battery of a minor (as a lesser offense of a charged sexual battery) and for lewd or lascivious assault. It is before this Court on conflict jurisdiction regarding the lower court's decision affirming the denial of the defendant's post-conviction motion.

A. <u>The state's case at trial</u>.

The trial was in 2003. It focused on two incidents said to have happened some years earlier in St. Lucie County. Before the trial, the court suppressed part of the defendant's police statement, finding it was coerced.

The alleged victim, V, said the first incident happened on a night when her family was joined by the defendant, his girlfriend and their son as a hurricane approached. SSR2 209.

V was asleep on the couch and was awakened by the defendant tapping her private part. He touched her vagina under her clothes, with his hand inside her underwear. SSR2 212-15.

This incident was the basis for the lewd assault charge. SSR1 174 (state's opening); SSR4 631-32 (final argument).

The sexual battery charge arose from an incident when she and her brother spent the night with the defendant's family. SSR2 218-23.

She woke up "and something was hurting me and it was [the defendant]." He put his finger inside her under her clothes. He took his finger out and asked if she had trouble sleeping. She said no, and he went back to his room. Her stomach hurt when she went to use the bathroom. SSR2 225-29.

The next day, while in the car with her parents, she said the defendant had done something to her. Her father braked and freaked out, and she said the defendant hit her. SSR2 231-32.

A year later, she told her aunt, and then spoke with her parents, the police and the state attorney. SSR2 239-45.

The aunt testified that she had taken V with her to clean a restaurant. V told her the defendant "touched me in here" with his finger. SSR2 269-70.

V said that the first time he just put his hand on her lap and her parents took care of it. SSR2 286.

As to the second incident, the aunt asked if he got it in, and V said she woke up and he was rubbing and it was irritating. When she went in the bathroom it was burning. She said he had his tip of his finger and it was rubbing. SSR2 287-92.

The aunt spoke with the defendant at the Ale House where they both worked. He said it was all bull. They argued and the aunt pushed and punched a manager who intervened. The aunt shouted that she had been going through harassment. The defendant had been promoted and she had not. She was fired for hitting the manager. SSR2 278-282.

V's father testified V said in the car that something happened with the defendant. SSR2 302-303. He pulled over and she said he touched her while they were playing video games, tapping her around the private parts. The defendant touches people he's talking to, he talks with his hands. SSR2 302-303.

In March 2002, the father was told by the aunt that he needed to talk to V, that V said the defendant had touched her. SSR2 306-307.

Without objection, the father testified on direct that: "I could see it in my daughter's eyes, I could see her telling me that, you know, you know, she's not lying, and it was scary." SSR2 312. "She swears - she said, I swear it was true. It's true." SSR2 314. They "wanted to be totally sure" and had a counselor with expertise in offenders talk to V, and he told them “he had no reason not to believe” V. SSR2 314-15.

The mother testified without objection that: She told V it was “really important that I needed to make sure it was true,” and V responded “mommy, I swear, it happened it happened - I swear.” SSR2 336. They “kept reiterating to her that that was serious,” and V “kept looking at me - she kept saying, mom, I swear, I'm not lying. It’s true, he did it.” V “insisted that what she was saying was true.” SSR2 338.

The mother said V told her the defendant used his finger to touch her private. SSR2 362.

A detective testified about her investigation of the case. She said without objection that: She stressed to V the “extreme importance of telling the truth,” and watched “for her responses as to how she react[ed] to me and her body language and look[ed] for things that if [she was] being deceptive, and V reacted “Perfectly.” SSR2 374. Children have blown things out of proportion in “five max” out of hundreds of cases but such cases were “very obvious from the get go.” SSR2 491-92. V “was unconfused. I was the one that got confused. … . She kept me organized.” SSR2 493.

The defendant interrogated the defendant. There was an audio recorder visible in the room, but the interrogation was also secretly recorded on video. The non-suppressed part of the interrogation was played to the jury.

In the recording, the defendant made an exculpatory statement about the incident at his house. He said V fell asleep downstairs and he carried her upstairs. When he entered the bedroom, he tripped over his son, who was lying on the floor. The defendant and V, who was still in his arms, fell on the bed. V woke up, looked at him, and said ouch. SSR3 431-32.

Immediately after the interrogation and while still in the interview room, the defendant spoke with his girlfriend. This discussion was also secretly recorded and played to the jury.

The defendant told his girlfriend that V "said that I touched her. I could have. I have to pay the price of what I did." He also said, "I kind of - I kind of remember touching" V. He was very remorseful. SSR3 454-55.

The defendant testified that on the night the hurricane was approaching he went to bed early because he was tired from the night before. He did not touch V that night. SSR3 517-520.

On the night of the other alleged incident, V was asleep on the couch and he carried her upstairs. His son and V's brother were sleeping on the floor. While stepping around them, he lost his balance, and dropped V on the bed. SSR3 526-30.

He explained:

> In the middle of the fall, I lost - I lost grip with [V]. I was going forward with her, she was starting to fall out of my arms, I had to kind of punch her to-

> gether with both my arms, uh, it was in the groin area where I had caught her, uh, tossed her on the bed. In no means was it meant in any sexual way. I caught her, like I said, in the midsection. If I did touch her, there was no sexual ill intent meant about it. My hands never went down her pants and my finger never went inside of this girls' vagina.

SSR3 545-46.

V said something. He asked if she was okay. She may have said ouch or made a scared sound. He did not remove her pants, did not put his finger in her vagina. He went to his room and went to sleep. SSR3 530-31.

He had only about two hours of sleep in the 36 hours before he spoke to the detective. When he told his girlfriend that he touched V, he did not mean in a sexual manner. SSR3 543, 545.

The defendant's girlfriend testified for the defense that the night the hurricane was approaching she went to sleep in the bed of V's mother, and all three children were in bed with them. She woke up around 3 or 3:30, and the children were still in bed with them. After smoking a cigarette, she went to sleep in the bed where the defendant was. SSR4 605, 607.

V's mother testified in rebuttal that the children did not sleep with her and the defendant's girlfriend on the night the hurricane was approaching. SSR4 628.

B. <u>The direct appeal</u>.

On direct appeal, the defendant argued that his recorded statement to the girlfriend should have been suppressed on two grounds. First, as counsel argued in the trial court, he argued the statement was a product of the initial police coercion. Second, he argued that it had been obtained by the detective by creating a false sense that the discussion was private.

The Fourth District rejected these arguments. As to the first issue, it held the statement was not the product of the initial police interrogation. It held the second issue had not been not preserved for appeal by trial counsel:

> The defendant also argues on appeal that the police deliberately induced in him a reasonable expectation of privacy in his conversation with the girlfriend, relying on *State v. Calhoun*, 479 So. 2d 241 (Fla. 4th DCA 1985). Because this particular argument was not made at trial, we find that this issue is not properly preserved for appellate review.

Lundberg v. State, 918 So. 2d 444, 445 (Fla. 4th DCA 2006) (*Lundberg I*).

C. <u>The post-conviction motion</u>.

The defendant filed a rule 3.850 motion alleging 23 grounds. R1 74-137. After the state responded, the court entered an order summarily denying many of the claims and granting an evidentiary hearing as to others. R4 662-96.

The claims for which the court denied a hearing included claim 14. R4 667-70. This claim alleged counsel was ineffective for failing to move to exclude the recorded discussion with the girlfriend on the ground that the detective fostered a belief that the discussion was private. R1 101-105.

The court granted an evidentiary hearing for grounds 4, 5, 6, 7, 9, 12 and 23, which involved failure to object to evidence bolstering V's credibility. R4 662-96.

D. The evidentiary hearing.

The defendant testified on his own behalf. On direct he addressed the claims for which the hearing had been granted - allegations about the bolstering of V's credibility. R7 6-32.

The state began cross by asking him about the statement to the girlfriend. He replied that those statements should have been suppressed. R7 32-34. (As already noted, the trial court denied an evidentiary hearing as to claim 14, which addressed this issue. R1 101-105; R4 677-80.)

The court then asked the defendant about the Fourth District's decision on direct appeal about the statement. He said the state had successfully argued on appeal that the privacy issue had not been raised in the trial court. R7 34-35.

Defense counsel sought to ask the defendant about this matter on redirect, but the state objected that the court had denied a hearing on it. The court said it would allow a limited inquiry since the state had raised the issue on cross. R7 43-46.

The defendant testified that the detective brought the girlfriend to the interview room and "before leaving the room, she says, I'm going to give you-all - I'm going to give you-all privacy, okay." The detective turned the tape recorder off and removed the audio tape before leaving them. R7 46-47.

The defendant said he discussed this issue with his attorney, Jack Frizzell, who said the statement could not be suppressed on the ground of an expectation of privacy:

> Q: Did you ever discuss that issue with Mr. Frizzell?
>
> A: I did. We discussed it and he told me that I - he said that I didn't have an expectation of privacy in the interview room. And I explained to him that it was the detective herself that, she offered privacy to both me and my girlfriend. And then she left. And I really wasn't aware that there was a videotape of the conversation between my girlfriend and I until it was brought to my attention. This was months after my arrest. And I was kinda surprised because I remember the detective saying that it was gonna be a private conversation.

R7 48.

The court interrupted and engaged in a discussion of the issue with both parties that included an extended reading from the transcript of the videotape of the defendant's statements in to the interview room to the detective. R7 48-64.

The transcript showed the detective turning off the in-room tape recorder before going to get the girlfriend:

> Q Okay. All right. I'm going to end the tape. Okay? Is there anything else? Anything at all?
>
> A No. Uh uh.
>
> A Okay. The time is eight twenty p.m. What do you want me to say to her when I go down there?

R2 384.

It further showed that, when the girlfriend was brought to the room, the detective said she was going to give them privacy:

> (Interviewer left the room. Female entered the room.)
>
> DETECTIVE DENNIS: You can just have a chair. I'm going to give you all some privacy. Okay?

R3 386 (e.s.).

The trial attorney testified for the state.

Because of the statement to the girlfriend, the attorney had a strategy to discredit V's credibility by showing that she made inconsistent statements to family members and law enforcement. He said, "we had to do that in the context of statements he himself had made to his girlfriend, so we had - you know, that's what we were working with." R7 67-68.

The strategy was to show V was not credible and was manipulated by her aunt, who did not like the defendant. V's lack of credibility was to be shown by the lengths family members went to in questioning her truthfulness. R7 69-71.

The attorney said he could not keep out the taped statements to the girlfriend because "any time you're in an interrogation room, any time you're in a police cruiser, there's no expectation of privacy." R7 72-73.

On cross, he again said the statement could not be kept out and "my experience and my familiarity with the case law is that when you're in an interrogation room, you do not have any more than if you're in a police cruiser an expectation of privacy. I think it's well settled in the case law that you do not have an expectation of privacy." He wanted to exclude all the defendant's statements. R7 87-88.

As the defense continued asking about the statement, the state objected that an evidentiary hearing was denied on the issue. The defense pointed out that the state had raised the issue on direct, and the judge said he would allow "a limited cross examination just in case I'm wrong as to Ground 14." R7 89-93.

As the defense tried to continue questioning the attorney on this, the court broke in to discuss the issue further. The court said the privacy claim (claim 14) was meritless, and sustained the state's objection to testimony about it. R7 94-97.

The court thereafter denied the rule 3.850 motion. FSR 1.

E. The post-conviction appeal.

The Fourth District affirmed. It wrote as to the summary denial of the claim about the statement to the girlfriend:

> In the present case the trial court summarily denied this claim of ineffective assistance, because it concluded that no reasonable expectation of privacy had been violated. Defendant was well aware of his previous conversation in the interview room having been recorded. Therefore, he had no reasonable expectation of privacy. The trial court concluded that the surreptitious taping of the conversation in this case was not employed to circumvent the exercise of the defendant's right to remain silent, as he had already relinquished that right when interviewed with the detective.

Lundberg v. State, 37 Fla. L. Weekly D2684, D2685 (Fla. 4th DCA

Nov. 21, 2012) (*Lundberg II*).

After discussing various appellate cases, the court affirmed the denial of this claim:

> While we acknowledge that this is a close case factually, and each case turns on its specific facts, for that very reason we cannot conclude that counsel made a serious error such that he was not functioning as counsel within the Sixth Amendment. As he stated at the evidentiary hearing, "I think it's well founded in the case law that you don't have a reasonable expectation of privacy under those conditions … . You're in an interrogation room, you're in handcuffs … ." Counsel did try to get the statements suppressed under *Wong Sun,* but both the trial court and this court rejected that approach. And while this issue was at least arguable, meaning that he could have filed a motion to suppress in good faith and made an argument based upon *Calhoun,* that does not mean that he was ineffective under the *Strickland* standard for failing to do so. We thus affirm the trial court's denial of postconviction relief on this ground.

Id. D2686 (ellipses in original). It also affirmed the denial of the defendant's other claims. *Id.* D2686-87.

SUMMARY OF THE ARGUMENT

The defendant was deprived of effective assistance of counsel under the Due Process and Counsel Clauses of the state and federal constitutions.

I. The Fourth District erred in denying Claim 14, which concerned the secret recording of the conversation with the girlfriend after the officer made a show of turning off the recorder and said, "I'm going to give you all privacy." The police may not obtain a recording by fostering an expectation that a discussion is private. Further, it erred by affirming where an evidentiary hearing was denied on the claim. Such record as was developed shows counsel failed to challenge the recording out of ignorance of the law, and the statement was prejudicial. The Fourth District used an incorrect standard for ineffectiveness claims.

II. The court erred in affirming the denial of claims about evidence bolstering V's credibility. Counsel based his strategy on his ignorant belief that he could not exclude the secretly recorded statement to the girlfriend. Based on this, he decided to challenge V's credibility by showing the family initially doubted her. But this strategy did not require allowing the state's use of a massive tide of bolstering evidence, including an expert's hearsay opinion that V was telling the truth. So far as counsel had a strategy, it was not reasonable. Even if it had been reasonable, it was carried out in a way that led to the state's use of prejudicial incompetent evidence.

III. The court erred in affirming the summary denial of claims about the date of the alleged lewd assault charge, which was based on a statute that went into effect after Hurricane Floyd. The evidence at trial indicated this crime occurred when Hurricane Floyd was approaching.

IV. The court erred in affirming the summary denial of other ineffectiveness claims. The record does not conclusively refute the claims.

V. The court erred in affirming the summary denial of claim 2, which alleged counsel incompetently obtained an instruction on attempted sexual battery, which resulted in his client's conviction for a crime not supported by the evidence.

ARGUMENT

The state and federal constitutions guarantee the right to effective assistance of counsel. Amend. VI, XIV, U.S. Const.; Art I, § 16, Fla. Const. Ineffectiveness claims involve two questions: (1) whether "counsel's representation fell below an objective standard of reasonableness," and (2) whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Porter v. McCollum*, 558 U.S. 30, 38-39 (2009) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). As to the second question, it is not necessary that the deficient conduct more likely than not altered the outcome, but only that there is a probability sufficient to undermine confidence in the outcome. *Porter*, 558 U.S. at 44. Under these standards, the Fourth District erred in affirming the denial of the defendant's 3.850 motion. Its decision is contrary to or involved an unreasonable application of clearly established federal and state law and was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding.

I. THE FOURTH DISTRICT MISAPPLIED THE LAW IN DENYING CLAIM 14, WHICH CONCERNED THE SECRETLY RECORDED CONVERSATION WITH THE GIRLFRIEND.

A. *Contrary to this Court's rulings, the court concluded that counsel was not ineffective even though the detective said she was providing privacy.*

This Court has ruled that conversations involving prisoners are "not entitled to the same degree of privacy afforded some other communications," but that they may not be intercepted if the police deliberately foster an expectation of privacy:

> On a related point, Allen argues that it was error to admit evidence obtained from electronic eavesdropping of statements he and Roberson made in their prison cells. We disagree. Voluntary jailhouse conversations between inmates are not entitled to the same degree of privacy afforded some other communications. *Lanza v. New York,* 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962). Thus, as a general rule, the courts have permitted the use of such evidence where it was electronically recorded, at least in the absence of any factor diminishing the trustworthiness of the conversation such as coercion or trick. *E.g., Williams v. Nelson,* 457 F.2d 376 (9th Cir.1972).
>
> There thus was no error here. We caution, however, that our conclusion in this regard rests on the fact that there was no improper police involvement in inducing the conversation nor any intrusion into a privileged or otherwise confidential or private communication. A different result might obtain otherwise. For example, police impropriety would exist <u>if police deliberately fostered an expectation of privacy in the inmates' conversation</u>, as happened in *State v. Calhoun,* 479 So. 2d 241 (Fla. 4th DCA 1985), especially where the obvious purpose was to circumvent a defendant's assertion of the right to remain silent. *Id.* The present case does not cross the line of what is permissible.

Allen v. State, 636 So. 2d 494, 496-97 (Fla. 1994) (e.s.). *See also Larzelere v. State*, 676 So. 2d 394 (Fla. 1996) and *Davis v.*

State, 121 So. 3d 462, 485 (Fla. 2013). By exploiting this expectation of privacy and recording a conversation, the police violate of the constitution and section 934.03, Florida Statutes. *State v. Calhoun*, 479 So. 2d 241 (Fla. 4th DCA 1985).

In *Davis*, this Court noted that courts of other states have likewise suppressed secretly-recorded statements when the police have fostered an expectation of privacy. *Id.*, 121 So. 3d at 486. *See State v. Munn*, 56 S.W. 3d 486 (Tenn. 2001) and *People v. A.W.*, 982 P. 2d 842, 848-49 (Colo. 1999) ("the detective's initial assurances that nothing or nobody was behind the two-way mirror and his later assurances that he would not be listening in, gave rise to a subjectively and an objectively reasonable expectation of privacy in his communications with his father.").

The important question is not whether the suspect invokes the right to remain silent, but whether the police have fostered a belief that the conversation is private. In *Allen*, this Court wrote that normally there is no reasonable expectation of privacy in jail absent circumstances "such as coercion or trick," but that the normal rule does not apply if the police have "deliberately fostered an expectation of privacy in the inmates' conversation." *Id.*, 636 So. 2d at 497. This was so even though Allen did not invoke the right to remain silent.

Significantly, there was no invocation of the right to counsel in the Tennessee and Colorado cases discussed in *Davis*.

See State v. Munn and *People v. A.W.* Further, the statement to the girlfriend came right after the part of the police statement that the trial court has suppressed because it was coerced.

The decision below conflicts with this case law. The detective had an audio recorder in the room, and announced in the defendant's presence that she was turning it off – indicating that any recording was at an end. R2 384. When the girlfriend entered, the detective explicitly fostered a sense of privacy. She left the room, shut the door and said: "<u>I'm going to give you all privacy</u>." R3 386.

All of this came after the detective had illegally coerced a confession from the defendant, as the trial court found in suppressing latter part of the interrogation.

The Fourth District wrote that the detective did not foster a sense of privacy, and instead "conveyed to the defendant that he could tell his girlfriend about his arrest out of the public eye — to save embarrassment to them both." *Lundberg II*, 37 Fla. L. Weekly at D2686. But there is just no difference between fostering a sense of privacy and conveying the impression that a discussion is out of the public eye to save embarrassment.

As already noted, the judge denied an evidentiary hearing on this claim. Nonetheless it was discussed at the evidentiary hearing as to other issues. The resulting partial record shows that (1) counsel did not have a strategic reason not to argue this issue, and (2) the statement was prejudicial.

(1) The state presented counsel's testimony that he was ignorant of the case law as to the privacy issue:

> I did everything I could to suppress the entire statements that were made. However, I knew that any time you're in an interrogation room, any time you're in a police cruiser, there's no expectation of privacy. I think it's well founded in the case law that you don't have a reasonable expectation of privacy under those conditions. You're in an interrogation room, you're in handcuffs, you're in a police cruiser in handcuffs. You know, many times when I've been in interrogation rooms with clients, I'll tell them, don't say anything, you know, we're being tape recorded. So I'll talk about the weather or whatever.

R7 72-73 (e.s.).

Due of this unawareness, he did not argue this issue in favor of excluding the recorded statement to the girlfriend. This is a case of deficient performance resulting from plain ignorance of the law on an issue vital to the client's case.

(2) Counsel's deficient performance prejudiced his client. Counsel testified for the prosecution that the statements to the girlfriend colored his entire trial strategy:

> Q: And what - okay. What was your trial strategy?
>
> A: All right. Any time you've got a case, particularly a case of this nature, you've got to consider what - what the State's evidence is and how to counteract or formulate some sort of a plausible defense to that. In this particular case we had - we had two things going against us. And number one was, we were able to get his confession to law enforcement suppressed, however, we could not get the statements he made to his girlfriend suppressed. So those statements were coming in, so I had to formulate a defense knowing that the

> jury was going to hear certain statements that he made. And then on the other hand we had - there was no eye witness, there were no - there was no physical evidence, so it was basically, you know, the testimony of the young girl, [redacted]. So the strategy was basically to try and - you know, any time you have a trial your defense could be reasonable doubt, it could be it didn't happen or something happened but not what they said happened or you got the wrong guy.
>
> In this particular case, what we were trying to do is discredit the victim to show where, you know, it had not occurred because there were various statements that she had made to law enforcement, various statements she'd made to family, her Aunt [redacted]. And so what we were trying to do is, you know, bring out these statements to show that the - there were inconsistencies in what she's telling one person and what she's telling somebody else in an attempt to show that, you know, her testimony cannot be relied upon. Unfortunately, we had to do that in the context of statements he himself had made to his girlfriend, so we had - you know, that's what we were working with.

R7 67-68 (e.s.).

The statement to the girlfriend was prejudicial. The state introduced it in its case in chief, effectively forcing the defendant to testify. It then used it extensively in cross-examining him. SSR3 573-78, 579-80, 582-83. It relied on it in final argument. It said it showed him "basically confessing. Yeah, I did it." SSR4 638. It pointed out that the jurors heard him "with your own ears, saying, I did it – I think I did it – I think I touched her." SSR4 639. It said he told the girlfriend that he was going to go to jail for sexual battery, and "that he committed these crimes." SSR4 668-69. (In fact, the state argued in response to the 3.850 motion that "[t]he probative value of the conversation was extremely high." R2 277-78. Also, in denying other post-conviction claims, the Fourth District pointed to the prejudicial effect of the secretly recorded statement. *Lundberg II*, 37 Fla. L. Weekly at D2687 ("The defendant admitted to his girlfriend in the taped conversation that he might have touched the child when he was drunk. … . His attempt to explain away his statements to his girlfriend at the jail were weak and ineffective.").)

Without this statement, the state's case would have come down to the credibility of V's account of something that allegedly happened while she was half asleep several years in the past. There is a reasonable likelihood that the result of the trial would have been different but for counsel's failure to move to exclude the secret recording.

B. *The Fourth District misapplied the law in affirming the denial of claim 14 without an evidentiary hearing.*

The Fourth District's ruling is contrary to this Court's rulings as to when an evidentiary hearing is required.

This Court has held:

> A defendant is entitled to an evidentiary hearing on an ineffective assistance of counsel claim unless the claim is legally insufficient or the record conclusively refutes the factual allegations. *See, e.g., Maharaj,* 684 So. 2d at 728; *Anderson,* 627 So. 2d at 1171; *Holland,* 503 So. 2d at 1251; *Lemon,* 498 So. 2d at 923.

Freeman v. State, 761 So. 2d 1055, 1064 (Fla. 2000). "When reviewing a trial court's summary denial, this Court must accept as true the defendant's factual allegations to the extent they are not rebutted by the record." *Thompson v. State*, 759 So. 2d 650, 663 (Fla. 2000).

The Fourth District affirmed the denial of an evidentiary hearing as to the claim about the secretly recorded statement not because the claim was ill-pled nor because it was conclusively refuted by the record.

Instead, contrary to this Court's rulings, it made its own finding of fact. It determined that even though the officer turned off the recorder and said, "I'm going to give you all privacy," R3 386, she did so to "convey[]to the defendant that he could tell his girlfriend about his arrest out of the public eye — to save embarrassment to them both" rather than to foster a sense of privacy. *Lundberg II*, 37 Fla. L. Weekly at D2686.

Even setting aside the Fourth District's odd conclusion that letting people talk "out of the public eye—to save embarrassment to them both" is somehow different from fostering a sense of privacy, the fact remains that, contrary to *Freeman,* the appellate court acted as the fact finder in a case in which the trial court denied an evidentiary hearing.

C. *The Fourth District applied the wrong standard for deficient conduct and did not consider prejudice.*

This Court has held that, as to ineffectiveness claims, a court must determine (1) whether counsel acted “outside the broad range of reasonably competent performance under prevailing professional standards,” and (2) whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Hurst v. State*, 18 So. 3d 975, 1008 (Fla. 2009). *See also Porter*.

(1) As to the issue of competent performance, a court must determine whether counsel made a reasonable strategic decision after a reasonably thorough investigation. It is “axiomatic that ‘counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’” *Hurst,* 18 So.3d at 1008 (quoting *Strickland*).

Without “a thorough investigation,” no strategic decision can be justified. This Court “rejects the notion that a ‘strategic’ decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.” *Rose v. State*, 675 So. 2d 567, 573 (Fla. 1996); *Douglas v. State*, 37 Fla. L. Weekly S13, S17 (Fla. Jan. 5, 2012) (following *Rose*). An action cannot be “‘justified by a tactical decision’ when ‘counsel [does] not fulfill their obligation to conduct a thorough investigation … .’” *Douglas* at S17.

Here, the Fourth District gave no consideration to whether counsel made a reasonably thorough investigation. The trial court denied a hearing on this claim, although the matter was addressed sideways at the hearing on other issues. The Fourth District noted counsel said at that hearing that “I think it’s well founded in the case law that you don’t have a reasonable expectation of privacy under those conditions … . You’re in an interrogation room, you’re in handcuffs … .” *Lundberg II*, 37 Fla. L. Weekly at D2686 (ellipses in original). But it did not determine whether counsel reached that conclusion after a reasonably thorough review of the law. In fact, he could not have - *State v. Calhoun*, *Allen*, *State v. Munn*, and *People v. A.W.* were all decided before his client’s 2003 trial.

(2) The court made no prejudice analysis. In fact, as discussed above, prejudice is obvious at bar.

II. THE FOURTH DISTRICT ERRED AFFIRMING AS TO THE CLAIMS ABOUT THE BOLSTERING OF V’S CREDIBILITY (CLAIMS 4, 5, 6, 7, 9 AND 12).

After the evidentiary hearing, the court denied the defendant’s ineffectiveness claims about extensive evidence bolstering V’s credibility.

These claims were numbers 4 (R1 90-91), 5 (R1 91-92), 6 (R1 93-96), 9 (R1 96-98) and 12 (R1 99-100). They involved a mass of evidence: (1) V said her aunt “asked if I was sure. And I said, yes,” SSR2 236, her father “kept asking me if it was really true,” and “I kept saying I swear and I'm sure,” her mother also “kept asking me if it really was true and I kept saying, yes,” and the parents “kept saying is it really true,” and she kept saying “yes, I swear.” SSR2 240-41. (2) The aunt said she asked V “are you sure you're not lying, you don't want attention? Or what did he do, are you mad at him? She goes, no.” SSR2 270. (3) The father said “I believed it, but it was just a shock, you know? I could see it in my daughter's eyes, I could see her telling me that, you know, you know, she's not lying, and it was scary.” SSR2 312. (4) The father testified to the counselor’s hearsay expert opinion that he “had no reason not to believe” V was telling the truth. SSR2 314-15. (5) The mother said she told V it was “really important that I needed to make sure it was true,” and V replied “mommy, I swear, it happened it happened - I swear,” SSR2 336; they “kept reiterating to her that that was serious,” and V “kept looking at me - she kept saying, mom, I swear, I'm not lying. It’s true, he did it,” and she “insisted that what she was saying was true.” SSR2 338. (6) The detective said on direct that she stressed to V the “extreme importance of telling the truth,” and watched “for her responses as to how she react[ed] to me and her body language and look[ed] for things that if [she was] being deceptive, and V reacted “Perfectly.” SSR2 374. (7) The detective said on redirect that children have blown things out of proportion in “five max” out of hundreds of cases but such cases were “very obvious from the get go,” SSR2 491-92, and V “was unconfused. I was the one that got confused. … . She kept me organized.” SSR2 493. (8) The detective said on tape that V’s story was pretty good, “she can tell me details about what you did and that makes it more believable that she’s telling the truth,” SSR2 435, the detective thought the aunt “doesn’t have anything to do” with the allegations, SSR2 447, and V was “very detailed and “very compelling to talk to,” SSR2 436-37, and was “really - really detailed.” SSR2 449.

A. *Counsel will be found ineffective for allowing evidence bolstering or vouching for credibility.*

In *Rhue v. State*, 693 So. 2d 567 (Fla. 2d DCA 1996), a capital sexual battery case, the victim’s mother testified that she asked him if it really happened and looked him in the face “because when you look him in the face you can tell.” The grandmother testified the child may tell lies about small things, “but never would he lie. We try to stress to him to tell the truth.” The great-grandmother said he wouldn’t lie. *Id.* at 569.

Further, a psychologist testified that he had found other children not credible, but not in this case. Counsel made a pretrial objection to the testimony but failed to preserve the issue for appeal. *Id.* at 567-69.

The trial court denied Rhue’s postconviction motion after an evidentiary hearing, but the Second District reversed, finding counsel was ineffective. *See also Norris v. State*, 525 So. 2d 998 (Fla. 5th DCA 1988) (counsel did not object to testimony that social worker scientifically “validated” child victim’s testimony); *Henry v. State*, 652 So. 2d 1263 (Fla. 4th DCA 1995) (counsel failed to object to testimony that officer was expert in determining if a victim was telling the truth by reading body language and, in her opinion, victim told the truth; new trial ordered despite judge's efforts to alleviate prejudice).

B. *Counsel was ineffective at bar.*

1. Counsel based his strategy on a misunderstanding of law.

Our law has long required that counsel "acquaint himself with the law pertinent to the facts." *Nelson v. State*, 274 So. 2d 256, 258 (Fla. 4th DCA 1973). It is "axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Hurst,* 18 So.3d at 1008 (quoting *Strickland*).

At bar, counsel did not have a strategy based on a reasonable investigation of the law. His strategy was based on an ignorant belief that the statements to the girlfriend were per se admissible no matter whether the police fostered a sense of privacy. R7 72-73. Due this ignorance, he felt he "had to formulate a defense knowing that the jury was going to hear certain statements that he made." R7 68. "Unfortunately, we had to do that in the context of statements he himself had made to his girlfriend, so we had – you know, that's what we were working with." *Id.* "So if all I brought out is that she had told her mom, she had told her dad, you know, and Aunt [redacted], if I had left it at that, then the jury could have concluded that, well, she told her mom, she told her dad and here we are and he's being charged. And then you couple that with his own statements, and we're in trouble." R7 83-84.

2. Counsel did not have a reasonable strategy for allowing the testimony.

Though the issue of whether counsel has a strategy is a question of fact, its reasonableness is a question of law reviewed de novo. *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (defendant not entitled to evidentiary hearing as to whether strategy was reasonable: "the reasonableness of a strategic choice is a question of law"); *Casey v. State*, 969 So. 2d 1055, 1058-59 (Fla. 4th DCA 2007) (following *Provenzano*); *Bowers v. State*, 929 So. 2d 1199 (Fla. 2d DCA 2006).

The alleged strategy at bar was unreasonable. Counsel wanted to show V's family doubted her in that they went to great lengths to be sure she was telling the truth. R7 68-69.

As for the testimony about the counselor, he said:

> A: No, it wasn't - it wasn't so much him vouching for her credibility but to show that the family - I mean, there's two sides of the coin. Yeah, you can say on the one hand he's vouching for her credibility. But on the other hand, you know, the family had, you know, gone so far as to consult with a professional. I mean you've gotta weigh - you've gotta weigh, you know, the tactical considerations, you know. Do I object to this or do I let it in simply because it may actually benefit us in the long run. You know, and those are tac-

> tical considerations you're confronted with in any trial situation. Do I - I do object to this or I do let it in. And, you know, all defense attorneys have to decide for themselves at that point in time, do I stand up and object to this or I do let it in. Do we achieve any tactical advantage at all by letting it in. And I - my belief was yes, that we would, because it would show the lengths the family went to questioning their on child's integrity.

R7 80-81.

Even if it was admissible that the parents consulted a counselor, that did not authorize use of his hearsay expert opinion that "he had no reason not to believe" V. SSR2 314-15.

Counsel said as to the detective that he wanted to show that the accusation of penetration came from the detective in that V told other people that the defendant just touched her. R1 86. His testimony on this point continued:

> Q: But couldn't you have gotten that out while asking the Court to suppress that - those comments from Detective Dennis that related to the girl's credibility?
>
> A: Yeah, you could, but at the same time, the big picture was we're trying to show that the child was less than credible. And that a lot of people, including the detective, including moms, dads, everybody were going to great lengths because they didn't necessarily believe her, especially the family. The law enforcement officer is always going to believe the child.

R7 86-87.

He did not explain how his strategy could have included allowing the state's tide of bolstering testimony. Such testimony is inadmissible. *See Williamson v. State,* 994 So. 2d 1000, 1013 (Fla. 2008) ("This Court has long recognized that '[i]t is improper to bolster a witness' testimony by vouching for his or her credibility.'" (quoting prior case)).

In summary, counsel had no reasonable strategy for allowing the incompetent evidence bolstering V's credibility.

3. Even if counsel had formed a reasonable strategy based on a thorough investigation of the law, it was executed in a way that harmed the defense.

In *Bowers*, *supra*, the defendant was charged with burglary and grand theft. Counsel had a strategy of relying on Bowers' credibility, which was to be built up by having him admit on direct that he had prior convictions. But in executing this strategy, counsel presented inadmissible evidence that the prior convictions included burglary and grand theft, and opened the door to cross about his client's prior imprisonment.

The Second District found: "Even if we were to conclude that counsel's strategy of being completely candid about Bowers' prior record was somehow reasonable, counsel's execution of the strategy defeated the intent." *Bowers*, 929 So. 2d at 1201.

Similar is *Visger v. State*, 953 So. 2d 741 (Fla. 4th DCA 2007), a burglary case. Counsel had an otherwise reasonable defense strategy of consensual entry, but he brought out no evidence of consent. Though he attacked the victims' credibility and the police investigation, he advised Visger not to testify even though only Visger could testify to consensual entry. The court found this bungled execution made the strategy unreasonable. *See also Cabrera v. State*, 766 So. 2d 1131 (Fla. 2d DCA 2000) (counsel had "bastardized theory of entrapment," but did not seek instruction on it; state then told jury that instructions did not authorize defense), *Mathis v. State*, 973 So. 2d 1153 (Fla. 1st DCA 2006) (even if decision was strategic, "arguing that the jury should find appellant not guilty because he was acting in self-defense and then failing to request an instruction on that theory was patently unreasonable and, thus, subject to collateral attack").

So even if a strategy is reasonable on its face, it will be found unreasonable if carried out in a self-defeating way.

At bar, counsel planned to undermine V's credibility. But it was not undermined by the unobjected-to testimony. <u>All</u> the state's witnesses testified to her credibility. This included incompetent expert testimony. So the avowed strategy was unreasonable given the flood of prejudicial improper evidence the jury should never have heard.

In *Acker v. State*, 787 So. 2d 77 (Fla. 2d DCA 2001) counsel was ineffective because he did not develop a coherent strategy and introduced evidence which, while it had some effect of impeaching the state's main witness, hampered the defense and strengthened the state's theory of the case.

At bar, the evidence at issue was extremely favorable to the state's case: it showed that, though the family and police had doubts about V's story, they ultimately established her truthfulness, including verification by the counselor - an independent, disinterested expert.

There was no physical evidence. The state's case depended on V's credibility. While the defense might have benefitted from evidence that the family and police initially doubted her, the defense was gravely hurt, and the state was greatly helped, by their conclusion that she did tell the truth, by the father's (in effect) expert opinion as to his own daughter, by the psychologist's expert opinion, by the detective's opinions that V showed no signs of deception, that she can tell deception "from the get go," and by her assessment of V's credibility based on her own experience and expertise.

C. *The lower court used the wrong standard in affirming the trial court.*

Contrary to *Provenzano* and *Bowers*, which held that reasonableness of a strategy is a question of law to be decided de novo, the Fourth District deferred to the trial court's finding that counsel's strategy was not "completely unreasonable": "Based upon our own review of the trial transcript, and giving the deference required under *Strickland,* we cannot conclude that the strategy was completely unreasonable." *Lundberg II*, 37 Fla. L. Weekly at D2686.

The "completely unreasonable" standard is also contrary to well-settled rule that the defendant need only show that the representation "fell below an objective standard of reasonableness." *See*, e.g., *Porter*, 558 U.S. at 38-39, *Hurst*.

Also contrary to well-settled law, the Fourth District used the wrong prejudice standard: "we cannot say that had all of the evidence bolstering the victim's credibility been excluded, the result would have been any different or that the jury would have had a reasonable doubt respecting guilt, thus failing the second prong of *Strickland*." *Lundberg II*, 37 Fla. L. Weekly at D2687. The right standard is whether there is a reasonable probability the result would have been different – a standard lower than a more likely than not standard. *Porter*, 558 U.S. at 44.

Further, in its prejudice discussion, the court relied on the secretly recorded statement to the girlfriend. *Lundberg II*, 37 Fla. L. Weekly at D2687 ("The defendant admitted to his girlfriend in the taped conversation that he might have touched the child when he was drunk. … . His attempt to explain away his statements to his girlfriend at the jail were weak and ineffective."). It thus used the incompetent failure to challenge the statement to reject this ineffectiveness claim.

III. THE COURT ERRED IN AFFIRMING THE SUMMARY DENIAL OF THE CLAIMS ABOUT THE HURRICANE INCIDENT.

Claims 16 and 22 concerned the date of the alleged incident as a hurricane was approaching. This incident formed the basis for the lewd assault conviction.

In 1999, the Legislature rewrote section 800.04, Florida Statutes (1997) to make it a <u>first degree felony</u> for a person aged 18 or over to touch the breasts, genitals, genital area or buttocks, or clothing covering them, of a person under age 12 in a lewd or lascivious manner. § 800.04(5)(b), Florida Statutes (1999). This change, which altered and elevated a prior <u>second degree felony</u> with different elements, was effective October 1, 1999. Ch. 99-201, Laws of Fla.

At bar, count II alleged the defendant violated this new statute in 2001. R3 399. He was convicted of, and sentenced for, this first degree felony. R3 205-16, 413.

The record shows this alleged incident occurred when a hurricane was approaching. V's father said it might have been Hurricane Floyd. SSR2 305, 326. The mother said the storm's eye was expected to hit West Palm first. R5 889. The detective said the incident was "around October 1999." R5 936. On the tape, she said it was "like '99, '98 something like that." R1 147. The state told the judge: "The only event that we could relate, uh, that count to was that it occurred during a hurricane. And that's what I stated in the Statement of Particulars as far as Count 2. We did not, uh, specify a date, because we couldn't. … . I did not know when that hurricane was." SSR3 507.

Defense counsel moved for acquittal because the evidence showed the incident occurred much earlier than the 2001 period alleged in the information. R3 572-74. This motion was properly denied since counsel failed to show prejudice to the defense. R1 117. *See Tingley v. State*, 549 So. 2d 649, 651 (Fla. 1989) (variance of date is allowed absent showing of prejudice).

Claim 18 alleged counsel incompetently failed to: seek judicial notice that Hurricane Floyd was in September 1999, <u>before the effective date of section 800.04(5)(b)</u>, argue for an acquittal on this ground, show the variance of the date was material, and subject the issue to adversarial testing. R1 116-17.

The defendant attached to his motion Florida Almanac excerpts stating Hurricane Floyd "so menaced Florida's east coast that 1.3 million people were evacuated and, for the first time, the entire east coast fell under a hurricane warning," although the storm ultimately passed by the state, "raking the coast but doing relatively little damage." R1 157.

As to Claim 18, the trial court ruled the defendant's conduct was illegal under the earlier statute. R4 686. This ignored that the statutory change altered the elements and increased the level of the offense so as to amount to an ex post facto violation. Art. I, § 10, U.S. Const.; Art. I, § 10, Fla. Const.

The court acknowledged counsel failed to show prejudice as to the variance, but it said the issue could have been raised on appeal. R4 687. In fact, it could not be raised on appeal: a variance is allowed unless defense counsel has shown prejudice. *See Tingley*.

Relying on non-record materials attached to the state's response, the court said that, though Floyd was in September 1999 (before the statutory change), Hurricane Irene was in October 1999 (after the change), and the hurricane in question was Irene because, while Floyd threatened the area, the eye of Irene passed over it and, the court said, the testimony at transcript page 353 was that the eye passed over the area. R4 688-91.

In fact, the testimony, as quoted by the trial court, R4 690, was that the eye "was supposed" to hit the area. SSR3 353.

Further, it was error to rely on extra-record material to deny the claim. *See Smalls v. State*, 18 So.3d 606, 608 (Fla. 1st DCA 2009) (error to rely on non-record photos in summarily denying 3.850 claim). Regardless, the state's attachments show Irene crossed the Keys onto the mainland and then went back to sea near Jupiter (so that the eye did not go over St. Lucie County) and the hurricane strength winds were all offshore. R3 418. (The defendant said in his response that the event alleged in Count II occurred during an evacuation, and there was no evacuation for Irene. R4 625.) Thus, there is a live factual issue as to whether Count II occurred before the statutory change. The court erred in denying this claim without an evidentiary hearing.

Claim 22 alleged: the state made a knowingly false allegation of the 2001 time period despite the absence of any material witness to that time and even though it knew V and her family did not live in St. Lucie County in the period alleged in the information, and the area was not threatened by any hurricane in the 2000-2002 period. The state said in its statement of particulars that the incident was associated with a hurricane, but refused to give a time for the hurricane. By falsely alleging the 2001 period, the state was able to join counts I and II as supposedly occurring around the same time. R1 124-27.

The trial court denied claim 22 based on its findings as to claim 18 that, based on matters outside the record, the incident occurred at the time of Hurricane Irene. It thus committed the same errors just discussed.

The Fourth District affirmed the denial of an evidentiary hearing on this issue without explanation. This ruling was contrary to this Court’s cases. A defendant is entitled to an evidentiary hearing “unless the claim is legally insufficient or the record conclusively refutes the factual allegations,” and the appellate court “must accept as true the defendant’s factual allegations to the extent they are not rebutted by the record.” *Freeman*, 761 So. 2d at 1064 and *Thompson*, 759 So. 2d at 663.

IV. THE LOWER COURT ERRED IN AFFIRMING THE SUMMARY DENIAL OF CLAIMS 8, 11, 15, 16, 19, AND 21.

The Fourth District erred in affirming without explanation the summary denial of these issues where the record did not conclusively refute them as required by *Freeman* and Thompson.

A. *Claim 8* alleged counsel incompetently elicited the detective's testimony (SSR3 470-71) that in a handful of cases children say something that's not true and it gets blown out of proportion. R1 96. The judge summarily denied the claim, ruling the evidence "appears to be to the Defendant's benefit and not prejudicial" so that it did not need to consider whether counsel had a strategic decision. R4 673.

The court erred. Counsel may be ineffective for allowing incompetent evidence even if it has some benefit, especially if it detrimentally affects the defense. *See Bowers* and *Acker*.

Here, any small benefit to the defense was washed away by the state's redirect, where the detective testified that, while incidents are blown out of proportion in "five max" out of hundreds of cases, such cases are "very obvious from the get go." SSR3 491-92. The detective did not consider this case to fall into that category: there was "no confusion" on V's part, she was "totally consistent through the whole thing." SSR3 498.

Further, there was no reason to question the detective on this issue. The detective said on the tape that "kids have a way of maybe blowing things out of proportion." SSR3 437. And it was the statements <u>on the tape</u> that counsel sought to turn to his client's advantage, saying in final argument: "Now she told you in her discussion with Robert on at least two occasions she said that children sometimes don't tell the truth. Sometimes children blow things out of proportion." SSR4 643 (e.s.).

B. *Claim 11* alleged failure to move to exclude parts of the police statement about the defendant's record. R1 98-99.

In the tape, the defendant and detective discussed that the defendant had a "lawyer from before," SSR3 406-07, the detective said she "ran your file" and found things like alcohol, SSR3 437, and he had a "past" but it "can't be used against you." SSR3 441.

In denying this claim, the trial court ruled the statement about counsel was "invited error" and merely clarified that the defendant had an attorney, the reference to the "file" only indicated alcohol problems, which the defendant admitted in other statements, including the statement to the girlfriend (which takes us back to the failure to competently move to exclude that statement), and the statements did not refer to bad acts or crimes. R4 675-76.

The court did not say how the "invited error" rule could apply to police questioning about counsel – the detective raised the issue. Regardless whether it went to whether the defendant had an attorney (an irrelevant issue at trial), it was part of a series of comments pointing to prior criminal behavior.

The detective directly tied the prior alcohol cases to the present allegations: Right after mentioning the prior alcohol cases, she said “maybe you touched her, maybe you were drinking back then and maybe you did something that wasn’t [as] big a deal as what she’s saying, okay?” R4 919-20. Right after discussing the defendant’s past, she said “if there is anything that happened and you drank and you do act different and you have gotten help for that –” R4 923-24.

Alcohol problems are usually seen as involving bad acts. That they came to the police’s notice as part of the defendant’s “file” shows prior criminal behavior. The totality of the statements – having an attorney from “before,” having a “file,” and having a “past,” all of which were known to the detective and which, the detective suggested, might explain the crimes at bar - put before the jury the stink of prior criminality.

Further, these statements were inadmissible as they only led to a denial of guilt in the part of the interrogation played for the jury. *See Jackson v. State*, 107 So. 3d 328, 340-41 (Fla. 2012).

C. *Claim 15* alleged counsel failed to argue that the police did not properly advise the defendant of his right to have counsel present during questioning. R1 106-07.

The detective told the defendant: “You have the right to an attorney and to have him here with you before any questioning,” “If you cannot afford to hire an attorney, one will be appointed for you before I ask any questions," and "If you decide to answer questions now without an attorney you still have the right to stop answering at any time – answering questions at any time." Also, she asked if he was "willing to answer my questions now without any attorney present." He said he understood and agreed to answer her questions. R2 295.

The trial court ruled the warnings were sufficient under *Florida v. Powell*, 130 S.Ct. 1195 (2010), *Canete v. State*, 921 So. 2d 687 (Fla. 4th DCA 2006), and *Williams v. State*, 998 So. 2d 650 (Fla. 4th DCA 2008). R5 680-82. The court erred.

The warnings were not adequate under *Florida v. Powell*. Powell was told both that he had the right to talk to a lawyer before answering questions and that he could use "any of these rights" at any time during the interview. *Id*. at 1200. These combined warnings were adequate:

> … . The Tampa officers did not "entirely omi[t]," post, at 1210 - 1211, any information *Miranda* required them to impart. They informed Powell that he had "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview." App. 3. The first statement communicated that Powell could consult with a lawyer before answering any particular question, and the second statement confirmed that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times.

Id. at 1204-05 (e.s.). Likewise, in *Canete* the suspect was told:

"If you decide to answer the questions now, without an attorney present, you still have the right not to answer my questions at any time until you can speak with an attorney." 921 So. 2d at 687 (e.s.). *Williams* is beside the point – it merely held the defendant could not argue on a successive 3.850 motion that he was not adequately warned of his right to counsel during questioning, and the rights form was adequate under *Canete*.

At bar, the defendant was told he had the right to an attorney before questioning, but not that he could exercise that right at any time during questioning. And though he was told he could stop the questioning, he was not told that he could have the attorney present during questioning.

Further, though the court inferred that he was already aware of his rights, that is irrelevant. Suspects must be advised of their rights even if they already know about them. *See U.S. v. Patane*, 542 U.S. 630 (2004).

D. *Claim 16* alleged counsel was ineffective as to the videotape in that he did not object that it was not properly authenticated when introduced at the suppression hearing, the state did not show a chain of custody, and counsel did not investigate apparent tampering. It alleged: at the suppression hearing, the detective said she did not review the exact copy used in court that day, and instead reviewed a different one; she said in her deposition, her police report and her probable cause affidavit that the defendant admitted penetration but that statement was not on the tape; the tape had “flashes/splices” indicating tampering; it did not have her statement to him that she was putting in her report that he penetrated V regardless whether he admitted it; the record contained two transcripts, one of 80 pages and one of 104 pages with no explanation; the interview was on May 2, but property receipts showed she did not put the tapes into evidence until May 7, with no accounting for the meantime. R1 107-14.

The trial court denied the claim, saying the state acknowledged the tape used at trial had been edited, with blank spots and a loud noise, the tape was authenticated without objection, and the jury was instructed to disregard the editing. R4 683-85.

The court erred. As a result of the ruling on the suppression hearing, an edited tape was used at trial. So the discussion of editing, blank spots and noise at trial concerned the tape as altered <u>after</u> the suppression hearing. This did not affect the separate issue of whether it was altered <u>before</u> the suppression hearing. Further, the fact that the tape was authenticated at trial without objection does not refute the ineffectiveness claim. The claim is counsel incompetently failed to investigate the the tape in order to be able to challenge its authentication.

Moreover, the defendant alleged counsel told him he did not challenge the integrity of this crucial evidence at the suppression hearing because he did not want the police to look like liars. R1 109, 113. This is a bizarre strategy at a suppression hearing, where the point is to show police misconduct. The record does not refute the claim that counsel formed an unreasonable strategy without adequate investigation, to his client's prejudice.

E. *Claim 19* alleged counsel was ineffective for failing to investigate and present expert testimony about parental alienation syndrome in support of the claim that the aunt manipulated V into making the accusations. R1 117-18.

The trial court suggested the defendant had not adequately plead his claim in that he did not state with specificity what evidence the expert would have presented and how it would have helped the defense. R4 692. But in that case, the court should have given leave to refile. *See Pressey v. State*, 19 So.3d 1092 (Fla. 4th DCA 2009).

The trial court also wrote that a law review article disapproved of such testimony, as had courts in four states (Louisiana, Wisconsin, Indiana and New York). R4 692. The main case cited was *Palazzolo v. Mire*, 10 So. 3d 748 (La. Ct. App. 2009), a child custody case. The court misread *Palazzolo*. *Palazzolo* noted that some commentators dispute the syndrome and others consider it valid. *Id.* at 772-74. It did not disapprove of the testimony, noting that, in the case before it, there was conflicting evidence about the child's alienation problems so that it deferred to the trial court's ruling as to custody. The same is true for the Wisconsin case, *Wiederholt v. Fischer*, 485 N.W. 2d 442 (Wis. Ct. App. 1992). In fact, such evidence was admissible in both cases. In the Indiana case, the majority relied on the evidence. *Hanson v. Spolnik*, 685 N.E. 2d 71, 77 (Ind. Ct. App. 1997). In the New York cases (both trial court decisions), it was acknowledged that other states allow such evidence. *People v. Loomis*, 658 N.Y.S. 2d 787 (N.Y. Co. Ct. 1997); *People v. Fortin*, 706 N.Y.S. 2d 611, 614 (N.Y. Co. Ct. 2000).

The trial court also wrote that such evidence could not apply because the aunt and the defendant were not the child's parents. R4 692. But it cited nothing that says the syndrome applies only to parents and not to aunts or uncles.

F. *Claim 21* alleged ineffectiveness for failure to object when: The state violated the order suppressing all of the tape from when the officer threatened the defendant with death until when he was alone with his girlfriend. Contrary to the court's order, the state stopped the tape before he was arrested and handcuffed, then cut to a section showing him under arrest and handcuffed and asking if he could bond out, then cut to the detective exiting the room, leaving the defendant was in restraints. It thus put before the jury that he incriminated himself in the gap time, despite the order suppressing his incriminating statement. R1 120-24.

The court adopted the state's response in denying this claim. R4 693-94. The state's response merely referred to the the words on the tape without considering the sight of the defendant's sudden transition from interrogee to arrestee. R2 290. This did not refute his claim.

V. THE FOURTH DISTRICT ERRED IN AFFIRMING THE SUMMARY DENIAL OF CLAIM 2, WHICH ALLEGED INEFFECTIVENESS FOR FAILING TO OBJECT TO THE INSTRUCTION ON ATTEMPTED CAPITAL SEXUAL BATTERY WHERE THERE WAS ONLY EVIDENCE OF A COMPLETED OFFENSE.

The court denied an evidentiary hearing as to claim 2. That claim alleged counsel failed to object to the instruction on attempted capital sexual battery as a lesser where the evidence showed only a completed capital sexual battery. R1 87-88.

Badger v. State, 933 So. 2d 729 (Fla. 4th DCA 2006), reversed the summary denial of a similar claim as to an attempted burglary conviction:

> In his fourth claim appellant alleged trial counsel failed to object to the jury instruction on attempted burglary of a conveyance with a battery because the evidence only showed a completed burglary. We find that pursuant to *Richardson v. State*, 922 So. 2d 331 (Fla. 4th DCA 2006), and *Pepitone v. State*, 846 So. 2d 640 (Fla. 2d DCA 2003), this claim has merit and reverse and remand for an evidentiary hearing or the attachment of records that conclusively refute this claim. We affirm as to all other claims.

Id. at 730.

Under *Badger*, the court erred in denying this claim without an evidentiary hearing and without attaching records conclusively refuting the defendant's claim.

In denying the claim, the court relied on the state's response. R4 667-69. The state argued counsel could not be ineffective on this issue as a matter of law. R2 268-70. This argument is refuted by *Badger*.

The state also said the evidence of an attempt came from the defense's impeachment of the state's witnesses with prior inconsistent statements. R2 269-70. But impeachment is not substantive evidence. *See Woodall v. State*, 39 So.3d 419, 421 (Fla. 5th DCA 2010) ("The impeachment of Woodall's mother and stepfather at trial by their prior inconsistent statements was just that - impeachment evidence, which cannot be used as substantive evidence to prove [Woodall] actually possessed a deadly weapon (i.e., the knife).").

In this regard, the state pointed to the following:

• V's testimony at transcript pages 257-58. R2 269. This passage was:

> Q Now when you talked with the Detective, did she – did she somehow suggest to you that he put his finger inside you?
>
> A I told her.
>
> Q You told her that or did you tell her he touched me?
>
> A After I said he touched me.

SSR2 257-58. Thus, V told the detective the defendant touched her, and then explained that he put his finger inside her. This shows a completed act of penetration, not an attempt.

• Questioning of the aunt at transcript page 288, lines 2-4. R2 269. The state took this brief exchange out of context. In context, the questioning went to impeach <u>the aunt</u> about her previous testimony.

The aunt had testified earlier that V said the defendant "touched me in there," and "used his finger," SSR3 269-70.

Then, in the passage cited by the state, defense counsel sought to impeach <u>the aunt</u> on this point. Here is the full exchange, extending from the transcript page cited by the state:

> A I didn't tell her she got up in there, she just, you know, I told her did he get in and she goes, well, I woke up and he was rubbing and it was irritating. Something woke me up because I kept feeling something. And when I went to the bathroom, it was burning.
>
> Q Okay. But she never specifically told you that he had put his finger
>
> A She didn't explain it to me in that sense.
>
> Q My question is, did she ever state to you he put his finger in my vagina?
>
> A No.

R3 287-88.

By leaving out the full context, the state obscured that this was an attempt to impeach the aunt. It was not substantive evidence of an attempt as opposed to a completed act.

• Questioning of V's aunt at lines 14-25 of transcript page 295. R2 269. Again, the state took this passage out of context.

The state's cited excerpt consists of the last few lines of cross-examination, and omits the fact that the aunt was being impeached with her own deposition testimony. The actual context was that counsel sought to clarify what the aunt had said at deposition. SSR2 294 ("I'm just trying to get at what you actually stated in your deposition back in October"); SSR2 295 ("I'm simply asking what you told me back on October 22nd"). At deposition, she had said she asked V if the defendant went "up in there," and V said "no, just like – just like I was sleeping." SSR2 295. It was the aunt who was being impeached with her prior statement, not V. Further, on the next page the state showed on redirect that the aunt's deposition did not contradict her trial testimony, as the aunt explained that V had simply not understood her question. SSR2 296.

• An excerpt from the cross-examination of the father (SSR2 326) to the effect that he did not recall V saying the defendant put it in her vagina. R2 269-70. The fact that the father did not recall V saying this was not a prior inconsistent statement of V, and was not competent evidence of a criminal attempt.

In summary, the state did not show competent evidence of a criminal attempt in the foregoing excerpts, which are mostly just clumsy attempts to impeach persons other than V with their own prior statements. These prior inconsistent statements were not substantive evidence of a criminal attempt. *See Woodall*.

The defendant made a viable claim that he was denied effective assistance of counsel, and his claim was not refuted.

The Fourth District affirmed the denial of an evidentiary hearing without explanation. The affirmance is contrary to this Court's holdings that there must be an evidentiary hearing "unless the claim is legally insufficient or the record conclusively refutes the factual allegations." *Freeman*, 761 So. 2d at 1064; *Thompson*, 759 So. 2d at 663.

CONCLUSION

The lower court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 18 November 2013 a copy of this brief, with appendix, has been efiled with this Court and furnished to Jeanine M. Germanowicz, Esq., Assistant Attorney General, Counsel for Respondent, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida, 33401-2299, by email to: CrimAppWPB@MyFloridaLegal.com.

/s/ Gary Lee Caldwell
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CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

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