IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CLIENT,

Appellant/Defendant,

v.

STATE OF FLORIDA,

Appellee/Plaintiff.
_____/

CASE NO: X
L.T. NO: X

INITIAL BRIEF

ON APPEAL FROM FINAL JUDGMENT OF CONVICTION
HON. JUDGE

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INTRODUCTION AND QUESTIONS PRESENTED

Mr. X was charged with sexual battery by penetration with his mouth, sexual battery by digital penetration, lewd and lascivious molestation by touching the victim's vagina, lewd and lascivious conduct by touching with his penis, and lewd and lascivious conduct by soliciting to touch his penis.

The victim MD made out of court statements that he had penetrated her vagina with his mouth and fingers, touched her vagina, and touched her with his penis and asked her to touch it. At trial, however, she said "no" when asked whether he had touched her with any part of his body other than his mouth, and said "I don't know" when asked whether he had used his hands.

Mr. X was acquitted of sexual battery but convicted of the lesser included offenses of battery. He was acquitted of lewd conduct by touching with his penis, and the state dismissed the count of lewd conduct by solicitation. He was convicted of lewd and lascivious molestation by touching the victim's vagina.

This case presents the following question:

1) Has the state presented sufficient evidence of penetrating and touching MD's vagina to sustain Mr. X's convictions where only her out-of-court statements, denied at trial, support the charge?

STATEMENT OF THE CASE AND FACTS

On December 4, 2013, Mr. X was arrested and charged with sexual battery on a victim under the age of twelve years in violation of section 794.011(8)(c), Florida Statutes. (R. 1).[1] Mr. X was subsequently charged by Information with two counts of sexual battery on a person less than twelve years of age, one count of lewd or lascivious molestation, and two counts of lewd or lascivious conduct. (R. 21-22). An Amended Information was filed on March 13, 2014, narrowing the dates for the offenses listed. (R. 95-96). The charges stem from incidents alleged to have occurred between Mr. X and his step-granddaughter MD on or about August or September 2013. (R 95-96).. The Amended Information charges:

Count I: sexual battery by causing his mouth to have union with the sexual organ of MD. (R. 95).

Count II: sexual battery by penetrating the sexual organ of MD with his finger. (R. 96).

Count III: lewd and lascivious molestation by touching MD's genital area or covering clothing with his fingers. (R. 96).

Count IV: lewd and lascivious conduct by touching MD with his penis. (R. 97).

[1] In this brief, (R. __) refers to documents paginated in the index; (T. __) refers to the trial transcript, which is not paginated with reference to the index; and (Supp. R. __) refers to the supplemental record.

Count V: Lewd and lascivious conduct by soliciting MD to touch his exposed sexual organ. (R. 98).

Appellant was found guilty of the lesser included charge of battery on counts I and II and guilty as charged in the indictment of count III[2] by a jury on November 7, 2014. (R. 252-61). On December 18, 2014, Mr. X was sentenced to life imprisonment on that conviction, and 365 days county jail with 365 days credit for time served on each of the battery charges. (R. 272). Mr. X's life sentence was to run concurrent with his battery sentences. (R. 284). Mr. X was also sentenced as a sexual predator and sexual predator probation was imposed as a result. (R. 280).

I. Pretrial Proceedings.

The State filed a Notice of Intention to Offer Child Victim's Hearsay Statement on March 24, 2014. (R. 111-12). The State also filed a Notice of Intention to Use Similar Fact Evidence based on an incident that occurred at Moss Park in April 2013 where Mr. X allegedly molested MD while they were on a camping trip. (R. 113-14). An Amended Notice of Intention to Offer Child Victim's Hearsay Statement and Amended Notice of State's Intention to Use Similar Fact Evidence were also filed. (R. 115-16; 175-76; 177-78).

Hearings on the similar fact evidence and child hearsay were held on October 17, 23, and 31, 2014. (R. 215-16). MD's mother CR testified that she met

[2] Counsel did not request an instruction on any of the permissive lesser included offenses, such as battery. (T. 569-70).

Appellant five or six years before, and he was nice to MD and her sister SD. (Supp. R. 76). The children stayed at the home of their grandmother (Appellant's wife) while he was there. (Supp. R. 78). On Easter weekend in 2013, they went on a camping trip with a large group, including Appellant. (Supp. R. 79). After this, MD did not appear to like going to her grandmother's house, and "a few times she asked me if he was there. And before I, you know, like, if I would say we were going over there, she would ask me, oh, is Al gonna be there?" (Supp. R. 80-81).

In December 2013, her daughter SD approached and said "Mom, before I go to bed, I have something to tell you. And I said, okay. Tell me. Well, all she says is: MD told me she was raped, and it was by X." (Supp. R 82). MD was called down. She told her mother that "it was at the camping trip and she told me exactly what he did to her. That he went into her pants, he touched her inside her vagina and that it didn't feel good, that it hurt her." (Supp. R. 84). MD also described what Clarissa believed to be an incident of rubbing: "She said she felt something touch her. She couldn't see 'cause it was dark, but she thought it was his penis 'cause she heard his pants unbuckle and then it touched her – it was touching her on her back." (Supp. R. 94-95).

She also described a second incident: "There was another time she says that he did the same thing to her, but at that time he also pulled down her pants and put

his mouth on her private also," and "he took his penis out and was telling her to touch it." (Supp. R. 84).

SD, MD's sister, testified that she was nine years old and knew the difference between a lie and the truth. (Supp. R. 134-35). She and her sister shared a bed and would stay up and talk sometimes. (Supp. R. 137). She remembered the Moss Park camping trip, and stated that MD and X stayed up after everyone else went to sleep. (Supp. R. 139-42). MD told her "SD, X raped me" one of those occasions, and told her not to "tell on me. I'm scared." (Supp. R. 144). SD told her mother the next evening. (Supp. R. 145, 154). She did not discuss it with MD again first, and told her mother that Mr. X had never done anything like that to her. (Supp. R. 156-58).

MD testified that she was eleven years old, and understood the difference between a lie and the truth. (Supp. R. 160-61). At the Park, she didn't go to bed when her grandmother and the other children did. (Supp. R. 166). She stayed awake, while Mr. X and his friends hung out by the fire. (Supp. R. 167). When she told him she was tired, he told her "go to my tent; I have something for you." (Supp. R. 167-68). After a while, he came in and told her to "lay down and turn around 'cause he was – he was – it's a surprise." (Supp. R. 168-69). She heard a zipper, and then he put his hand down the front of her pants, penetrating her bare vagina. (Supp. R. 169). "He put something up against my back and it didn't feel

like a hand." (Supp. R. 170). "I had a thought that it was his – his penis." (Id.). She told him that she "was scared to be over there because it was really dark and there were scary noises." Mr. X took her to her mother's tent, telling her "what happened with – with us, stays with us. I don't want to get blamed for anything." (Supp. R. 170-71).

MD testified that the second incident occurred at her grandmother's house on CCC shortly before the school year began in 2013. (Supp. R. 171-72). Her grandmother left around noon. (Supp. R. 172). She was lying on his bed playing with a tablet computer. (Supp. R. 173). "He had came and then went under the covers and pulled down my pants and then he put his mouth on my vagina." (Supp. R. 173). When asked "Did he touch your body with any other body part," she replied "yes," and when asked to tell what part she said "his hand again." (T. 173). He touched her and penetrated her digitally, and tried to make her touch him as well. (Supp. R. 173-74). She replied "No" when asked whether he had "touch[ed] your private areas over your clothes." (Supp. R. 174). She testified that he had rubbed his penis on her, but never asked her to touch it. (Supp. R. 174).

The CPT interview was published to the court. (Supp. R. 197). In the interview, she said that after her grandmother left "he called me in his room. And I thought he was gonna let me play with his Kindle, but then sat on bed and then he

starts touching me and stuff." (Supp. R. 207). He took his penis out and rubbed it on her leg, "saying for me to touch it," then put his finger "out and inside of" her vagina. (Supp. R. 209-10). He then pulled down her pants and licked her vagina. (Supp. R. 212). She also described thePark incident, where he rubbed her vagina on the outside and rubbed his penis against her. (Supp. R. 217-18).

Counsel made no legal argument in opposition to admitting the CPT interview or other hearsay statements describing the alleged offenses. (Supp. R. 250).

II. Jury Trial: State's Case.

Detective MOC testified that he was called out to meet with MD. (T. 54). He met with Clarissa, spoke to her briefly, and reviewed her written statement. (T. 55). He spoke to her husband MD as well, but did not speak with SD or MD. (T. 56). Child Protection Team ("CPT") Case Coordinator Alexandra Gregory testified that interviewers try to avoid putting any ideas in the mind of the child being interviewed. (T. 81). She authenticated the DVD of the interview, which was admitted without objection. (T. 88).

In the taped interview MD said that Mr. X had touched the outside of her vagina a couple of times. (T. 94). She described the Blackberry court incident, including digital penetration, licking her vagina, and rubbing his penis on her leg.

(T. 94-101). She then described the Moss Park incident, with rubbing the exterior of her vagina and rubbing his penis against her backside. (T. 102-04).

CR testified she had seen Mr. X as a nice person who treated her children well. (T. 125). His relationship with MD had been good until March 2013, but afterward MD did not want to go to her grandmother's as often and would ask whether Mr. X would be there. (T. 133). SD had told her that Mr. X raped MD; MD confirmed it, crying. (T. 140).

SD testified that she and MD had had a good relationship with Mr. X. (T. 226-28). She described a picture taken on the first day of the Moss Park camping trip. (T. 231-32). She said that MD had stayed up when the rest of the children went to sleep. (T. 233). She described the December incident when MD told her "Al raped me." (T. 238). On cross examination she admitted that her mother was the only person she told about the statement; the investigators did not question her. (T. 241). On redirect, she said that she told her mom that MD "Told me that she got raped," then said it was "Al" when asked. (T. 246).

MD testified next. (T. 253). The jury was given a Williams rule instruction that allowed them to consider her testimony regarding the Park incident, *inter alia*, to corroborate MD's testimony. (T. 262).

The Blackberry Court incident happened in the afternoon, while her grandmother was at the store. (T. 278). She was in Mr. X's bedroom using the

Kindle when he came in. (T. 279). He got under the covers and pulled down her pants, then put his mouth on her vagina and penetrated her with his tongue. (T. 281). This time, she said that he did not do anything with any other part of her body; when squarely asked whether he used his hands, she said she did not remember. (T. 281). The exact testimony of what happened after she testified "he put his tongue in me" was:

> Q: Did he do anything else with any other part of his body?
> A: No.
> Q: Did he use his hands to touch you?
> A: I don't remember.
> Q: Once he stopped having his mouth on your vagina – before he did that, did he do anything to your vagina?
> A: I don't remember.
> Q: After he was done putting his mouth on your vagina, did he do anything with his private?
> A: No.
> Q: Did he ask you to do anything with his private?
> A: At the camping trip.
> Q: Okay. What happened after he stopped?
> A: I don't remember.
> Q: Did you get your clothes back on?
> A: Uh-huh.

(T. 281-82). On cross-examination, she replied "yes" to the question "Do you believe you told it accurately when you just explained it to [the prosecutor]?" (T. 303-04).

Later, in the car with SD and MD, Mr. X said "what happened with us stays with us. I don't want to get blamed for anything." (T. 282, 307). Around

Thanksgiving, MD told SD that Mr. X had "touched" her. (T. 283). She then told her mother that Mr. X had "molested" her. (T. 285).

On cross examination, she explained that she left the restroom as her grandmother was leaving, and saw her in the surveillance video as she drove off. (R. 295-96). She verified that Mr. X had come into the room, not called her. (T. 301-02). She also stated for the first time that the Moss Creek incident occurred on the second night of the trip, not the first (T. 332). On redirect she stated that she told Ms. G everything she remembered during the CPT interview. (T. 340). On recross, she admitted she had watched the CPT interview earlier that day. (T. 342-43).

III. Jury Trial: Defense case and sentencing.

The State's motion to amend the information to conform with the evidence presented for the date range was granted without objection. (T. 345-47). The defense moved for acquittal on count II because MD denied digital penetration on the stand. (T. 348). The state relied on the CPT interview. (T. 348-49). The defense also moved for acquittal on count III because there was no testimony of touching at trial, and on count IV because there was no testimony regarding touching her with his penis. (T. 351).

The state agreed to dismiss count V because there was no competent evidence that Mr. X solicited her to touch his penis. (T. 351-52). The parties disagreed about whether MD had recanted her statement in the CPT interview. (T. 353-56). The court reserved its ruling on counts II-IV. (T. 357).

Mr. X's first witness was his twelve-year friend DE. (T. 388-89). Ms. E had been at the Park camping trip. (T. 290). According to her, all the children had gone to bed by the time the campfire was going on the first night. (T. 393). She did not remember any children being around while the adults socialized the second night, either. (T. 395).

CB testified that he had been friends and neighbors with Mr. X since 1999. (T. 412). He had helped Mr. X fix Clarissa's Ford Taurus, which Mr. X had helped her purchase. (T. 418-19). On cross-examination, he said he spent most of

the weekend "B.S.ing" with Mr. X, but that it was not impossible Mr. X had directed a child to his tent while he used the restroom. (T. 432-33).

Mr. X testified he had come to the United States from Costa Rica in 1980, and was not a citizen. (T. 446). He married Ms. L primarily to help with that, although they had a sexual relationship as well. (T. 452, 457). He moved into her house in July 2011. (T. 459). He did not particularly like children, and would usually be gone when they visited and during holidays. (T. 459-61). At Moss Park, the adults stayed up late and all four of Clarissa's children went to sleep with Ms. L. (T. 468-69). MD was never in a tent with him. (T. 469). A photograph taken Saturday morning showed MD walking on his feet holding his hand. (T. 471-72).

He admitted he was probably home alone with MD some time in August or September but did not remember. (T. 482). When Ms. L went shopping she nearly always took the children with her. (Id). He never molested MD. (T. 483).

He had around $80,000 in savings. (T. 489). After his arrest, $12,000 was withdrawn without his permission, and around $3,200 was charged to his credit card. (T. 491). On cross-examination, he stated that Ms. L worked full time but nevertheless had financial problems. (T. 492-93).

Defense renewed the motion for acquittal on counts II-IV, and the court again reserved ruling. (T. 558).

During the deliberation process, the jury asked for a readback of the testimony of SD, MD, and Mr. X. (T. 728-735). The jury was told that preparing the testimony of MD and Mr. X would take approximately 1.5 hours each, and that they could not hear SD's testimony again. (T. 728-736). The verdicts were delivered before any readback occurred, but an hour after the projected time they would be completed. (T 740-42; Supp. R. 342 (defense counsel characterizing the timing as "an hour past the projected arrival time)).

Mr. X was acquitted of sexual battery by oral and digital penetration, but convicted of the lesser included offense of battery on each count (Counts I and II). He was convicted of lewd and lascivious molestation by touching MD's vagina or covering clothing, as charged in this indictment. (Count III). He was acquitted of lewd and lascivious conduct by touching her with his penis. (T. 740-41).

After conviction Defense counsel filed a motion for a new trial listing 18 instances of improper comments during closing arguments. (R. 262-64). Because no motion for mistrial was made, these statements are not preserved for review.

At sentencing, the judge denied the motions for acquittal on Counts II and III, finding the motion moot as to Count IV due to the acquittal. (R. 267).

Mr. X appeals.

SUMMARY OF ARGUMENT

The jury's verdict relied on out-of-court statements that the alleged victim denied on the stand. The CPT interview described digital penetration, oral penetration, touching, rubbing his penis against her, and soliciting her to touch it. MD's statements at the hearing on child hearsay described only digital penetration, and specifically denied that he had solicited her to touch his penis or touched her genitals over her clothes. At trial, MD described only oral penetration. When asked whether Mr. X had touched her with any other part of his body besides his mouth, MD said "no," where she had previously described further incidents of abuse in response to the same question. Despite having watched the CPT interview earlier that day, she could not remember Mr. X using his hands on her genitals.

The law does not permit a conviction based solely on an out-of-court statement or a prior inconsistent statement. Because there is no other evidence of touching or digital penetration, the lower court erred by denying the motion for acquittal on counts II and III, and they must be reversed.

STANDARD OF REVIEW

Mr. X preserved his argument about the sufficiency of the evidence by moving for a judgment of acquittal, apprising the court of the discrepancy between MD's testimony and her recorded out of court statement. Williams v. State, 560 So. 2d 1304, 1307 (Fla. 1st DCA 1990). "In reviewing the denial of a motion for judgment of acquittal, appellate courts apply a de novo standard of review and do not reverse a conviction where the conviction is supported by competent, substantial evidence." Smith v. State, 170 So. 3d 745 (Fla. 2015). To the extent the resolution of Claim 1 depends on the admissibility of evidence, the issues are reviewed de novo because they depend on interpretations of statutes and case law rather than discretionary decisions. McCray v. State, 919 So. 2d 647, 649 (Fla. 1st DCA 2006); see generally Pantoja v. State, 59 So. 3d 1092, 1095-96 (Fla. 2011).

ARGUMENT

Mr. X's convictions for lewd and lascivious molestation and for battery cannot stand because the victim recanted her earlier statements and did not adopt them.

The Supreme Court of Florida recognizes that generally "prior consistent statements are not admissible to bolster the testimony of a witness." Chandler v. State, 702 So. 2d 186 (Fla. 1997). The legislature has created an exception to this hearsay principle when the victim is a child who has allegedly suffered sexual abuse. Fla. Stat. § 90.803(23). A child victim's prior statement "not otherwise admissible" becomes admissible if the trial court determines that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." Id. This rule creates the potential for subsequent inconsistent statements in court by the alleged victim. When, as here, the testimony contradicts the out-of-court statement, the out-of-court statement cannot be used as substantive evidence of guilt.

"In cases in which an inconsistent out-of-court statement was admitted as substantive evidence of the charged sexual acts and no other evidence was presented, state and federal courts have nearly uniformly concluded that there was insufficient evidence to support the conviction." United States v. Bahe, 40 F. Supp. 2d 1302, 1307-08 (D.N.M. 1998) (citing cases); see also State v. Brende, 835 N.W.2d 131 (S.D. 2013); State v. Pierce, 906 S.W.2d 729 (Mo. 1995). As in

most other jurisdiction, in Florida a prior out-of-court statement is not sufficient evidence of guilt if the victim recants the statement and no other corroboration exists. State v. Moore, 485 So. 2d 1279, 1281 (Fla. 1986) (holding that "in a criminal prosecution a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt."). "The rule that prior inconsistent statements may not be used substantively as the sole evidence to convict, applies to Section 90.803(23) evidence as well." State v. Green, 667 So. 2d 756, 760 (Fla. 1995); see also Beber v. State, 887 So. 2d 1248, 1252-53 (Fla. 2004) (affirming continued vitality of principle announced in Green).

Thus, in Williams v. State, 560 So. 2d 1304, 1306 (Fla. 1st DCA 1990), the First District reversed where the prior statements, both unsworn and not corroborated by other evidence, were contradicted by the victim's reply of "huh huh" when asked whether the defendant had penetrated him with his finger. And in Ticknor v. State, 595 So. 2d 109, 110 (Fla. 2d DCA 1992), the Second District reversed where the victim's testimony that the defendant had not taken off his clothes contradicted her out-of-court statement to a detective that the defendant had rubbed her penis against him. In another case, the First District reversed a conviction for sexual battery by oral union where the victim "testified that his grandfather touched his penis, but when he was asked several times if his

grandfather had ever done anything else to his penis, the boy said no." Bell v. State, 569 So. 2d 1322, 1323 (Fla. 1st DCA 1990).

Although MD did not state that she had lied, Baugh v. State, 961 So. 2d 198, 203 (Fla. 2007), nevertheless this is not a case where "somewhat ambiguous" testimony is coupled with affirmative testimony that establishes the final element of the crime. Means v. State, 814 So. 2d 1136, 1137 (Fla. 1st DCA 2002). MD was not able to confirm her out-of-court statements with respect to anything besides oral penetration. (T. 281). "This kind of testimony (repeated answers of 'I don't know' or that the child does not recall, combined with his testimony that the defendant did not commit the alleged acts) is precisely the kind the supreme court has characterized as a recantation." Johnson v. State, 1 So. 3d 1164, 1166 (Fla. 1st DCA 2009) (citing Beber, 887 So. 2d at 1252). There was no other corroboration.

Recantation or not, there was no testimony presented at trial, and a "child's hearsay statements, standing alone, are insufficient to sustain" a conviction. Beber, 887 So. 2d at 1253. Therefore, the Court should reverse Mr. X's convictions as to Count II and Count III because the State failed to carry its burden of proof beyond a reasonable doubt.

CONCLUSION

Mr. X's convictions for lewd molestation and battery are supported only by out-of-court hearsay statements, and must be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by email to:

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CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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