IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

WILLIAM RODERICK

Appellant,

vs.

STATE OF FLORIDA

Appellee.
_____/

CASE # 16-2010-CF-008841-AXXX-MA
DIVISION CR-E

APPEAL # 1D12-4510

On Appeal To The First District Court Of Appeal
From The Circuit Court Of The Fourth Judicial Circuit
In And For Duval County

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

In this Brief, the Appellant, William Roderick, will be referred to as "Mr. Roderick" or "Appellant." The Appellee, the State of Florida, will be referred to as the "State." The court below, the Circuit Court of the Fourth Judicial District, in and for Duval County, will be referred to as the "trial court" or the "court below."

Citations to the record on appeal will be made by the letter "R," followed by the applicable page number. Citations to the trial transcript will be made by the letter "T," followed by the applicable page number. Citations to the sentencing transcripts will be made by the letter "S," followed by the applicable page number.

JURISDICTIONAL STATEMENT

Venue is proper in this Court pursuant to Florida Statutes § 35.043. The Notice of Appeal in this case was timely filed on September 17, 2002 (R. at 175-176), within thirty (30) days of the September 5, 2012 Judgment and Sentence. (R. at 130-139). Accordingly, jurisdiction lies in this Honorable Court pursuant to Florida Rule of Appellate Procedure 9.140(b).

INTRODUCTION AND QUESTIONS PRESENTED IN THIS APPEAL

Appellant appeals from his Judgment of Conviction after a jury trial on the charges Sexual Battery Upon a Child 12 Years of Age or Older but Under 18 Years of Age by a Person in Familiar or Custodial Authority (2 counts), Florida Statutes § 794.011(8)(b), Providing Alcoholic Beverages to a Person Under the Age of 21,

Florida Statutes § 562.11(1)(a), and Resisting Officer Without Violence to His or Her Person, Florida Statutes § 834.02, and his sentences of 25 years plus 5 years of sex offender probation

The charges arose from an alleged incident on August 5-6, 2010 at a hotel in Jacksonville, Florida where the Appellant's 14-year old daughter informed the hotel clerk that her father had just raped her after giving her alcohol inside the hotel room. (R. at 3). The hotel clerk called 911 to relay the report. (R. at 3). Deputies from the Jacksonville Sheriff's Office responded and arrested Appellant, who allegedly resisted. (R. at 3). After being transported to a local hospital, the complainant was examined by a registered nurse practitioner specializing in pediatric sexual assault who found no physical evidence. Appellant was tried upon a jury, and convicted of all four counts as charged. A motion for a new trial was heard prior to sentencing and denied, and Appellant was ultimately sentenced to an aggregate sentence of 25 years imprisonment.

The issues to be decided in this appeal concern (1) whether Appellant received effective assistance of counsel, or in the alternative, whether the admission of certain expert testimony and comments made by the prosecutor during summation denied Appellant his fundamental right to a fair trial; (2) whether the verdict was against the weight of the evidence; (3) and whether the

trial court's denial of Appellant's motions in limine and the introduction of certain evidence denied him the right to a fair trial

STATEMENT OF THE CASE AND FACTS

Pre-Trial Proceedings

On August 6, 2010, Appellant was arrested by law enforcement officers from the Jacksonville Sheriff's Office. (R. at 1). He was subsequently charged by way of Information on September 1, 2010 with the crimes of Sexual Battery Upon a Child 12 Years of Age or Older but Under 18 Years of Age by a Person in Familiar or Custodial Authority, Florida Statutes § 794.011(8)(b) (Count 1), Sexual Battery Upon a Child 12 Years of Age or Older but Under 18 Years of Age by a Person in Familiar or Custodial Authority, Florida Statutes § 794.011(8)(b) (Count 2), Providing Alcoholic Beverages to a Person Under the Age of 21, Florida Statutes § 562.11(1)(a) (Count 3), and Resisting Officer Without Violence to His or Her Person, Florida Statutes § 834.02 (Count 4). (R. at 18-19).

The Trial

Motions In Limine

After jury selection but prior to opening statements, the defense moved in limine to preclude the State from introducing a recording of a 911 call placed on August 6, 2010 by Ardis Livingston, one of the State's witnesses, on the grounds that the recording constituted inadmissible hearsay for which no exception existed.

(T. at 98-99). In support of the defense's argument, trial counsel specifically cited Walden v. State, 17 So.3d 795 (Fla. 1st DCA 2009) and handed up a copy of the case to the trial court. (T. at 100). The trial court then summarily denied the defense motion. (T. at 100).

The defense also sought to preclude the State from introducing testimony as to why the Appellant, the complainant, and her paternal grandmother were staying at the hotel, i.e.; that the Appellant was unable to pay his electricity bill and decided to stay at the hotel rather than inside a house without electricity, and that the Appellant paid for two separate rooms, one for he and his daughter, and one for his mother. (T. at 101). Appellant moved to exclude this evidence on the grounds that it was irrelevant to the issues to be tried, and that the prejudice outweighed any probative value. (T. at 101-103). The State opposed, conceding that the reason that there were two rooms was because the grandmother was a smoker, but the trial court denied the Appellant's motion, ruling "I think there has to be some explanation of why they were there." (T. at 103, 124).

The State's Case

After opening arguments, the State's first witness was DETECTIVE LASHANTE WHITAKER from the Jacksonville Sheriff's Office. (T. at 134). Detective Whitaker testified that she was working as a detective in the sex crimes unit of the Jacksonville Sheriff's Office on August 6, 2010 when she was assigned

to investigate a possible rape involving the Appellant. (T. at 139-140). She interviewed the complainant in the early morning hours of August 6, 2010, and then questioned Appellant at approximately 2:00 a.m. after she spoke with the complainant. (T. at 140, 148). During the course of her interview with Appellant, he explained that he had checked into two rooms at the hotel on the night in question because his daughter did not want to stay in the room with his mother because she was a smoker. (T. at 149). He admitted that he had consumed at least seven drinks containing alcohol, and that he permitted his daughter to drink alcohol as well. (T. at 144, 149). The Appellant also told Detective Whitaker that he and his daughter had discussed her absentee mother that same evening, and that his daughter had been upset during this discussion. (T. at 149). Appellant denied that he had raped his daughter, and told Detective Whitaker that the thought of him having sex with his daughter made him want to vomit. (T. at 144, 149). The interview was recorded on video, and admitted into evidence as State's Exhibit A. (T. at 147).

S.R.[1], Appellant's daughter and the complaining witness, testified as the second witness for the State. At the time of trial, S.R. was 16 years old and lived in Maine with her mother and her mother's boyfriend. (T. at 152, 155). She testified that on August 5, 2010, the electricity was turned off in the apartment

[1] Because of the nature of the case, the complainant will be referred to by her initials, S.R. or the complainant.

where she lived with her father and her paternal grandmother. (T. at 160). The three then checked into a Holiday Inn Extended Stay hotel, and the Appellant rented two rooms because his mother was a chain smoker and S.R. did not want to stay in the same room as her because of her smoking habit. (T. at 161). Initially, the trio stayed in the same room and the Appellant started drinking rum that he had brought with him from home. (T. at 163-164). The complainant started drinking rum from the bottle, but said it tasted "like poison" to her. (T. at 164). According to S.R., her grandmother objected, and said she would not stand for it and left the room. (T. at 164-165). At one point, Appellant started talking about S.R.'s absentee mother, and how he missed her, and they both got emotional over her absence. (T. at 168). At one point, she claimed that Appellant pinned her arms over her head, began to rub his body against hers, removed both of their clothing and licked her genital area prior to vaginally penetrating her. (T. at 169-171). She then claimed that she pushed Appellant off, grabbed some clothing, and fled the room, ending up in the hotel manager's office. (T. at 171-173). The hotel manager called 911, and she remained inside the office until police arrived. (T. at 174).

On direct examination, the complainant testified that after the alleged rape, she was interviewed by several law enforcement personnel between 12:00 a.m. and 3:00 a.m. on August 6, 2010. (T. at 179). She claimed that prior to August 5, 2010, she had not had any sexual experiences and claimed to be unfamiliar with

sexual terminology. (T. at 180-181). However, S.R. later changed her testimony on re-direct examination and testified that she had researched sex on the internet as young as 10 or 11 years old. (T. at 194). She did admit that when she was asked by a female investigator, she told them that her father had ejaculated. (T. at 181). She further testified on direct examination that when her father penetrated her vagina, she felt no pain and did not bleed. (T. at 182).

S.R. testified on cross-examination that she wanted to visit her mother in Maine, but that Appellant would not allow it because he did not want to see her mother. (T. at 187). She further admitted that she wanted Appellant and her mother to get back together, but knew it was not going to happen. (T. at 187). On cross-examination, the complainant admitted that she learned that there was no DNA evidence to corroborate her claim that she was raped by Appellant. (T. at 191). She also admitted on cross-examination that she was not allowed to go live with her mother because her mother was dating Appellant's nephew. (T. at 193).

ARDIS LIVINGSTON was the third witness to testify for the State. He testified that in August, 2010, he was employed as the overnight attendant at the subject hotel. (T. at 197). At approximately 12:20 a.m. on August 6, 2010, the complainant, S.R., approached him at the front desk and asked him for help, claiming that her father had raped her. (T. at 198). He called 911 and took her into the office, locking the door. (T. at 199-200). Over defense objection, the recorded

911 call was admitted into evidence as State's Exhibit 20 and published to the jury. (T. at. 200-201). Livingston further testified that the Appellant approached the front desk and asked him if the hotel had security cameras, which Livingston responded by pointing to the cameras. (T. at 204). During their interaction, Livingston saw that Appellant had no injuries to his face. (T. at 209). A short time thereafter, police officers arrived at the hotel and went into the office where the complainant was and spoke with her briefly. (T. at 204).

LISA CASSIDY was the fourth witness for the State. She testified that she has a master's degree in nursing, is a registered nurse practitioner, and has a national certification as a sexual assault examiner for the Child Protection Team. (T. at 212). After going through her credentials, training, experience in over 1000 cases, and education, as well as her prior experience in testifying in court as an accepted expert witness, she was qualified as an expert in the field of pediatric sexual assault examination. (T. at 215-216).

Ms. Cassidy began her testimony by "dispelling the myth" of the broken hymen as an indicator that a female has had sexual intercourse. (T. at 216). She then discussed the findings in a study published in the official journal of the American Academy of Pediatrics, which examined 36 pregnant 13-14 year old girls and found that 34 of the test subjects had intact hymens. (T. at 217-219). Ms. Cassidy further testified that in at least 85-90 % of the cases she had been involved

with, there were no physical signs of injury after a reported sexual assault. (T. at 219). She explained that this study confirmed that just because there is no physical evidence of a sexual assault does not mean it did not occur. (T. at 222).

Ms. Cassidy testified that she conducted an examination of S.R. on the night in question at approximately 4:00 a.m. (roughly 3 ½ hours after the alleged rape), and that she first spoke with S.R. about what had occurred before conducting a physical examination of her. (T. at 223-224, 234-235). S.R. reported that Appellant had licked her vagina and then penetrated her with his penis and had ejaculated. (T. at 224-225). After conducting the physical examination, Ms. Cassidy found no physical evidence. (T. at 225). She sought to explain this lack of evidence in several ways. First, she explained that it was common for children to be ignorant as to what ejaculation meant, despite her testimony that she used simple, age-appropriate language in her interview with S.R. to ensure comprehension. (T. at 228-229, 233). Second, she testified that the lack of physical evidence neither negates nor corroborates that a sexual assault did, in fact, occur. (T. at 229). She did, however, testify that she concluded, in her expert opinion that S.R's allegations of rape were true based upon S.R.'s statement that a rape had occurred, despite the lack of physical evidence. (T. at 229).

DEPUTY ABIGAIL MCCAUGHEY of the Jacksonville Sheriff's Office was the fifth witness for the State. She testified that she responded to a call just

after midnight on August 6, 2010 at the Extended Stay hotel in Jacksonville, Florida. (T. at 241). After initially speaking with the manager and S.R., an ambulance arrived and S.R. was taken away on a stretcher. (T. at 242-244). A short time later, other police officers apprehended Appellant inside the hotel, and he was placed inside Officer McCaughey's patrol car for transportation. (T. at 245-246). According to her testimony, Appellant made a statement that he did give alcohol to his daughter, but did not think it was a cause for such concern. (T. at 249, 252). Later, at approximately 4:00 a.m., police obtained a search warrant for the Appellant's hotel room, and the warrant was executed. (T. at 249).

DEPUTY JAMES BUSQUE of the Jacksonville Sheriff's Office was the sixth witness for the State. On August 6, 2010, he responded to the Extended Stay hotel in Jacksonville, Florida in response to a 911 call. (T. at 255-256). After initially speaking with the complainant, he encountered Appellant inside the hotel and took him into custody after a brief struggle in which nobody was injured. (T. at 256-262).

SUKHAN WARF, a biologist at the Florida Department of Law Enforcement, was the seventh witness for the State. (T. at 262). After being qualified as an expert in the field of biological and DNA testing, the witness testified that he conducted testing on a rape kit involving S.R. (T. at 263-265). He testified that he found the presence of potential saliva on one of the swabs taken

from S.R.'s vaginal area, but did not find any DNA that was foreign to S.R. (T. at 267). Likewise, he did not find the presence of semen in the rape kit. (T. at 272).

At the conclusion of Sukhan Warf's testimony, the State published the videotaped statement Appellant made to Detective Whitaker on August 6, 2010, and rested.

The Defense Case

Trial counsel called a single witness, MARILYN BOWEN, Appellant's mother, as a defense witness. (T. at 306). Ms. Bowen testified that in 2008 she, Appellant, and S.R. moved to Jacksonville, living in two different homes that had television and computers with internet access, and that S.R. used the computers and the internet. (T. at 309-310). She testified that on August 5, 2010, she, Appellant, and S.R. checked into the Extended Stay hotel, taking two rooms because Ms. Bowen was a smoker and talked in her sleep. (T. at 306-307). She testified that Appellant had been drinking and left his alcoholic beverage on a counter when S.R. took a sip out of it. (T. at 308). She reported to Appellant that S.R. had drunk alcohol, and Appellant told S.R. to stop. (T. at 308). At one point Ms. Bowen retired to bed, leaving Appellant and S.R. in their room. (T. at 309). Later that night, hotel management awoke her to notify her something was wrong. (T. at 316).

The Prosecutor's Summation

During the prosecutor's summation, he argued that S.R. was a credible witness for a number of reasons, including:

> Her disclosure. It's not very often that 14 year old girls run screaming down the halls in the middle of the night that their daddy has raped her. It's not very often that you get an immediate disclosure on a father daughter rape. (T. at 338).

During another portion of the prosecutor's summation, he compared the instant case to the Biblical story of King Solomon deciding which woman was the true mother of an infant by inviting the jury to use their "God given common sense" in evaluating the testimony as King Solomon did. (T. at 347-348). He returned to this analogy again at the end of his summation, arguing to the jury that "we're confident that when you use Solomon's wisdom, you'll hold him accountable and find him guilty as charged." (T. at 349).

In addition, the State Attorney also challenged the defense theory that S.R. had fabricated the charges in order to remove herself from her father's custody and go to Maine to live with her mother, arguing that if that were true, S.R. would not have remained in Florida for months after the alleged rape had occurred, arguing "[m]ind you, she didn't go directly to her mother, **it was months before she went to her mother**..." (T. at 336).

The Verdict

On April 5, 2012, the jury returned verdicts of "Guilty" on each count at 6:17 p.m. (T. at 385-388).

Post-Trial Proceedings and Sentencing

On April 12, 2012, Appellant filed a motion for a new trial through new counsel, later supplemented by Appellant's pro se filing, raising a host of issues that entitled him to a new trial. (R. at 116-118). The motion alleged that (1) the trial court should have granted Appellant a judgment of acquittal after the close of the State's case, (2) the trial court should have granted Appellant a judgment of acquittal after the close of all evidence, (3) that the verdict was contrary to the weight of the evidence, (4) that the verdict was contrary to the law, (5) that the trial court erred in denying Appellant's motion in limine to preclude the 911 calls, (6) that the trial court erred in denying Appellant's motion in limine to redact portions of his post-arrest statement, and (7) that the trial court erred in denying Appellant's motion in limine to preclude certain testimony about the reasons why the Appellant and his family were staying in the hotel. (R. at 116-117). Appellant's pro se filing added two separate claims: one, that the State Attorney knowingly made false factual arguments to the jury, and two, that the State Attorney improperly invoked the Bible and appealed to religion during his summation to the jury. (R. at 118).

On August 12, 2012, new counsel for Appellant amended his motion for a new trial, adding an eighth claim that trial counsel provided ineffective assistance based upon a number of reasons. (R. at 127). The amended motion alleged, inter alia, that trial counsel failed to adequately investigate by identifying and

developing defense witnesses and documentation to impeach the complainant, S.R., failed to object to the State's expert evidence regarding sexual assault on children and reasons for the lack of corroborating, physical evidence, and failure to object to various improper arguments and to properly cross-examine the State's witnesses. (R. at 127-129).

A hearing was held on Appellant's motion on September 5, 2012. (R. Volume 2 of 5). At the beginning of the hearing, Appellant repeatedly raised the issue that he had asked his prior counsel numerous times to obtain further evidence and documentation that the complainant was lying when she alleged that he had raped her, and asked his trial counsel to secure an expert witness to evaluate the case and the lack of DNA evidence. (S. at 8, 12, 14, 15).

Appellant, WILLIAM RODERICK, testified at the hearing. He testified that he was learned that S.R. had returned to Maine just a few weeks after the alleged incident from conversations with his mother and S.R.'s mother. (S. at 19-20). Appellant identified at the hearing a travel itinerary containing flight information for S.R. that he had obtained after the trial, proving that S.R. flew to Maine on August 25, 2010, just weeks after the alleged incident, not months as the State had claimed. (S. at 20-21, 32-34). He further testified that he requested that trial counsel secure the services and testimony from a DNA expert once he learned there was no DNA evidence to corroborate the claim of rape, and that his request

was made so that trial counsel could corroborate his defense that no sexual contact had occurred. (S. at 19, 22-23). Trial counsel refused to consult with an expert, much less call an expert, because "it's not fact, it's opinion when it comes to DNA." (S. at 22).

The hearing also established that the jury paid particular attention to the testimony of Lisa Cassidy at trial, and the results of the study regarding the "broken hymen myth" and that Appellant was unaware that this testimony would be received at trial until he heard the witness testify (S. at 25). Appellant then asked trial counsel to object, but no objection was made. (S. at 26). Appellant further testified that he informed trial counsel that S.R. had been placed on birth control after moving to Maine with her mother, and had been caught drinking and was arrested for possession of marijuana in school, all events that occurred prior to trial which were fruit for cross-examination. (S. at 28). None of those issues were raised by trial counsel. (S. at 29). Appellant testified that prior to trial, S.R. had told her mother and Appellant's mother that she believed that the alleged incident was just a dream. (S. at 31). Appellant made trial counsel aware of this, yet S.R. was not cross-examined with this material nor was it presented by the defense. (S. at 32).

TIFFANY POORE, Appellant's trial counsel, was the final witness to testify at the hearing, She testified that she was assigned to represent Appellant in May,

2011 and continued to represent him through trial in April, 2012. (S. at 39-40). Prior to her representation, Appellant was represented by Phyllis Wiley, Esq. (S. at 40). Ms. Poore testified that upon receiving the file from her predecessor, she reviewed her predecessor's notes and discovered that Aurora Roderick, S.R.'s mother, was a potential defense witness. (S. at 40). However, she did not speak to her predecessor about Aurora Roderick or her possible testimony. (S. at 40). Ms. Poore testified that she did not conduct a deposition of the State's expert witness. (S. at 40-41). When asked why she did not hire an expert to explain either (1) the absence of DNA in light of the fact that S.R. initially claimed that Appellant had ejaculated into her during the alleged rape or (2) to refute the claims of the State's expert that the lack of a ruptured hymen did not refute a claim of rape, and (3) that there was a medically-accepted study to support this expert testimony, Ms. Poore failed to respond to the question and answered:

> A: I did not because – and I believe I even cross examined Miss Cassidy regarding this and she was trying to dispel the myth of the broken hymen. And I questioned her, I cross examined by, I think she referred to old wive's tale or something and that begins somewhere, that there was obviously some basis to that, that when sexual activity occurs or even use of tampons that the hymen can break. (S. at 44).

Ms. Poore was then asked the following questions and gave the following answers about the study referred to by the State's expert witness:

> Q: First of all, did you ever – was this study ever provided to you by the State prior to trial?
> A: Not it was not.

Q: Even at trial did you know what study she was referencing?
A: Just that she had stated it on her direct examination.
Q: Okay. Did have the ability to look into that study to (sic) veracity of it, anything like that whatsoever?
A: Did I have the ability to at the time during trial?
Q: Correct.
A: No.
Q: At any point during the trial did you --- well, I guess pre-trial did you become aware that the State had this study that was being referenced?
A: No.
Q: When that started to come up did you request a Richardson Hearing? Would you agree with me that's something that study was certainly important, did you request a Richardson Hearing?
A: No, I did not.
…
Q: Would you agree with me that would be very I guess, strong point for the State if this is normal, basically it's not a big deal that hymen wasn't broken because that happens most of the time, that was a major point for the State, would you agree with me?
A: Yeah, for them it was in their point of view. (S. at 45-47).

Next, Ms. Poore was asked about the discrepancy between the State's theory that S.R. did not return to Maine for three months after the alleged incident, and Appellant's claim that she went back to Maine within a few weeks. (S. 47-48).

Ms. Poore was asked the following:

Q: At any point, whether it was with depositions of [S.R.] or at trial did you ever determine exactly when she left Jacksonville to go back to Maine?
A: It was my understanding that after these allegations arose that she then went to live in St. Augustine with some family members for a brief period of time. I'm not entirely sure. And then she had to move or was – then flew up to Maine but, no, I don't know the exact time, it was not a long period of time.
Q: Based on your pre-trial with the victim and your investigation of the case, certainly your understanding that it was a month period of time at

most, I guess month and half shorter period of time?
A: Quite frankly I cannot answer that. I cannot give you a definitive answer one way or another of the exact time frame. I just cannot recall or if I ever knew the exact time frame. (S. at 48-49)

Ms. Poore further admitted that when the State's Attorney argued to the jury in its closing statement that S.R. "didn't go directly to her mother, **it was months before she went to her mother**" she failed to register an objection. (S. at 50)

Ms. Poore was asked about whether she had any information that S.R. had told family members that the alleged rape had all been just a dream. (S. at 51). She admitted that she had such information prior to trial, but explained that she did not use that information during cross-examination or otherwise introduce such evidence because she was unable to verify that information through S.R. (S. at 52). Finally, Ms. Poore admitted that she did not object when the State's Attorney made several references to the Biblical story of King Solomon during his summation. (S. at 53).

At the conclusion of the hearing, the trial court denied Appellant's motion for a new trial and proceeded to sentencing. (S. at 63-64). The trial court imposed sentences of 25 years imprisonment to be followed by 5 years sexual offender probation on Counts #1 and 2, and sentences of time served/60 days on Counts # 3 and 4, all sentences to run concurrently. (S. at 68-69). Appellant thereafter timely filed a notice of appeal. (R. at 175-176).

SUMMARY OF THE ARGUMENT

Appellant received ineffective assistance of counsel where trial counsel failed to conduct adequate pre-trial investigation, develop easily-obtainable evidence to support the theory of defense, failed to object to inadmissible hearsay in the form of testimony of a study, failed to object to inadmissible "expert" testimony where the State's expert vouched for the credibility of the complaining witness, and failed to object to inflammatory comments made by the prosecutor on summation, invoking religion and the Bible and himself vouching for the credibility of the complaining witness. Alternatively, these errors were so fundamental that they deprived Appellant of a fair trial. Additionally, the verdict was against the weight of the evidence, and the trial court failed to conduct an appropriate evidentiary evaluation upon Appellant's motion for a new trial. Finally, admission of irrelevant but prejudicial evidence at trial deprived Appellant of a fair trial and constituted an abuse of discretion.

ARGUMENT

POINT I - APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO CONDUCT ADEQUATE PRE-TRIAL INVESTIGATION INTO THE COMPLAINANT'S FACTUAL ALLEGATIONS, FAILED TO PRESENT EVIDENCE KNOWN TO COUNSEL THAT WOULD HAVE CORROBORATED THE THEORY OF DEFENSE, FAILED TO CHALLENGE INADMISSIBLE AND PREJUDICIAL EVIDENCE AT TRIAL, AND FAILED TO OBJECT TO THE PROSECUTOR'S INVOCATION OF RELIGION DURING SUMMATION; IN THE ALTERNATIVE, THIS COURT SHOULD REVIEW THESE ERRORS IN THE INTEREST OF JUSTICE AND FIND THAT APPELLANT WAS DEPRIVED OF A FAIR TRIAL

A. Standard of Review

It is axiomatic that both the United States Constitution and the Florida Constitution guarantee each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a due process of law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made

out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, supra at 690.

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing

professional norms, is to make the adversarial testing process work in the particular case. Downs v. State, 453 So.2d 1102, 1108 (Fla. 1984).

B. Argument on the Merits

1. Failure to Object to the State's Expert Witness Vouching for the Credibility of The Complaining Witness and the Study Regarding Probability of Broken Hymens

Here, the State called Lisa Cassidy, a registered nurse practitioner and expert child sexual assault examiner for the Child Protection Team. This witness vouched for the credibility of the complainant, and further testified about the findings of an unnamed study that supported bolstered her credibility and the credibility of the complainant. Trial counsel failed to object to this evidence.

a. The Expert Testimony Vouched for the Credibility of the Complainant

The Florida Supreme Court has repeatedly held that "it is not proper to allow an expert to vouch for the truthfulness or credibility of a witness." Frances v. State, 970 So.2d 806, 814 (Fla. 2007), Feller v. State, 637 So.2d 911, 915 (Fla. 1994), State v. Townsend, 635 So.2d 949, 958 (Fla. 1994). "The general rule applies to prohibit an expert witness from testifying concerning the truthfulness or credibility of the victim in child sexual abuse cases." Geissler v. State, 90 So.3d 941, 947 (Fla. 2d DCA 2012), citing Tingle v. State, 536 So.2d 202, 205 (Fla.1988); Weatherford v. State, 561 So.2d 629, 634 (Fla. 1st DCA 1990).

"Even if the expert does not comment directly on the child victim's credibility, expert testimony is improper if the juxtaposition of the questions

propounded to the expert gives the jury the clear impression that the expert believed that the child victim was telling the truth." Geissler v. State, 90 So.3d 941, 947 (Fla. 2d DCA 2012), citing Hitchcock v. State, 636 So.2d 572, 575 (Fla. 4th DCA 1994); Price v. State, 627 So.2d 64, 66 (Fla. 5th DCA 1993).

This case bears a striking resemblance to Geissler v. State, supra, in which the defendant was charged with sexually assaulting a child who lived with him. In Geissler, there was no medical evidence to support the child's accusation, and no witnesses other than the defendant and the child. At trial, the State called an expert witness, a registered nurse practitioner and medical examiner with the Child Protection Team, who interviewed the victim and conducted a physical examination. The physical examination yielded no evidence to support the allegation that sexual abuse had occurred. In that case the expert witness testified that in her opinion,

> My impression was that the medical assessment supported the allegation of sexual abuse. The child gave a history of a sexual abuse; however, the physical findings neither supported nor negated an allegation of sexual abuse. Since many types of sexual abuse will leave [no] physical findings on an exam, that the exam shouldn't be viewed as evidence that the sexual abuse did not take place. But it appears to be a case of sexual abuse without physical findings on the exam. Geissler, supra at 947.

The Second District Court of Appeal held that this testimony was clearly improper because the testimony was based upon statements of the victim, which "left the jury with the unmistakable impression that [the expert's] opinion –

supported as it was by her impressive credentials – was that [the victim's] account of the sexual abuse was truthful." Id. at 947. As a result, the Court reversed the defendant's conviction and remanded for a new trial, specifically finding that the admission of this evidence did not constitute harmless error. Id. at 947-948.

Here, just as in Geissler, the State called a registered nurse practitioner and medical examiner with the Child Protection Team, who interviewed the victim and conducted a physical examination of S.R. The expert testified that "Probably at least 85 to 90 percent of the girls I examine have no physical sign of injury after a sexual assault." (T. at 219). She testified that she spoke with S.R. who gave her an account of the alleged rape by Appellant. (T. at 224). The expert also testified that she conducted a physical examination, but found no physical evidence of penetration. (T. at 225). She then testified that the lack of physical evidence was not inconsistent with victim's allegations. (T. at 225). When asked about the discrepancy between S.R.'s initial report that Appellant had ejaculated and the lack of semen or any other evidence of ejaculation, the expert testified as follows:

> Q: Is it common for a child of that age to not know whether someone ejaculates or not?
> A: Yes. It is very common for them not to know. (T. at 229)

The expert was then asked to give her expert opinion on whether a rape had, in fact, occurred:

> Q: Can you tell the jury what conclusions you were able to reach in this case?
> A: **The conclusions I reached in this case were that there was a sexual assault or abuse by history**, and that the child has disclosed to a trained interviewer in an age appropriate manner a history of inappropriate sexual contact; **and that the physical findings are consistent with the history**, and **that the physical findings neither confirm nor negate allegations of sexual assault, since many types of sexual abuse leave no physical findings this examination should not be viewed as evidence that sexual abuse did not take place**. (T. at 229) (emphasis added).

During this entire line of questioning, there was no objection by trial counsel. This was a fatal error. This testimony was clearly inadmissible. Just as in Geissler, the expert witness, with all of her impressive credentials, was able to testify that in her expert opinion, S.R. was telling the truth, based upon nothing more than S.R.'s allegations. The fact that there was no physical evidence to support S.R.'s allegations, particularly in light of the fact that S.R. had reported that Appellant had ejaculated onto her or in her during the course of the alleged rape, apparently meant nothing, as the expert testified; according to her, the lack of physical evidence actually supported S.R.'s allegations when she testified "**that the physical findings are consistent with the history**,"

Trial counsel then compounded the problem by ending her cross-examination with the following:

> Q: Okay. In your summary of the physical examination, the findings, the second box consistent with the history neither confirm nor negate, so you're saying this could go either way, the conclusion.
> A: The conclusion I'm making is that I can't tell from examining her whether or not sexual assault took place. That the results of the physical exam cannot be viewed as confirmation that it took place, and **that it also cannot be used as confirmation that it did not take place**. (T. at 236)(emphasis added).

The prosecution then immediately seized upon the opportunity, asking on re-direct:

> Q: Can you let the jury know the percentage of times that you have a finding of residual findings?
> A: Probably about 10 percent, about 10 to 15 percent I might see physical findings. Most of the time there are no findings on exam. (T. at 237)

This testimony eviscerated the defense. By allowing an expert witness such as Lisa Cassidy testify in such a fashion without objection, trial counsel permitted someone with impressive credentials to opine to the jury that S.R. was telling the truth. Thus, the State's expert was able to tell the jury that the defense theory that no rape had occurred because there was no physical evidence to substantiate it was wrong in her professional opinion, because there is only physical evidence to support an allegation in 10-15% of the cases. The prosecution used this expert testimony to great advantage on summation, arguing to the jury that "the medical tells you the truth" because in in "80, 90 percent of the time we don't see anything" and argued that there was overwhelming evidence of the Appellant's guilt. (T. at 339, T340).

Had trial counsel conducted legal research into this issue, or at least consulted with an expert prior to trial, much less call an expert to testify, trial counsel would have been in a position to properly confront the witness instead of merely repeating the expert's damaging conclusion. Counsel was grossly ineffective for permitting this evidence to be received without any objection.

b. The Admission of Hearsay in the Form of a Medical Study and Failure to Request a Richardson Hearing

Ms. Cassidy began her testimony by dispelling the "myth" of the broken hymen as an indicator that a female has had sexual intercourse. (T. at 216). She then discussed the findings in a study published in the official journal of the American Academy of Pediatrics, which examined 36 pregnant 13-14 year old girls and found that 34 of the test subjects had intact hymens. (T. at 217-219). The unnamed study was not introduced into evidence by the State. According to trial counsel's testimony at the sentencing hearing, she was unaware that the State would be introducing such testimony about the study prior to trial, as she did not receive the study in discovery. However, during the testimony, trial counsel neither objected nor requested a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla.1971). Again, this was gross error.

"Admission of hearsay cannot be deemed harmless error if there is a reasonable possibility that it contributed to [the] conviction." Thomas v. State, 993 So.2d 105, 108-09 (Fla. 1st DCA 2008) (citing State v. DiGuilio, 491 So.2d 1129,

1138-39 (Fla.1986)). Here, the unnamed study was unquestionably hearsay. It was an out-of-court statement offered for the truth of the matter asserted – that just because S.R. had an intact hymen did not mean that Appellant did not penetrate her as she claimed. It was also used to bolster the credibility of Lisa Cassidy and S.R. to support their testimony on the same topic.

The failure to object or at least request a Richardson hearing proved fatal. First, by failing to object to such hearsay evidence, trial counsel permitted testimony in the form of this study to be admitted without any confrontation. Trial counsel compounded the error by failing to cross-examine the expert witness about the veracity of the study. The problem was further compounded by trial counsel's admitted failure to consult with an expert prior to trial to prepare for this exact sort of contingency.

At the very least, trial counsel was under an obligation to at least request a Richardson hearing to determine whether a sanction was warranted for the State's failure to turn over this piece of damning evidence that was used with great effect against Appellant. Trial counsel should have made at least an attempt to keep this evidence out by objecting on Confrontation Clause grounds, or upon grounds that the State failed to provide this material in pre-trial discovery. This failure, combined with the others mentioned infra, deprived Appellant of his right to effective assistance of counsel.

2. Failure to Properly Investigate and Develop Facts and Evidence to Contradict the Complainant's Testimony and the State's Theory of Prosecution

It is well-settled that under the Federal and Florida Constitutions, effective assistance of counsel requires that trial counsel conduct a reasonable investigation into the facts of the case. Davis v. State, 928 So.2d 1089 (Fla. 2005); Freemen v. State, 858 So.2d 319, 325 (Fla. 2003); see also Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (holding "the defendant's right to representation does entitle him to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial"); Scott v. Wainwright, 698 F.2d 427, 429–30 (11th Cir.1983) (defense counsel's failure to familiarize himself with the facts and relevant law made him so ineffective that the petitioner's guilty plea was involuntarily entered); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel); Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982) (where counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims, counsel fails to provide service within the expected range of competency).

In setting forth a claim of ineffective assistance of counsel, a defendant must demonstrate that trial counsel's conduct was not a sound trial strategy. Dufour v.

State, 905 So. 2d 42, 51 (Fla. 2005) (citing Strickland, 466 U.S. at 689). "Judicial scrutiny of counsel's performance must be highly deferential." Id. (citing Strickland, 466 U.S. at 689). However, importantly, "a trial strategy to do nothing…is not an acceptable one." Williams v. State, 507 So. 2d 1122, 1124 (Fla. 5th DCA), rev. denied, 513 So. 2d 1063 (Fla. 1987).

In Williams, the defendant brought forth a claim of ineffective assistance of counsel wherein he alleged his trial counsel conducted virtually no pretrial investigation and presented no witnesses at trial. Id. at 1124. In defense of the claim, Williams' trial counsel asserted this was all part of his trial strategy to preserve "rebuttal during closing argument." Id. On review of the denial of the motion for post-conviction relief, the Fifth District Court of Appeal reversed and remanded the case for a new trial. Id. at 1125.

In finding Williams' conviction was the result of his receiving ineffective assistance of counsel, the court specifically considered trial counsel's failure to depose the two alleged victims and his failure to interview other witnesses. Id. at 1123-1124. The Court reasoned that the failure to depose the two witnesses was detrimental to the defense, particularly where there was no physical evidence, and it was Williams' word against that of the victims. Id. at 1123. Furthermore, the alleged victims had previously provided statements, which were inconsistent with their testimony at trial. Id. Without having deposed the witnesses, Williams' trial

counsel was unable to properly impeach their testimony with their prior statements. Id. The Court also noted trial counsel's statement that he did not depose the victims so that he could "retain a tactical surprise examination" was actually a trial strategy to do nothing. Id.

With regard to Appellant's first claim of ineffective assistance of counsel, trial counsel's strategy either to do nothing by failing to conduct an adequate investigation, vigorously cross-examine the complaining witness, consult with and call an expert to rebut the State's expert witness, call defense witnesses to establish the complainant's motive to lie, and to properly object to inadmissible, surprise evidence and inflammatory and prejudicial remarks made by the State's Attorney during summation should be afforded no deference.

Here, trial counsel was well aware of witnesses and facts that directly contradicted the State's theory that the complainant left Florida months after the alleged incident, rather than 3 weeks. Trial counsel spoke with the complainant's mother and paternal grandmother (Appellant's mother), as well as Appellant, who confirmed that S.R. left Florida roughly three weeks after the alleged incident and reunited with her mother in Maine. After trial, Appellant obtained and provided trial counsel with a flight itinerary of S.R. confirming that she had, in fact, flown from Florida to Maine within weeks, not months, of the alleged incident. This itinerary could have easily been obtained by trial counsel during the 1 year that she

represented Appellant merely by seeking a subpoena for the information – simple for an attorney, difficult for a pro se layman.

This information was not trivial. During his summation, the State Attorney challenged the Appellant's theory of defense that S.R. had fabricated the charges so that she could go live with her mother and have more freedom to do as she wanted. The State Attorney specifically argued that the defense theory was undermined because "[m]ind you, she didn't go directly to her mother, **it was months before she went to her mother**..." (T. at 336) (emphasis added). Had trial counsel simply sought a subpoena for the flight information Appellant gave her, not only would the State's theory have been contradicted by physical evidence, but the defense theory would have been corroborated and substantiated by the same evidence. At the sentencing hearing, when asked about this particular issue and her failure to investigate when S.R. had left Florida for Maine, trial counsel pled ignorance and was only able to repeat that she was unsure as to when S.R. left Florida. Ignorance is simply no defense in this situation. When representing a defendant on a case where he faces significant charges such as the one here, counsel has a Constitutional duty to not be ignorant.

This evidence would have dovetailed with evidence that S.R. had been arrested for possession of marijuana at school in Maine after moving there to live with her mother, and evidence that she had been sexually active despite her claims

to the contrary and professing ignorance of commonly-known sexual terms. They would have again corroborated Appellant's theory of defense: that S.R. fabricated the charges so that she could live wild and free in Maine, smoking marijuana in school and becoming sexually active at the young age of 15, things she was apparently unable to do living with her father. Unfortunately, trial counsel failed to even ask S.R. about these issues, let alone investigate and present any evidence to support them.

Finally, trial counsel failed to cross-examine S.R. or present any evidence that she had told family members that the alleged rape had been just a dream. Again, this information was in the possession of trial counsel, as was established at the post-trial hearing. Appellant's mother and S.R.'s mother were ready, willing and able to testify to the fact that S.R. had told them that the alleged rape was "just a dream." However, trial counsel not only failed to cross-examine S.R. about her statement that it was "just a dream," but failed to call either of the two witnesses to the stand to testify as to that fact. When asked why she failed to present such evidence at trial, trial counsel's response was that "[i]t was all second hand knowledge that I was or second hand statements that I was unable to verify through S.R. That was the problem." (S. at 52).

This logic was fatally flawed. First, as all trial attorneys are well aware, prior inconsistent statements are by their nature "second hand statements."

Second, trial counsel failed to ask S.R. during cross-examination whether she had ever made such a statement – the first requirement for proving a prior inconsistent statement through another witness or extrinsic evidence. Finally, even if trial counsel was "unable to verify through S.R." that she had made such a prior inconsistent statement, a common occurrence for witnesses to conveniently forget prior inconsistent statements, trial counsel could have verified such a statement through two independent, separate witnesses. Either trial counsel was grossly mistaken about the law on "second hand statements" or was content to simply sit back and do nothing on this issue, neither of which can be fairly attributed to reasonable strategic or tactical choices. These failures, and others, rendered trial counsel ineffective.

3. Failure to Object to the Prosecutor Vouching for the Credibility of the Complainant and His Invocation of the Bible and Religion During Summation

a. The Invocation of Religious Doctrine During Summation

The Florida Supreme Court has "strongly condemned" the invocation of religion during summation on numerous occasions. See Ferrell v. State, 686 So.2d 1324, 1328 (1996); Farina v. State, 937 So.2d 612 (Fla. 2006) (Anstead, J., dissenting in part); see also Lawrence v. State, 691 So.2d 1068, 1074 n. 8 (Fla.1997) (cautioning prosecutors "that arguments invoking religion can easily cross the boundary of proper argument and become prejudicial").

In Meade v. State, 431 So.2d 1031, 1031-32 (Fla. 4th DCA 1983), review denied, 441 So.2d 633 (Fla.1983), the Fourth District Court of Appeal found error and reversed a manslaughter conviction where the prosecutor had argued, "There, ladies and gentlemen, is a man who forgot the fifth commandment, which was codified in the laws of the State of Florida against murder: Thou shalt not kill." Similarly, in Harper v. State, 411 So.2d 235, 237 (Fla. 3d DCA 1982), the Third District held that the prosecutor's comments to jurors about biblical teachings was an "improper appeal" to emotion. Florida law is clear in prohibiting the use of religious invocation by prosecutors, particularly during summation.

Here, the State Attorney invoked religion several times during his summation, comparing the instant case the Biblical story of King Solomon being called upon to make an extremely difficult decision as to which one of two women was the rightful mother of an infant. The prosecutor asked the jury to substitute their own common sense and experience, as well as the trial court's instructions on evaluating the credibility of witnesses, with their "God-given common sense" akin to that of the Bible and King Solomon, and cast aside the trial court's instructions on deciding a case beyond a reasonable doubt and use their conscience as King Solomon did. This argument went beyond the bounds of fair comment, was not a response to any similar religious argument made by the defense, and improperly inflamed the jury's religious passions. Trial counsel's failure to object to such an

improper comment deprived Appellant of his right to effective assistance of counsel.

b. The Prosecutor Vouched for the Credibility of S.R. During Summation

While attorneys have wide latitude in arguing to a jury (Breedlove v. State, 413 So.2d 1, 8 (1982)), "attorneys must 'confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence.'" Hosang v. State, 984 So.2d 671, 672 (Fla. 4th DCA 2008), quoting Knoizen v. Bruegger, 713 So.2d 1071, 1072 (Fla. 5th DCA 1998), see also United States v. Martinez, 96 F.3d 473, 476 (11th Cir.1996) (holding "argument to the jury must be based solely on the evidence admitted at trial").

Both Florida and Federal appellate courts have consistently held that a prosecutor may not vouch for the credibility of a prosecution witness. Olson v. State, 705 So.2d 687 (Fla. 5th DCA 1998); Smith v. State, 754 So.2d 54 (Fla. 3d DCA 2000); United States v. Epps, 613 F.3d 1093, 1100 (11th Cir. 2010); United States v. Sims, 719 F.2d 375, 377 (11th Cir.1983); United States v. Hands, 184 F.3d 1322, 1333–34 (11th Cir.1999).

"Improper vouching occurs in two different circumstances: (1) if the prosecutor "place[s] the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity," or (2) if the prosecutor "implicitly vouch[es] for the witness' veracity by indicating that information not

presented to the jury supports the testimony." United States v. Epps, 613 F.3d 1093, 1100 (11th Cir. 2010) (internal citations omitted).

Here, the State Attorney made himself an unsworn witness and vouched for the credibility of S.R. when he argued to the jury as follows:

> Her disclosure. It's not very often that 14 year old girls run screaming down the halls in the middle of the night that their daddy has raped her. **It's not very often that you get an immediate disclosure on a father daughter rape**. (T. at 338) (emphasis added)

This argument implied to the jury that the prosecutor had specialized information and experience, and that in his experience, an immediate disclosure or prompt outcry of rape meant that the witness was telling the truth. This implication was clearly improper, and had the effect of convincing the jury that S.R. was, in fact, telling the truth. Again, trial counsel's failure to object to this comment rendered her performance constitutionally deficient.

4. Conclusion

Both the Florida Supreme Court and the United States Supreme Court have held that "strategic choices made **after a thorough investigation of law and facts relevant to plausible options** are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Schoenwetter v. State, 46 So.3d 535, 555 (Fla. 2010), quoting Strickland, supra at 690-691 (emphasis added). As the Eleventh Circuit Court of Appeals has

explained, "…so called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." Hardwick v. Crosby, 320 F.3d 1127, 1186 (11th Cir. 2003) (citations omitted).

"[A]n appellate court may review an ineffective assistance of counsel claim on direct appeal **when the claimed ineffectiveness is apparent on the face of the record**." Kidd v. State, 978 So. 2d 868 (Fla. 4th DCA 2008) (emphasis added).

Here, the record is clear. The testimony at the sentencing hearing made clear that trial counsel's numerous failures were not strategic decisions. Nor did the evidence establish that there was any reasonable, professional reason not to conduct a full investigation or adequately prepare the Appellant's defense. Rather, trial counsel did as little as possible to prepare for trial, and failed to stand up and register proper objections to clearly inadmissible, improper, and highly prejudicial evidence that doomed the defense. Thus, Appellant has shown that counsel's deficient performance prejudiced him greatly.

In the alternative, Appellant respectfully requests that this Court reach these issues in the interest of justice as these errors were fundamental.

In general, to raise a claimed error on appeal, a litigant must object at trial when the alleged error occurs. F.B. v. State, 852 So.2d 226 (Fla. 2003); J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998). "Furthermore, in order for an argument to

be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

The exception to the contemporaneous objection rule applies where the error is fundamental, i.e.; "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." F.B. v. State, 852 So.2d 226 (Fla. 2003), citing Brown v. State, 124 So.2d 481, 484 (Fla.1960).

Here, the cumulative errors of the admission of highly improper expert testimony vouching for the credibility of S.R; the admission of unchallenged and surprise evidence in the form of testimony regarding the study of the "myth" of the broken hymen in teenage girls; and the prosecutor's highly inflammatory and prejudicial arguments during summation all deprived Appellant of a fair trial. This Court should review these issues independently of Appellant's claim of ineffective assistance of counsel in the interest of justice, reverse Appellant's convictions and sentences, and remand the matter for a new trial.

POINT II - THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE WHERE THERE WAS NO EVIDENCE TO CORROBORATE THE COMPLAINANT'S CLAIM THAT SHE WAS RAPED

A. Standard of Review

Florida Rule of Criminal Procedure 3.600(a)(2) provides that a court "shall grant a new trial" if "[t]he verdict is contrary to ... the weight of the evidence." This standard of review upon such a motion is different that the sufficiency of evidence standard used in determining whether a judgment of acquittal pursuant to Rule 3.380 is appropriate. Spear v. State, 860 So.2d 1080 (Fla. 1st DCA 2003), Ferebee v. State, 967 So.2d 1071, 1072 (Fla. 2nd DCA 2007), Geibel v. State, 817 So.2d 1042, 1044 (Fla. 2d DCA 2002).

When considering a motion for new trial under Rule 3.600(a)(2) based on a claim that the verdict is against the weight of the evidence, the trial court must exercise its discretion to determine "whether a greater amount of credible evidence supports" an acquittal. Ferebee v. State, 967 So.2d 1071, 1073 (Fla. 2d DCA 2007). "Rule 3.600(a)(2) thus enables the trial judge to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror." Tibbs v. State, 397 So.2d 1120, 1123 n. 9 (Fla.1981).

B. Argument on the Merits

In the instant case, there was no evidence to corroborate S.R.'s claim that she had been raped by her father. Despite initially telling investigators that she had

been licked by her father on her vagina before being forcibly penetrated vaginally and ejaculated in or upon, and despite the fact that she was medically examined within hours after the alleged rape, there was no physical or DNA evidence to support her allegations. Additionally, the evidence placed before the trial court indicated a strong motive for the complainant to lie. Accordingly, the trial court should have granted Appellant's motion for a new trial on the basis that the verdict was against the weight of the evidence.

> It is a well-established general rule in this court that when the propriety of a verdict depends upon the credibility of conflicting testimony, and when the facts in evidence are complicated or contradictory, requiring a consideration of the character, integrity, or probity of witnesses whose testimony it is necessary to compare and weigh, **the verdict of the jury will not be set aside as against the weight of the evidence unless the evidence preponderates so strongly against the verdict that the court cannot conclude that such verdict was the result of a due consideration of the evidence**. Hammock v. State, 99 Fla. 1119, 1121, 128 So. 267 (Fla. 1930)(emphasis added)

Here, at the sentencing hearing, the trial court ruled on Appellant's claims raised in his motion for a new trial as follows:

> All right. On the amended motion for new trial as to paragraphs one through seven which deal with alleged improper decisions by the Court, I would stand by those decisions and deny counts one through seven, paragraphs one through seven, I am satisfied with the decisions that I made. If they are erroneous, then I believe there is a proper remedy for that. (S. at 63-64).

It is clear that the trial court failed to evaluate and weigh the evidence independently.[2] Additionally, the trial court issued a written 1-page decision dated September 5, 2012 which simply denied Appellant's motion for a new trial without explanation. (R. at 144).

This was plain error. As this Court has held, defendants have the right "to have the trial judge evaluate and weigh the evidence independently of the jury's findings to determine whether the jury verdict was contrary to the weight of the evidence." Kelley v. State, 16 So.3d 196, 197 (Fla. 1st DCA 2009). That simply did not occur in the instant case.

This case turned upon the credibility of a single witness, S.R., who claimed she was forcibly raped by her father and immediately ran away, reported the rape, and was immediately taken by ambulance to a hospital and medically examined within a short time frame. She reported to the examining nurse that Appellant had licked her vagina and had unprotected vaginal sex with her, and had ejaculated during the course of the sexual contact. No DNA or biological evidence was found at all within this short time frame. No DNA foreign to S.R. was found on her body. There were no physical signs of penetration. Additionally, the evidence developed by Appellant (mainly, after trial) strongly supported a theory that S.R. had a motive to fabricate the charges so that she could live in Maine with her

[2] The trial court did evaluate Appellant's claim of ineffective assistance of counsel with minimal specificity.

formerly estranged mother and live with less parental supervision, becoming sexually active and smoking marijuana in school. The only evidence to support S.R.'s claim of rape was the inappropriately-received testimony of the State's expert, who opined that S.R. was telling the truth in spite of the lack of corroborating evidence.

Accordingly, this Court should find, on the merits, that the verdict was against the weight of the evidence and reverse Appellant's convictions, and order a new trial.

POINT III – THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTIONS IN LIMINE TO PRECLUDE HEARSAY AND IRRELEVANT AND PREJUDICIAL TESTIMONY WAS ERROR REQUIRING REVERSAL

A. Standard of Review

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. Globe v. State, 877 So.2d 663, 672 (Fla. 2004). However, a court's discretion is limited by the evidence code and a court's erroneous interpretation of the evidence code is subject to de novo review. Gilliam v. Smart, 809 So.2d 905, 907 (Fla. 1st DCA 2002). Here, several evidentiary rulings deprived Appellant of his fundamental right to a fair trial.

B. Argument on the Merits

Florida Statutes § 90.403 reads as follows, in pertinent part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

This statute compels the trial court to weigh the danger of unfair prejudice against the probative value. State v. McClain, 525 So.2d 420, 422 (Fla. 1988). As the Florida Supreme Court has observed, "[i]ndeed, the same item of evidence may be admissible in one case and not in another, depending upon the relation of that item to the other evidence." Id.

In weighing the probative value against the unfair prejudice, the trial court must "consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction." Id. citing 1 C. Ehrhardt, Florida Evidence § 403.1 at 100-03 (2d ed. 1984).

Here, Appellant moved in limine to preclude a 911 recording call placed on August 6, 2010 by Ardis Livingston, one of the State's witnesses, on the grounds that the recording constituted inadmissible hearsay for which no exception existed. Trial counsel further argued that it was irrelevant since both of the witnesses on the recording, Livingston and S.R., would be testifying for the State. (T. at 99). Trial

counsel specifically cited a decision from this Court on the issue, Walden v. State, 17 So.3d 795 (Fla. 1st DCA 2009) and handed up a copy of the case to the trial court. (T. at 100). The trial court then summarily denied the defense motion without explanation, ruling "Well, I would allow it over your objection, assuming the proper predicate is laid." (T. at 100).

In Walden v. State, 17 So.3d 795 (Fla. 1st DCA 2009), this Court reviewed a conviction in which 911 calls providing a description of the defendants and the car in which they fled was introduced at trial over objection. Even though the 911 callers testified at trial and were cross-examined, this Court still found that the 911 calls should have been excluded as evidence, holding "this case illustrates the most important reason why hearsay should be vigilantly excluded: it may well be unreliable." Id. at 798.

Here, the 911 call should have been precluded. The fact that the police were called on August 6, 2010, or that S.R. reported that she had been raped to Ardis Livingston and the police on the same night were not in dispute. Both witnesses testified at trial that the police were contacted via 911 call, and that they spoke with the police and reported what had allegedly happened upon their arrival at the hotel. The 911 recording was irrelevant to prove these facts because they were not at issue. Instead, they were offered, and used, to bolster the credibility of the witnesses with prior consistent statements. This was clear error.

Appellant next sought to preclude the State from introducing testimony as to the reasons why the Appellant, the complainant, and her paternal grandmother were staying at the hotel, i.e.; that the Appellant was unable to pay his electricity bill and decided to stay at the hotel rather than inside a house without electricity. Appellant argued that the prejudice outweighed the probative value, and that his inability to afford his electricity bill negatively reflected upon Appellant's character. (T. at 101). Without conducting a balancing test of the prejudicial effect versus the probative value, the trial court denied the Appellant's motion, ruling "I think there has to be some explanation of why they were there." (T. at 103, 124).

The reason as to why Appellant, S.R., and Appellant's mother was immaterial to the issues to be decided at trial. Whether the family was homeless, staying at a hotel because their home was inhabitable, or they were on vacation, or any other number of legitimate reasons was irrelevant to whether or not Appellant committed the crimes charged. It was unnecessary to prove any element of the charged offenses. Thus, there was no probative value of this evidence whatsoever.

However, the prejudicial effect was pronounced, given the prosecution's characterization of Appellant and his daughter and mother as transients, moving from state to state, lacking such luxuries as computers and internet access, and unable to pay their electricity bill. This evidence amounted to an attack on

Appellant's character, which had no other purpose or effect other than to inflame the jury and prejudice them against the Appellant.

CONCLUSION

> Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because 'even though there was competent substantial evidence to support a verdict ... and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.' McDuffie v. State, 970 So.2d 312, 328 (Fla. 2007)(internal citations omitted)

Even though several errors, standing alone, would be sufficient to warrant a reversal, here the multiple errors committed by trial counsel, the prosecutor, and the trial court all had the cumulative effect of depriving Appellant of a fair trial.

Based upon the foregoing reasons, this Court should reverse the convictions, and dismiss the charges with prejudice, or in the alternative, order a new trial.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 12th day of March, 2013 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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