

292 So.3d 46

District Court of Appeal of Florida, Fifth District.

Jonathan SMITH, Appellant,

v.

STATE of Florida, Appellee.

Case No. 5D18-2444

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Opinion filed March 6, 2020

### Synopsis

**Background:** Defendant was convicted in the Circuit Court, 18th Judicial Circuit, Seminole County, [Melanie Chase, J.](#), of capital sexual battery. Defendant appealed

**Holdings:** The District Court of Appeal, [Sasso, J.](#), held that:

<sup>[1]</sup> audio recording of defendant's interview was not admissible, and

<sup>[2]</sup> admission of audio recording did not constitute harmless error.

Reversed and remanded.

**Procedural Posture(s):** Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (7)

<sup>[1]</sup> **Criminal Law** Reception and Admissibility of Evidence  
The trial court's ruling on admissibility of evidence is reviewed for an abuse of discretion.

<sup>[2]</sup> **Criminal Law** Necessity and scope of proof  
The trial court's discretion to admit evidence is limited by the rules of evidence.

<sup>[3]</sup> **Criminal Law** In general; subjects of opinion evidence

**Criminal Law** Credibility of Witnesses

It is error to permit a witness to comment on the credibility of another witness because the jury alone determines the credibility of witnesses.

<sup>[4]</sup> **Criminal Law** In general; subjects of opinion evidence

It is especially harmful for a police witness to give his opinion of a witness's credibility because of the great weight afforded an officer's testimony.

<sup>[5]</sup> **Criminal Law** Sound recordings

**Criminal Law** Matters directly in issue

Audio recording of defendant's interview with police in which investigating officers commented on truthfulness of child victim was not admissible at trial for capital sexual battery, where, even though detectives were engaged in an appropriate investigative technique, comments went far beyond simply positing how a child could know about sexual conduct alleged and instead constituted unequivocal statements supporting victim's veracity; statements did not provoke relevant responses from defendant, statements permitted the state to improperly elicit police opinion testimony and invade province of the jury, and jury was not therefore permitted to hear statements in order to provide context to defendant's statements. [Fla. Stat. Ann. § 90.403](#).

<sup>[6]</sup> **Criminal Law** Matters or Evidence Considered

Application of the harmless error test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied.

<sup>[7]</sup> **Criminal Law** Documentary and demonstrative evidence

**Criminal Law** Opinion evidence

Admission of audio recording of defendant's interview with police in which investigating

officers commented on truthfulness of child victim in trial for capital sexual battery did not constitute harmless error, where child victim's credibility was central and determinative issue, there was no physical evidence corroborating child's statements, child's report of incident served as foundation for each of the other witnesses' testimony, frequency of prejudicial statements compounded the error, error was further compounded when the state emphasized recorded statement in closing, and during deliberations, jury requested and was permitted to hear first fifteen minutes and last fifteen minutes of defendant's interview again.

\*47 Appeal from the Circuit Court for Seminole County, Melanie Chase, Judge.

#### Attorneys and Law Firms

William R. Ponall, of Ponall Law, Maitland, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

#### Opinion

SASSO, J.

Jonathan Smith appeals his judgment and sentence after a jury found him guilty of one count of capital sexual battery.<sup>1</sup> He raises several issues on appeal, one of which has merit. Smith argues the trial \*48 court erred in denying his requests to redact certain portions of the recording from a police interview at his home. We agree that the probative value of the evidence was outweighed by unfair prejudice because the recording contained improper comments on the credibility of the victim and invaded the province of the jury. Because we cannot say the error was harmless beyond a reasonable doubt, we reverse. In light of our decision, we decline to address the remainder of Smith's arguments.

The State alleged Smith committed capital sexual battery through penis to mouth penetration or union. During trial, the State sought to introduce the audio recording of Smith's interview with the police. Smith objected, arguing the recording included inadmissible comments made by the investigating officers bolstering the victim's credibility. In support, Smith filed a detailed motion outlining the specific objectionable statements and corresponding legal basis for the objections. Although the trial court sustained a few of Smith's objections, the recording as submitted to the jury contained several statements by the investigating officers commenting on the truthfulness of the child victim, including, but not limited to, the following remarks:

- "I can tell you once again from experience it's in her brain because it happened."
- "But I'm going to tell you right now, I believe that your [ ] licked someone's pee-pee. I wholeheartedly believe that ..."
- "It's not within the realm of what a [ ] year old would come up with."
- "And I can tell you she's not lying. She's not lying about this. She did not make this story up."
- "Once again, a [ ] doesn't make this stuff up."
- "Very descriptive. Very detailed, not something that comes out of a [ ] year-old's mouth."

In addition to the recording of Smith's interview, the State also presented testimony of the victim, the victim's mother, a family nurse practitioner, and a senior crime laboratory analyst. The witnesses confirmed that the victim reported the incident to her mother, but there was no physical evidence corroborating the victim's report. In the State's closing argument, it emphasized certain portions of the recording, noting, for example, that the detective said, "there are things that [ ]-year-olds just don't say."

#### STANDARD OF REVIEW

[1] [2] The trial court's ruling on admissibility of evidence is reviewed for an abuse of discretion. However, that discretion

#### FACTS

is limited by the rules of evidence. *Hudson v. State*, 992 So. 2d 96, 109 (Fla. 2008).

### ANALYSIS

[3] [4] We begin our analysis by observing a basic principle: it is error to permit a witness to comment on the credibility of another witness because the jury alone determines the credibility of witnesses. *Calloway v. State*, 210 So. 3d 1160, 1189 (Fla. 2017). This principle applies equally in cases where the testimony offered directly comments on the truthfulness of a minor victim. See *Tingle v. State*, 536 So. 2d 202 (Fla. 1988) (holding that it was error to allow counselor and social worker to testify that they believed alleged child victim was telling truth); *Fuller v. State*, 540 So. 2d 182 (Fla. 5th DCA 1989) (holding that it was error to allow member of child protection team to testify that he believed alleged child victim was telling \*49 truth); *Davis v. State*, 527 So. 2d 962 (Fla. 5th DCA 1988) (holding that it was error to allow psychologist to testify that alleged child victim was telling truth). And, “[i]t is especially harmful for a police witness to give his opinion of a witness[’s] credibility because of the great weight afforded an officer’s testimony.” *Seibert v. State*, 923 So. 2d 460, 472 (Fla. 2006) (quoting *Page v. State*, 733 So. 2d 1079, 1081 (Fla. 4th DCA 1999)).

[5] Applying these principles to the instant case, the error in admitting the objected-to comments becomes readily apparent. The detectives’ comments during their interview of Smith went far beyond simply positing how a child could know about the sexual conduct alleged and instead constituted unequivocal statements supporting the victim’s veracity. The trial court recognized this by sustaining Smith’s objection to a few of the detective’s similar comments. Even so, other prejudicial comments were admitted. In this respect, the trial court abused its discretion.

The State, however, argues the statements were properly admitted. The State observes that the detectives were simply engaging in an appropriate investigative technique, and with this observation we agree. However, we disagree that it necessarily follows that the jury was therefore permitted to hear the detectives’ statements in order to provide context to Smith’s statements. Rather, even in this setting, the trial court’s gatekeeping role pursuant to [section 90.403, Florida](#)

Statutes, is critical. *Accord McLean v. State*, 934 So. 2d 1248 (Fla. 2006).

Our conclusion finds support in *Jackson v. State*, 107 So. 3d 328 (Fla. 2012). In *Jackson*, the defendant filed a motion to exclude a videotaped interrogation on several grounds, including that the tape contained numerous statements of the detective’s belief in the defendant’s guilt. 107 So. 3d at 331. In determining the trial court erred in admitting the interview, the Florida Supreme Court noted that the detectives made repeated expressions of their personal opinions and proclamations of knowledge that the defendant committed the murder as well as statements praising the victim and eliciting sympathy for the victim. *Id.* at 341. The *Jackson* court held that admission of the videotape was harmful error that was more prejudicial than probative, and that the great majority of the detectives’ statements did not provoke relevant responses from the defendant and did not set forth circumstances in which he admitted any culpability or involvement. *Id.* at 341-42.

Here, as in *Jackson*, the objectionable statements permitted the State to improperly elicit police opinion testimony and invade the province of the jury because a central issue in the case was whether the victim fabricated or distorted a memory. And here, as in *Jackson*, the detectives’ statements did not provoke relevant responses from Smith. Indeed, several of the improper comments did not provoke relevant responses at all.<sup>2</sup> Also aligning this case with the circumstances in *Jackson*, the detectives here never secured a confession from Smith.

The similarities between this case and *Jackson* also distinguish this case from *King v. State*, 260 So. 3d 985 (Fla. 2018). In *King*, the Florida Supreme Court held \*50 that a defendant failed to show the prejudice necessary for entitlement to postconviction relief resulting from the admission of a detective’s statements during an interrogation and reaffirmed that “when placed in their proper context, an interrogating detective’s statements to a suspect could be understood by a rational jury to be techniques used by law enforcement officers to secure confessions.” 260 So. 3d at 996 (quoting *McMillian v. State*, 214 So. 3d 1274, 1286 (Fla. 2017)) (internal quotation marks omitted). In contrast from the interview here, the detective’s comments in *King* gave proper context to the entirety of the interrogation, which

elicited several incriminating and inconsistent statements from the defendant.

**All Citations**

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<sup>[6]</sup> Because we conclude the trial court abused its discretion in admitting portions of the recorded interview, we next consider whether the error was harmless. *Jackson*, 107 So. 3d at 342. Application of the harmless error test requires an examination of the entire record by the appellate court “including a close examination of the permissible evidence on which the jury could have legitimately relied ....” *Id.* (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)).

<sup>[7]</sup> In evaluating whether the error here was harmless, we first note the child victim's credibility was the central and determinative issue in this case. There was no physical evidence corroborating the child's statements, and the child's report of the incident served as the foundation for each of the other witnesses' testimony. Second, this is not a case presenting an isolated, prejudicial comment. Instead, the frequency of the prejudicial statements here compounded the error. Third, the error was further compounded when the State emphasized the recorded statement in closing. And finally, during deliberations, the jury requested and was permitted to hear the first fifteen minutes and the last fifteen minutes of Smith's interview again. Thus, based on the specific facts and circumstances of this case, we cannot say beyond a reasonable doubt that the error was harmless.

CONCLUSION

For the reasons expressed above, we determine the trial court abused its discretion in admitting portions of the recorded interview at trial. Because the probative value of the statements at issue was substantially outweighed by the danger of unfair prejudice, and the error in admitting the statements was not harmless, we reverse Smith's convictions and remand for a new trial.

REVERSED and REMANDED.

COHEN and WALLIS, JJ., concur.

### Footnotes

<sup>1</sup> Smith was charged with two counts of capital sexual battery through penis to mouth penetration or union during two separate time periods (Counts One and Two), and one count of lewd or lascivious molestation by forcing or enticing the alleged victim to touch his penis (Count Three). The victim identified in the amended information was six years old. The jury found him guilty on Count One but not guilty on Counts Two and Three. Smith was sentenced to life in prison.

<sup>2</sup> This exchange is emblematic of the interrogation:

Investigator One: And it's not within the realm of what a [ ]-year-old would come up with.

Investigator Two: Okay. And you know, I'm waiting for you to kind of open up because I feel like you're on that fence, you're teetering.

Smith: I'm just ... so in shock.