FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-0804

DONALD E. RILEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Francis Allman, Judge.

November 16, 2020

B.L. THOMAS, J.

In this *Anders*[1] appeal Appellant's counsel identifies three potential issues regarding Appellant's judgment and sentence. By pro se motion Appellant also raises a newly discovered evidence claim. We decline to address any assertion of newly discovered evidence. *See Richardson v. State*, 546 So. 2d 1037, 1037 (Fla. 1989) (holding that claims based on newly discovered evidence should be brought under Florida Rule of Criminal Procedure 3.850). We agree with Appellant's counsel that no reversible error occurred at trial.

Facts

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[1] *Anders v. California*, 386 U.S. 738 (1967).

Appellant was charged with one count of sexual battery on a child under twelve years of age by a person eighteen years of age or older (penile penetration and union); one count of sexual battery on a child under twelve years of age by a person eighteen years of age or older (oral sex); two counts of sexual battery by a person in familial or custodial authority on a child twelve years of age but less than sixteen years of age; and one count of lewd and lascivious molestation.

Before trial the State filed a "Notice of Intent to Introduce Child Hearsay Statement," consisting of the child protection team recording of the victim's forensic interview. A hearing was held on the introduction of the child hearsay statement and the trial court allowed the statement into evidence.

During opening statements, the State claimed that it would present a separate *Williams*[2] rule witness who was also molested by Appellant. Defense counsel requested a sidebar, objecting to the State's use of a *Williams* rule witness because he had not received proper notice. The trial court stated that proper notice had been filed and overruled defense counsel's objection.

The victim was Appellant's granddaughter. She testified that when she was seven or eight years old, her family lived with her grandparents in Wakulla County.[3] The first incident she remembered occurred on Christmas day. Appellant took her into his bedroom to show her some knives. He locked the door and unzipped his pants. When the victim tried to leave, Appellant blocked the door with his foot. He then undressed the victim, put her on the bed, and put his penis in her "vaginal area" while he held her hands down. The victim said it ended when her mother and grandmother came home. The victim testified that this

[2] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

[3] Prior to trial, the State had filed a notice of intent to introduce similar-fact evidence involving sexual activity by Appellant upon the same victim in Wakulla County. Appellant's counsel did not argue that introduction of this evidence was improper, and we agree there is no error in the State's presentation of this testimony as either similar-fact evidence or as evidence that was inextricably intertwined.

occurred multiple times when her family was living with her grandparents in Wakulla County. Appellant also made the victim perform oral sex on him.

The victim testified that another incident occurred at Appellant's house in Leon County around Halloween when she was about ten years old. She stated that she was asleep on the couch when Appellant came in and started putting his hands in her pants and touching her. Appellant undressed her, touched her, and put his penis in her "vaginal area."

When Appellant lived in Leon County he also put his penis in the victim's mouth several times. Appellant assaulted the victim orally in a shed located behind Appellant's house. The victim testified that the intercourse stopped around the time she reached sixth grade. However, she stated that Appellant continued to grope her by touching her breasts, hips, and genitals. The victim testified that these incidents caused her to suffer emotional injury and she attempted suicide twice.

The State played a video of the victim's interview with the child protection team coordinator. The victim's interview and her testimony at trial were substantially similar. In the interview, the victim recounted the rape at Christmas that occurred in Appellant's bedroom. The victim stated that Appellant had threatened to hurt her siblings if she didn't shut up. The victim did what Appellant said and undressed. Appellant then held the victim down and raped her by putting his "penile structure" inside her "vaginal area." Once Appellant heard the victim's mother and grandmother arrive, he told the victim to get dressed and act like she was using the bathroom.

The victim also stated that Appellant did this "pretty much any time he could get [her] alone." She said it went on until she was about ten or eleven and stopped before she reached sixth grade. She stated that the last time she remembered it happening was around Halloween when she was in fifth grade and Appellant raped her in the living room. The victim stated that since then, Appellant continued to observe her and "try to grope [her] on the breasts or behind."

The State attempted to call its *Williams* rule witness but was unable to contact her. The trial court continued the trial until the following day. Defense counsel did not object to the continuation. The next day, the State failed to present its *Williams* rule witness. Defense counsel opted to continue with the trial even though the State mentioned the witness during its opening statement.

A detective with the Leon County Sheriff's Office testified that he conducted a voluntary interview with Appellant on November 7, 2016. During the interview, Appellant told the detective that it had been a couple years since he had been able to achieve an erection. This stood out to the detective because around the time Appellant said he stopped being able to achieve an erection was the time that sexual intercourse with the victim stopped. When the detective brought this information to Appellant's attention, Appellant backtracked and said, "well, it had to have been longer than that, you know. That couldn't be right."

Following the detective's testimony, the State rested. Defense counsel moved for judgment of acquittal based on insufficiency of the evidence, which was denied. Defense counsel did not present any additional evidence or witnesses.

After deliberating for approximately an hour and a half, the jury returned with a verdict of guilty on all counts. Sentencing proceeded directly after trial. The trial court adjudicated Appellant guilty and sentenced him to concurrent sentences of life in prison as to counts one and two, thirty years in prison as to count three, and fifteen years as to count five. The State had previously dismissed count four.

Analysis

I.

The trial court did not commit any error when it allowed the State to introduce the victim's child hearsay statements, under section 90.803(23), Florida Statutes (2013), which provides, in part:

> (a) Unless the source of information or the method or circumstances by which the statement is reported

> indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
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> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
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> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense . . .

Florida courts have provided further elaboration on the admissibility of child hearsay statements. *See State v. Townsend*, 635 So. 2d 949, 954 (Fla. 1994); *see also Small v. State*, 179 So. 3d 421, 424–25 (Fla. 1st DCA 2015) (holding trial court's admission of child hearsay statements was proper where its findings were specific, properly placed on the record, and supported by competent, substantial evidence consisting of the child's mental and physical age, the child-like description of the acts, and the lack of inconsistencies in the child's accusations).

The victim's statement met all the requirements of the statute. The victim was thirteen at the time the statements were made and sixteen when she testified at trial. After a hearing outside the presence of the jury, the trial court found that there were sufficient safeguards of reliability surrounding the victim's statement. In making its decision, the trial court relied on the professionalism of the interview, the victim's honesty in answering the questions, and the indication that there was no improper motivation on the victim's part. Thus, the trial court's findings on the trustworthiness and reliability of the victim's statements were properly placed on the record and supported by competent, substantial evidence. *See Small*, 179 So. 3d at 424. The victim's statement qualifies as an exception to the hearsay rule and the trial court did not err by allowing the interview into evidence.

II.

The trial court also correctly overruled the objection to the State's comment during opening statements about a *Williams*-rule witness that did not testify at trial. "Opening statements 'are not evidence, and the purpose of opening argument is to outline what an attorney expects to be established by the evidence.'" *Gonzalez v. State*, 990 So. 2d 1017, 1024–25 (Fla. 2008) (quoting *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990)). Florida courts have consistently held that references made during opening statements to witnesses who subsequently do not appear at trial constitute harmless error. *See Williams v. State*, 947 So. 2d 517, 519 (Fla. 3d DCA 2006) (holding failure of witness to testify even though the witness was mentioned in the State's opening statement was harmless error where there was no indication that the prosecutor acted in bad faith and the witness's statements were introduced through other witnesses and were tangential or irrelevant); *see also Travieso v. State*, 480 So. 2d 100, 103 (Fla. 4th DCA 1985) (holding no fault occurred where the prosecutor and defense counsel spoke about a person during opening statements as though he was going to be a witness at trial, but neither party called him as a witness).

When the State gave its opening statement, it was unaware that there may be a possible issue with its *Williams*-rule witness. The State had previously notified opposing counsel and the trial

court that it intended to introduce this witness.[4] When the issue arose, the trial court discussed the situation with both parties, and the State left the decision to defense counsel who decided against a mistrial. Thus, the State was not acting in bad faith. *See Williams*, 947 So. 2d at 519. Furthermore, the State's comment was harmless error under *State v. DiGuilio*, as it did not affect the verdict in light of the substantial testimony of the victim, the testimony of the detective, and Appellant's own admission, as described below. 491 So. 2d 1129 (Fla. 1986).

III.

The trial court correctly denied Appellant's motion for judgment of acquittal. In reviewing a trial court's ruling on a motion for judgment of acquittal, an appellate court must consider "the evidence and all reasonable inferences from the evidence in a light most favorable to the State." *Wallace v. State*, 240 So. 3d 872, 873 (Fla. 1st DCA 2018). The concern on appeal is whether, "after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment." *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981). "Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal." *Id.*

The State presented testimony from the victim that she suffered both vaginal-penile penetration and oral-penile penetration from Appellant when she was under the age of twelve. The victim testified that after she turned twelve, the vaginal-penile penetration stopped, but the oral-penile penetration

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[4] Although the State's notice of intent to present similar fact evidence as to this witness is not in the record, the trial court stated that a notice was filed in December of 2017. The State claimed that it complied with all the legal requirements and filed the notice. Additionally, the State disclosed the witness during jury selection. Finally, even if this was error and proper notice was not given, it was harmless error because the witness did not testify. *See McCuin v. State*, 198 So. 3d 1066, 1068 (Fla. 1st DCA 2016) (stating an error is harmless where the record establishes beyond a reasonable doubt that the jury would have reached the same verdict without the error).

continued. Appellant also continued to grope the victim. Appellant's testimony was supported by the video of her interview with the child protection team coordinator. The detective's testimony provided additional evidence to corroborate the victim's testimony, including statements from Appellant that he was unable to achieve an erection around the time the sexual intercourse with the victim stopped. Because the State provided substantial, competent evidence supporting the verdict, the trial court did not err by denying Appellant's motion for judgment of acquittal. *See Tibbs*, 397 So. 2d at 1123.

AFFIRMED.

RAY, C.J., and KELSEY, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy Thomas, Public Defender, and Maria Ines Suber, Assistant Public Defender, Tallahassee, for Appellant; Donald E. Riley, pro se, Appellant.

Ashley Moody, Attorney General, Tallahassee, for Appellee.