DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ARMANDO RODRIGUEZ-OLIVERA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Nos. 2D18-706, 2D20-296
CONSOLIDATED

October 13, 2021

Appeals from the Circuit Court for Hendry County; James D. Sloan, Judge.

J. Andrew Crawford of J. Andrew Crawford, P.A., St. Petersburg, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Laurie Marie Benoit-Knox, Assistant Attorney General, Tampa, for Appellee.

LABRIT, Judge.

Armando Rodriguez-Olivera appeals (1) his convictions for capital sexual battery and two counts of lewd or lascivious

molestation and (2) the summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. For the reasons explained below, we reverse Mr. Rodriguez-Olivera's convictions and remand for a new trial.

Background

Mr. Rodriguez-Olivera was charged for acts he allegedly committed during a family barbeque that was attended by twenty to thirty people, most of whom were related to Mr. Rodriguez-Olivera and the victim (M.S.) by blood or marriage. The incident occurred while several children and teenagers were watching movies in a small bedroom down the hall from a living room where the adults were gathered; by all accounts, the door to the bedroom was continuously open, the room was well lit, and the adults were frequently going into the room to check on their children.

On the evening in question, Mr. Rodriguez-Olivera was twenty years old, M.S. was eleven years old, and the other movie-watchers ranged in age from eight to sixteen years old. The incident wasn't reported to law enforcement until several months after it allegedly occurred. As a result, no physical or forensic evidence was

introduced at trial and the State's case was based entirely on M.S.'s account of the incident.

After a trial that lasted a total of eight hours (inclusive of jury selection and instruction) over two consecutive days and following deliberations of less than forty-five minutes, a jury found Mr. Rodriguez-Olivera guilty on all charges. He was sentenced to life in prison without parole on the capital sexual battery count and concurrent terms of forty years in prison for each of the lewd or lascivious molestation counts.

Mr. Rodriguez-Olivera appealed his conviction; during the pendency of his direct appeal, this court relinquished jurisdiction to allow him to file a separate postconviction motion alleging ineffective assistance of counsel. The postconviction court summarily denied Mr. Rodriguez-Olivera's motion. Mr. Rodriguez-Olivera appealed the order denying his motion, and that appeal was consolidated with his existing direct appeal.

On direct appeal, Mr. Rodriguez argues that several errors occurred; because most errors were not properly preserved, he

presents his argument primarily as one of fundamental error.[1] With respect to three of the errors, he alternatively contends that he is entitled to a new trial because his counsel provided ineffective assistance that is apparent on the face of the record. Mr. Rodriguez-Olivera also argues that the cumulative effect of all the errors requires reversal.

Analysis

By failing to object to the admission of highly prejudicial evidence and by failing to move for a mistrial when the jury heard such evidence, Mr. Rodriguez-Olivera's trial counsel provided ineffective assistance that is apparent on the face of this record. While a new trial is warranted for that reason alone, the errors underlying the ineffective assistance claims—when considered cumulatively with the other errors—also operated to deprive Mr. Rodriguez-Olivera of a fair and impartial trial.

I. Ineffective Assistance on the Face of the Record

"[C]laims of ineffective assistance of counsel are not normally cognizable on direct appeal. . . ." *Forget v. State*, 782 So. 2d 410,

[1] *See generally Monroe v. State*, 191 So. 3d 395, 399–401 (Fla. 2016).

413 (Fla. 2d DCA 2001). "They may be reviewable, however, on direct appeal where 'the ineffectiveness is apparent from the face of the record and it would be a waste of judicial resources to require the trial court to address the issue.' " *Marty v. State*, 210 So. 3d 121, 125 (Fla. 2d DCA 2016) (quoting *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987)).

"To establish ineffective assistance of counsel a defendant 'must show that counsel's performance was deficient' and 'that counsel's errors were so serious as to deprive the defendant of a fair trial.' " *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish deficient performance, "a defendant must show that counsel's performance 'fell below an objective standard of reasonableness' as measured by 'prevailing professional norms.' " *Id.* (quoting *Strickland*, 466 U.S. at 688). And to demonstrate that such deficient performance "prevented a fair trial, a defendant must show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see Alcorn v. State*, 121 So.

3d 419, 425 (Fla. 2013) (stating that the *Strickland* prejudice "standard does not 'require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in [that] outcome' " (alteration in original) (quoting *Parker v. State*, 89 So.3d 844, 855 (Fla. 2011))).

Mr. Rodriguez-Olivera argues that his counsel was ineffective on the face of the record in three ways, which we address in turn below.

A. Uncharged Collateral Crimes

On two separate occasions at trial, the jury heard about uncharged acts of molestation Mr. Rodriguez-Olivera allegedly perpetrated upon M.S. First, on direct examination, child protective investigator Ashlee Harmon relayed what M.S. had told her about the underlying allegations. As she concluded her narrative, Ms. Harmon stated, "That was that incident, there was another as well." Mr. Rodriguez-Olivera's counsel objected. The trial court heard a proffer of Ms. Harmon's testimony concerning the second incident and agreed that she had referenced an uncharged crime. After conferring with Mr. Rodriguez-Olivera, defense counsel stated that

he was "not seeking a mistrial based on my client, but I leave it to the court's discretion." The trial court then issued a curative instruction.

The next morning, the State played a video recording of the Child Protective Team (CPT) interview of M.S. The jury heard the following exchange between M.S. and Reanna Vinciguerra, the CPT case coordinator who interviewed M.S.;

> Q: Beside what we just talked about, was there any other times, or any other incidents with [Mr. Rodriguez-Olivera]?
>
> A: Me, him, my dad, my stepmom – the second time that he tried to get me, but like it was like – we went to – me my dad—

After defense counsel objected, the trial court replayed the tape and engaged in extended colloquy with counsel for both sides as to whether that "second time" occurred on the night of the acts for which Mr. Rodriguez-Olivera was charged or on a later date when M.S., her father, Mr. Rodriguez-Olivera, and others were together for a quinceañera.

Ultimately, the trial court concluded that the testimony did not refer to the uncharged quinceañera incident but was "a different version" of the charged incident. This conclusion is negated by the

record. Seven months before the trial, Ms. Vinciguerra (and three other witnesses, including Ms. Harmon) testified at a hearing on the State's motion to admit child hearsay. They explained that M.S. had accused Mr. Rodriguez-Olivera of two different instances of abuse which occurred on two different dates. Those witnesses uniformly related that the "second time" the abuse allegedly occurred was in connection with the quinceañera, when Mr. Rodriguez-Olivera "tried" to molest M.S. but was unsuccessful because M.S.'s father and others were present. The quinceañera incident was the subject of Ms. Harmon's trial testimony the preceding day, which the trial court had then emphatically concluded was "an uncharged incident." Despite this critical error, defense counsel—the same lawyer who attended the child hearsay hearing—did not move for a mistrial or request a curative instruction.

Mr. Rodriguez-Olivera has satisfied both prongs of the *Strickland* test. Counsel's failure to move for a mistrial after two witnesses successively referred to the same uncharged collateral crime constituted deficient performance. To establish deficient performance, a defendant must "overcome the presumption that,

under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Bradley v. State*, 33 So. 3d 664, 671 (Fla. 2010) (quoting *Strickland*, 466 U.S. at 689). With respect to the first instance (Ms. Harmon's testimony), the State contends defense counsel affirmatively waived a mistrial as a matter of trial strategy. After conferring with Mr. Rodriguez-Olivera, counsel stated that he was "not seeking a mistrial based on my client, but I leave it to the court's discretion." Even if this is deemed a strategic decision to waive mistrial, nothing suggests that a sound trial strategy was behind counsel's failure to move for mistrial (or even request a curative instruction) after the second time a State witness mentioned an uncharged crime. To the contrary, "[w]e can conceive of no strategic reason for the decision," and for the reasons discussed below it is clear that Mr. Rodriguez-Olivera suffered prejudice from it. *See Anderson v. State*, 46 Fla. L. Weekly D1721, D1722 (Fla. 2d DCA July 30, 2021).

The improper admission of evidence of an uncharged crime "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." *Straight v. State*, 397 So. 2d

903, 908 (Fla. 1981). Moreover, "[b]ecause of the commonly held belief that individuals who commit sexual assaults are more likely to recidivate as well as societal outrage directed at child molesters, the admission of prior acts of child molestation has an even greater potential for unfair prejudice than the admission of other collateral crimes." *McLean v. State*, 934 So. 2d 1248, 1256 (Fla. 2006).

Mr. Rodriguez-Olivera was prejudiced because "if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different—that is, a probability sufficient to undermine confidence in the outcome." *Curran v. State*, 229 So. 3d 1266, 1269 (Fla. 1st DCA 2017) (quoting *Jones v. State*, 998 So. 2d 573, 584 (Fla. 2008)) (holding that defendant was prejudiced where counsel failed to object to testimony of uncharged acts of molestation); *see Botto v. State*, 307 So. 3d 1006, 1010 (Fla. 5th DCA 2020) (same); *see also Austin v. State*, 48 So. 3d 1025, 1028 (Fla. 2d DCA 2010) (recognizing that jury's assessment of defendant's credibility and character in molestation case "could easily have been affected by the improper evidence" of uncharged collateral crime). Simply put, "[w]e cannot say that there was no

reasonable probability of [Mr. Rodriguez-Olivera] being prejudiced by his trial counsel's error." *See Marty*, 210 So. 3d at 127.

B. Comments and Closing Argument on Prearrest Silence

While defense counsel was cross-examining the lead detective as to why law enforcement didn't interview other witnesses to determine who else was present in the room during the incident, the following exchange occurred:

> Q: How come you don't talk to the other witnesses to see if they know, instead of taking her word for it?
>
> A: Because [a witness] said it was just her and him and [M.S.] in the room.
>
> Q: In criminal cases though you interview witnesses on who you want to interview, not just take other people's word for it?
>
> A: Yes, because this was later in the night after everyone else had left.
>
> Q: They are family, they all live in the area; no way to track them down or make phone calls?
>
> A: I attempted to interview the suspect in the case, but he had already obtained an attorney who did not want him to give a statement.

Counsel took no action in response to this comment. Mr. Rodriguez-Olivera argues that the failure to take curative action constitutes ineffective assistance of counsel apparent from the face

of the record; he maintains that this ineffectiveness was compounded when defense counsel inexplicably highlighted the comment during closing argument.

The privilege against self-incrimination guaranteed by article I, section 9 of the Florida Constitution "offers *more* protection than the right provided in the Fifth Amendment to the United States Constitution." *State v. Horwitz*, 191 So. 3d 429, 439 (Fla. 2016). Evidence of a defendant's prearrest, pre-*Miranda*[2] silence is inadmissible "as substantive evidence of guilt or when the defendant fails to testify." *Urbaniak v. State*, 241 So. 3d 963, 966 (Fla. 2d DCA 2018). As the supreme court has explained, anything that is "fairly susceptible of being interpreted by the jury as a comment on [defendant's] failure to testify" constitutes a "serious error." *Horwitz*, 191 So. 3d at 445 (alteration in original) (quoting *State v. Kinchen*, 490 So.2d 21, 22 (Fla. 1985)). This is because "[a] jury that is allowed to consider a defendant's ambiguous silence as evidence of guilt could conclude that the defendant's failure to explain the silence—which of course the defendant is not obligated

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

to do—supports an inappropriate belief that the defendant is guilty." *Id.* at 443.

The detective's comment on Mr. Rodriguez-Olivera's prearrest silence was improper because the jury easily could have concluded that Mr. Rodriguez-Olivera's prearrest silence, combined with his failure to testify, supported a finding of guilt. To make matters worse, Mr. Rodriguez-Olivera's counsel highlighted the improper comment in closing argument, stating that "I asked the detective did you speak to all these people, . . .and she goes nope; . . . he got a lawyer. I'd get a lawyer too."

We see no tactical explanation for counsel's failure to take any corrective action whatsoever as to the improper comment, nor can we discern any strategic reason for highlighting the comment during closing argument. This is particularly true since there was no physical evidence and the outcome hinged entirely on the jury's perception of the trustworthiness of M.S. and the defendant. Under such circumstances, allowing an unconstitutional inference of guilt to be drawn from the detective's testimony about Mr. Rodriguez-Olivera's prearrest silence without taking corrective action is

unacceptable; amplifying that inference in closing argument is inexplicable.

This deficient performance prejudiced Mr. Rodriguez-Olivera. "The fact that we regard improper comments on silence as 'high risk' errors that are less likely than others to be harmless necessarily means that a lawyer's failure to object to such comments is to some extent more likely than other failings of counsel to be prejudicial . . . ." *Howard v. State*, 288 So. 3d 1239, 1250 (Fla. 2d DCA 2020). Because Mr. Rodriguez-Olivera did not testify, the only version of the events came from M.S. (and the various retellings of her story through child hearsay discussed below). Without the improper comments on his invocation of rights, there is at least a reasonable probability that the trial would have ended with a different result. *See id.*; *see also Marty*, 210 So. 3d at 126.

C. Child Hearsay

After reporting the alleged abuse to law enforcement, M.S. was interviewed by the CPT as part of a criminal investigation. In the leadup to trial, the State moved to admit the recorded interview as child hearsay pursuant to section 90.803(23), Florida Statutes

(2015). The trial court conducted a hearing on the motion and heard testimony from L.P. (M.S.'s mother); Ms. Harmon (the child protective investigator); Diane Smith (a nurse practitioner who examined M.S.); and Reanna Vinciguerra (the individual who conducted M.S.'s CPT interview). Mr. Rodriguez-Olivera generally contested admission of child hearsay. The trial court issued an order permitting only "the hearsay set forth in the child protection team interview on December 8, 2015."

Notwithstanding this order, at trial the State introduced additional child hearsay beyond that in the CPT interview. Specifically, *before* the State introduced the recorded CPT interview, it called M.S., then elicited child hearsay from L.P., Ms. Harmon, and Nurse Smith,[3] all of whom testified live after the jury heard M.S.'s live testimony and all of whom corroborated M.S.'s account of her allegations against Mr. Rodriguez-Olivera. At no point did defense counsel object to that child hearsay; indeed, he first objected when the State moved to admit the recorded interview and publish it to the jury. Mr. Rodriguez-Olivera contends that defense

[3] Nurse Smith's testimony was admissible under another hearsay exception. *See* § 90.803(4).

counsel was ineffective on the face of the record for failing to properly object to child hearsay, and we agree.

The child hearsay order was entered nearly eight months before trial, and defense counsel never objected to the sufficiency of the findings, so any error concerning the order is unpreserved. Likewise, defense counsel knew the recorded CPT interview would be introduced as child hearsay, but when M.S., then her mother, and then Ms. Harmon testified, each corroborating M.S.'s statements, counsel never objected. Given the circumstances of this case—which boiled down to whether the jury believed M.S.'s allegations—failure to object to this cumulation of inadmissible hearsay, that served only to corroborate M.S.'s testimony, was deficient performance. *See Johnson v. State*, 679 So. 2d 49, 50 (Fla. 1st DCA 1996) (recognizing that failure to object to child hearsay may constitute deficient performance); *see also Maddry v. State*, 702 So. 2d 1314, 1315 (Fla. 1st DCA 1997) (holding that failure to properly object to admission of similar fact evidence in sexual battery case was deficient performance). Again, we can discern no strategic reason for counsel's failure to object to this child hearsay.

Mr. Rodriguez-Olivera was prejudiced by this deficiency. "Regarding . . . child hearsay witnesses, '[t]he admission of a corroborative statement can provide powerful evidence to support credibility and reliability.' " *Curran*, 229 So. 3d at 1269 (second alteration in original) (quoting *Platt v. State*, 201 So. 3d 775, 778–79 (Fla. 4th DCA 2016)). As in *Curran*,

> the State's case rested heavily on the victim's credibility. Without the corroborating testimony of the 4 witnesses, the State's case would have essentially come down to the competing version of events testified to by the victim and appellant. Thus, we find appellant sufficiently demonstrated that if counsel had challenged the admission of this testimony, there was a reasonable probability that the outcome in the proceedings would have been different.

Id. The same is true here. *Cf. Bullington v. State*, 311 So. 3d 102, 112–13 (Fla. 2d DCA 2020) (concluding that erroneous admission of child hearsay in sexual battery case was harmless where "significant other" physical evidence corroborated the victim's testimony).

In sum, Mr. Rodriguez-Olivera's claims of ineffective assistance on the face of the record are individually substantial and collectively warrant reversal for a new trial because the deficiencies in counsel's performance have "so affected the fairness and

reliability of the proceeding that confidence in the outcome is undermined." *Peterson v. State*, 221 So. 3d 571, 583 (Fla. 2017) (quoting *Schoenwetter v. State*, 46 So. 3d 535, 546 (Fla. 2010)); *see Harvey v. Dugger*, 656 So. 2d 1253, 1257 (Fla. 1995) (recognizing that the cumulative effect of numerous errors in counsel's performance may constitute prejudice).

II. Cumulative Error

For the benefit of the parties and the trial court on retrial, we address Mr. Rodriguez-Olivera's cumulative error argument. He contends that the cumulative effect of several errors—the evidentiary errors underlying his ineffective assistance claims as well as two other errors—warrants a new trial. We agree.

The Florida Supreme Court has explained that

> [w]here multiple errors are discovered, it is appropriate to review the cumulative effect of those errors because even with 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."

Smith v. State, 320 So. 3d 20, 33 (Fla. 2021) (second alteration in original), *reh'g denied*, SC18-822, 2021 WL 2425310 (Fla. June 14,

2021). Taken in the context of this record and against the backdrop of prejudice caused by ineffective assistance of counsel that is apparent on the face of the record,[4] the cumulative effect of the errors of which Mr. Rodriguez-Olivera complains operated to deprive him of a fair trial. *See Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) ("Where several errors are identified, the Court 'considers the cumulative effect of evidentiary errors and ineffective assistance claims together.' " (quoting *Suggs v. State*, 923 So.2d 419, 441 (Fla. 2005))).

A. Evidentiary Errors Underlying Ineffective Assistance Claims

The State correctly argues that the evidentiary errors underlying Mr. Rodriguez-Olivera's ineffective assistance of counsel claims are unpreserved. It further contends that those errors were

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[4] Because we are remanding for a new trial, we need not address the propriety of the postconviction court's summary denial of Mr. Rodriguez-Olivera's rule 3.850 motion. We note, however, that Mr. Rodriguez-Olivera's primary argument was that trial counsel failed to investigate and call several witnesses, several of whom would have testified that M.S. fabricated her allegations against Mr. Rodriguez-Olivera and one of whom would have testified that she twice heard M.S. tell her grandmother that Mr. Rodriguez-Olivera never touched her. Obviously, this testimony would have been material to the defense. *See, e.g.*, *Bozada v. State*, 277 So. 3d 625, 627–28 (Fla. 5th DCA 2018).

harmless. "[I]n evaluating whether the errors were harmless, we may consider 'the cumulative effect' of preserved and unpreserved error." *Allstate Ins. Co. v. Marotta*, 125 So. 3d 956, 961 (Fla. 4th DCA 2013). As discussed above, notwithstanding lack of preservation, the errors underlying Mr. Rodriguez-Olivera's ineffective assistance claims were not harmless. To recap, evidence of uncharged crimes is presumptively harmful. *See Straight*, 397 So. 2d at 908. And improper comments on a defendant's prearrest silence are regarded as "high risk" errors. *See Howard*, 288 So. 3d at 1250. Lastly, in a molestation case where the State's case rested entirely on the victim's account, the corroborative impact of otherwise inadmissible cumulative child hearsay cannot be said to be harmless. *See Curran*, 229 So. 3d at 1269; *see also Thorne v. State*, 271 So. 3d 177, 185 (Fla. 1st DCA 2019) ("If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986))).

B. Limitation of Cross-Examination of M.S.

In addition to her claim against Mr. Rodriguez-Olivera, M.S. accused a man named J.M. (a close family friend) of molesting her a

few months before the incident with Mr. Rodriguez-Olivera. M.S. reported her allegations against J.M. to law enforcement in December 2015 at the same time she reported her allegations against Mr. Rodriguez-Olivera.[5] In brief, while M.S. was sleeping on a floor with J.M.'s wife, another adult female, and some other children, J.M. awakened M.S. when he touched her breast over her clothing. J.M. attempted to touch M.S. again but was unsuccessful because M.S. got up and left the area where the others continued sleeping. J.M. was arrested and charged with a felony; he admitted the allegations and pleaded to a misdemeanor.

The parties agreed to exclude from Mr. Rodriguez-Olivera's trial any reference to the J.M. incident unless the State opened the door. In the recorded CPT interview that the State published at trial, after M.S. described how Mr. Rodriguez-Olivera touched her and asked to see her breasts, the interviewer asked M.S.:

Q: When did you tell your mom and her friend?

A: It was like a couple weeks ago.

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[5] The probable cause statement in J.M.'s case indicates that M.S. and her mother did not report the incident immediately "because they tried to handle it as a family."

Q: Couple weeks ago I (inaudible) You had said he asked you to see your titties?

A: Yeah.

Q: Did he see your titties?

A: No, I didn't show him.

Q: Okay. Besides [Mr. Rodriguez-Olivera], have you ever experienced anything like this with anyone else?

A: No.

Shortly after, the interviewer asked again:

Q: Has anybody else done anything to you like that?

A: No.

After the recording was played to the jury, defense counsel sought a ruling that the foregoing testimony opened the door to the J.M. incident; he sought to challenge M.S.'s credibility by questioning her about her denial of previous similar incidents. The State objected, claiming that evidence of the J.M. incident was inadmissible pursuant to Florida's rape shield statute[6] and *Pantoja v. State*, 59 So. 3d 1092 (Fla. 2011). Although it recognized that the rape shield statute was inapplicable, the trial court erroneously concluded that *Pantoja* precluded cross-examination that the

[6] § 794.022(2) Fla. Stat. (2015).

defense sought. Mr. Rodriguez-Olivera argues that the trial court erred by denying him the right to cross-examine M.S. on the J.M. incident. We agree.

Pantoja featured the question of "whether the trial court erred in excluding evidence that the victim recanted a prior accusation of molestation against another person." *Pantoja*, 59 So. 3d at 1094.[7] The decision stands for the proposition that evidence of a victim's prior *false* allegation of sexual misconduct is not admissible to impeach the victim or prove the victim's bias or propensity to lie. *See id.* at 1097–1100. Here, defense counsel acknowledged that he did not intend to question the truth or falsity of M.S.'s allegations

[7] In its answer brief, the State doesn't attempt to rebut Mr. Olivera-Rodriguez's argument that *Pantoja* is inapplicable. Instead, the State principally argues that it did not open the door to the J.M. incident. The trial court never directly addressed this argument, and the State's argument is unpersuasive. The incidents were similar molestation cases that both occurred in the context of a family get-together, both involved M.S.'s breasts, both occurred in close temporal proximity, and M.S. reported both crimes at the same time. M.S.'s statements in the CPT interview were wholly inconsistent with her allegations against J.M., and Mr. Rodriguez-Olivera was entitled to use those statements to test M.S.'s credibility. *See Austin v. State*, 48 So. 3d 1025, 1027 (Fla. 2d DCA 2010); *Docekal v. State*, 929 So. 2d 1139, 1143 (Fla. 5th DCA 2006).

against J.M.;[8] instead, he sought to challenge M.S.'s credibility based on her denial of any prior similar incidents of molestation.

Mr. Rodriguez-Olivera should have been permitted to cross-examine M.S. on the J.M. incident as a prior inconsistent statement. *See Elmer v. State*, 114 So. 3d 198, 202 (Fla. 5th DCA 2012) ("It is axiomatic and fundamental to our system of justice that a party may impeach a witness by introducing statements of the witness which are inconsistent with the witness's present testimony."); *see also Hawn v. State*, 300 So. 3d 238, 243 (Fla. 4th DCA 2020) (holding that trial court erroneously denied the defendant's request to present prior inconsistent statement impeachment evidence against the victim in a lewd or lascivious molestation case). M.S.'s "credibility was a central issue in this case and [Mr. Rodriguez-Olivera's] ability to challenge that credibility was unduly encumbered." *See Recco v. State*, 264 So. 3d 273, 275 (Fla. 5th DCA 2019). Because M.S. was "the State's key witness in a case that otherwise lacks corroborating evidence,"

[8] The veracity of M.S.'s allegations against J.M. wasn't subject to challenge anyway because the probable cause statement in J.M.'s case reflected that J.M. admitted the allegations.

limiting Mr. Rodriguez-Olivera's right to confront her on a prior inconsistent statement "constituted an abuse of discretion and was not harmless error." *Id.* at 276.

C. Jury Instructions for an Uncharged Crime

In counts two and three of the criminal information, Mr. Rodriguez-Olivera was charged with lewd or lascivious molestations for touching M.S.'s genitals, buttocks, or the clothing covering them. The information did not allege that he touched M.S.'s breasts. Nevertheless, the judge instructed the jury as follows:

> Armando Rodriguez Olivera in a lewd or lascivious manner, intentionally touched *the breasts* or genitals or genital area or buttocks or the clothing covering the breasts or clothing covering the genitals or the clothing covering the genital area or the clothing covering the buttocks of M.S. . . . .

(Emphasis added.) In her closing argument, the prosecutor also argued that the State could prove count two by establishing that Mr. Rodriguez-Olivera "touched the *breasts*, genitals or genital area or buttocks or the *clothing covering the breasts* or clothing covering the genitals or clothing covering the genital area, or the clothing covering buttocks of M.S." (Emphasis added.) Thus, the jury received an instruction on an uncharged version of a charged

offense. Mr. Rodriguez-Olivera's counsel did not object. Mr. Rodriguez-Olivera argues that the erroneous jury instruction constitutes fundamental error.

As the State correctly argues, the jury instruction does not rise to the level of fundamental error. But as the State concedes, the instruction was nonetheless erroneous. Even if the erroneous instruction, standing alone, could be considered harmless, it still may properly be considered in a cumulative error analysis. *See Smith*, 320 So. 3d at 33; *see also Penalver v. State*, 926 So. 2d 1118, 1137 (Fla. 2006) ("[E]ven when we find multiple harmless errors, we must still consider whether 'the cumulative effect of [the] errors was such to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." (alteration in original) (quoting *Brooks v. State*, 918 So.2d 181, 202 (Fla. 2005))). And " 'in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive' the defendant a fair trial." *Penalver*, 926 So. 2d at 1138 (quoting *Nowitzke v. State*, 572 So. 2d 1346, 1350 (Fla. 1990)).

In conclusion, we hold that Mr. Rodriguez-Olivera's counsel was ineffective on the face of the record. That ineffectiveness and

the cumulative effect of the errors discussed above deprived Mr. Rodriguez-Olivera of a fair trial.

Reversed and remanded for a new trial.

KELLY and KHOUZAM, JJ., Concur.

Opinion subject to revision prior to official publication.