

1 THE COURT: WERE YOU PRESENT WHEN THEY MADE ANY
2 STATEMENTS TO A POLICE OFFICER LATER ON THAT DAY?

3 THE WITNESS: NO.

4 THE COURT: SO THE POLICE OFFICER TOOK THEM OVER
5 IN A ROOM, OR SOMETHING, AT THE POLICE STATION, OR AT
6 YOUR HOME?

7 THE WITNESS: AT THE HOME. I WAS TOLD THAT THEY,
8 ON A LITTLE TAPE RECORDER, RECORDED IT. BUT I NEVER
9 HEARD IT.

10 THE COURT: DO YOU HAVE ANY OTHER QUESTIONS OF
11 THE WITNESS?

12 MR. BENDER: NO, YOUR HONOR.

13 THE COURT: DOES THE DEFENSE HAVE ANY OTHER
14 QUESTIONS?

15 MR. EIDE: I WOULD HAVE NO QUESTIONS, YOUR HONOR.

16 THE COURT: ANY ARGUMENTS YOU WANT TO MAKE?

17 MR. EIDE: YES, YOUR HONOR. I MAKE AN ARGUMENT
18 AS TO THE ADMISSIBILITY OF MICHELLE ██████, AS TO
19 MICHELLE AND ANGELA.

20 IS THE COURT READY TO HEAR ARGUMENT AS TO
21 BOTH?

22 THE COURT: YEAH.

23 MR. EIDE: CONTINUED ARGUMENT AS TO MICHELLE.

24 I STAND ON MR. EHRHARDT AND THE CHILDRESS
25 CASE AND THE FACT THAT I STILL BELIEVE RELEVANCY IS

1 QUESTIONABLE, ESPECIALLY WHEN THE COURT APPLIES 90.803.
2 I THINK THE RELEVANCY HERE -- THE PROBATIVE VALUE IS
3 SEVERELY OUTWEIGHED BY THE PREJUDICIAL.

4 THE COURT: WHY WOULD IT BE IRRELEVANT?

5 MR. EIDE: I'M SAYING THAT IT'S IRRELEVANT BECAUSE
6 THE FACTS SURROUNDING IT AND ALSO THAT THE STATE SHOULD
7 NOT BE ALLOWED TO USE, OR MAKE A CASE, OR USE HEARSAY
8 STATEMENTS TO NOTHING BUT CORROBORATE.

9 AND THERE'S BEEN NO QUESTION HERE OR NO
10 ASSERTION BY THE DEFENSE THAT THESE STORIES WERE
11 RECENTLY FABRICATED. WE'VE GOT QUESTIONS AS TO WHETHER
12 IT HAPPENED. BUT WE'RE NOT SAYING THAT THE MOTHER HAD
13 MADE IT UP.

14 NOW, I'M NOT SAYING WE WOULD NOT LATER. BUT
15 UNTIL THAT HAPPENS, I THINK THAT IT WOULD BE IRRELEVANT.

16 THE COURT: ALL RIGHT.

17 MR. EIDE: FURTHER, I WOULD JUST POINT TO THE FACT,
18 YOUR HONOR, SHOWING THAT I DON'T THINK THE CIRCUMSTANCES
19 ARE SUCH THAT IT WOULD INDICATE TRUSTWORTHINESS.

20 THEY WERE AT SCHOOL WITH EACH OTHER. THE
21 KIDS WERE PICKED UP EARLY; INDICATING, IN AND OF ITSELF,
22 THERE'S SOMETHING WRONG.

23 THE TRUSTWORTHINESS OF THE "BLOW UP THE
24 HOUSE" STATEMENT; BY THE FACT THAT THE KIDS WERE SENT
25 TO SCHOOL; OFFICERS WITH NOT CALLED AFTER IT WAS MADE.

1 AND I ALSO QUESTION THE RELATION OF THE
2 TIME BETWEEN WHEN MR. MERSON WAS ALLEGEDLY THERE AND
3 WHEN THE STATEMENTS WERE MADE OR DISCLOSED. THERE'S
4 A FEW HOURS, AND I QUESTION WHETHER THAT, THEREFORE,
5 MAKES THE STATEMENTS UNTRUSTWORTHY. PLUS, OF COURSE,
6 WHAT THE COURT HAS OBSERVED HERE AND THE RECORD HAS
7 COLLECTED.

8 I THINK THAT CHILDRESS SPEAKS FOR ITSELF ON
9 IT, AS FAR AS MICHELLE. I THINK WHAT I'VE JUST TALKED
10 ABOUT SPEAKS TO ANGELA. AND I WOULD ALSO POINT THE
11 COURT, AS TO ANGELA, MY ARGUMENT THAT IT'S A TWO-STEP
12 SITUATION TO GET SOMETHING ADMITTED, YOUR HONOR.

13 FIRST OF ALL, THERE HAS TO BE THE GENERAL
14 RULE OF ADMISSIBILITY TO ALLOW THE ADMISSIBILITY OF
15 IT, AND ALSO THE RELEVANCY OF IT.

16 THERE'S TWO CASES THAT I WOULD CITE, TOO.
17 ONE IS PRICE VERSUS STATE, 553 SO.2D 728, SECOND
18 DISTRICT, OF 1989. THERE IT'S STATED THAT THE TESTIMONY
19 IN THAT CASE WOULD NOT BE ADMISSIBLE EXCEPT FOR RECENT
20 FABRICATION.

21 IN THIS CASE THE DEFENDANT HAD WAIVED THE
22 RIGHT TO OBJECT, AND THEY JUST DIDN'T OBJECT. AND AT
23 THIS POINT I DON'T KNOW OF ANY CLAIM BY THE DEFENSE OF
24 RECENT FABRICATION.

25 SECONDLY, I WOULD REFER THE COURT TO

1 WISE, W-I-S-E, VERSUS STATE, 546 SO.2D 1068,
2 SECOND DISTRICT, REHEARING DENIED AUGUST OF '89.

3 IN THERE IT STATED THAT: AS A GENERAL RULE,
4 A WITNESS' TRIAL TESTIMONY COULD NOT BE CORROBORATED
5 BY HIS OWN PRIOR INCONSISTENT STATEMENTS. I THINK THE
6 COURT NEEDS TO TAKE THAT INTO CONSIDERATION WHEN THEY
7 LOOK AT IT.

8 IT FURTHER STATED IN THERE, AND THIS IS AT
9 PAGE 1070 IN THE FIRST COLUMN: THE PRIOR CONSISTENT
10 STATEMENTS BY THE CHILD WERE PRESENTED AT A POINT IN
11 THE TRIAL WHEN THERE WAS NO EVIDENCE OF HER PRIOR
12 INCONSISTENT STATEMENTS OR THAT SHE DENIED MAKING
13 SUCH STATEMENTS.

14 A NON-HEARSAY STATEMENT -- IT FURTHER SAYS --
15 IS ADMISSIBLE ONLY WHEN IT TENDS TO PROVE OR DISPROVE
16 A MATERIAL FACT.

17 AND WE DON'T BELIEVE THAT'S ADMISSIBLE AT
18 THIS POINT AT ALL. THE STATEMENT, WHETHER OR NOT HE
19 BLEW UP THE HOUSE AND THESE THINGS ARE NOT ADMISSIBLE
20 TO GOING TO PROVE A MATERIAL FACT.

21 I PRESENT THE COURT WITH COPIES OF THESE.
22 AND I THINK YOU REALLY NEED TO TAKE CONSIDERATION OF
23 BOTH THE STATUTE AS TO HEARSAY AND ALSO WHAT I PRESENTED
24 TO THE COURT NOW AND THEN MAKE A DETERMINATION.

25 SURELY, MICHELLE'S IS NOT ADMISSIBLE, UNDER

1 THE STATUTE. AND I DON'T BELIEVE ANGELA'S STATEMENTS
2 ARE ADMISSIBLE. ALTHOUGH WITHIN THE STATUTE, I'M SURE,
3 I DON'T THINK THEY'RE WITHIN THE RELEVANCY GROUNDS.

4 THE COURT: WELL, DOES THE STATE WANT TO MAKE
5 ANY ARGUMENT? I DON'T NEED TO HEAR ANY ARGUMENT FROM
6 THE STATE CONCERNING THE ADMISSIBILITY OF ANGELA'S
7 STATEMENT.

8 I'M WELL-SATISFIED THAT THEY ARE ADMISSIBLE,
9 AND I'LL GO THROUGH THE REQUIREMENTS UNDER 90.803,
10 SUBSECTION (23) CONCERNING THAT.

11 BUT AS FAR AS THE SISTER IS CONCERNED, THE
12 YOUNGER SISTER, DO YOU WANT TO MAKE ANY OTHER ARGUMENT
13 OTHER THAN THAT, THAT'S ALREADY BEEN MADE? I'LL BE
14 GLAD TO HEAR THAT. BUT IT SEEMS TO ME THAT CHILDRESS
15 WOULD CONTROL, EVEN THOUGH I DON'T AGREE WITH IT.

16 MR. BENDER: YOUR HONOR, I WOULD JUST URGE THAT
17 YOU ARE NOT REQUIRED TO FOLLOW CHILDRESS SINCE IT IS
18 NOT A SUPREME COURT OF FLORIDA CASE.

19 SECONDLY, BY THEIR OWN STATEMENTS OF THE
20 LEGISLATIVE HISTORY AND ALL THE WHEREASAS', "WHEREAS,
21 CHILDREN ARE IN NEED OF SPECIAL PROTECTION AS VICTIMS
22 OR WITNESSES."

23 MICHELLE ██████ IS A VICTIM IN THIS CASE.

24 THE COURT: WELL, LET ME TELL YOU HOW I FEEL
25 ABOUT THIS THING. AND, ULTIMATELY, I'VE GOT TO MAKE

1 THE DECISION ON IT.

2 I THINK THERE'S A VERY GREAT POTENTIAL FOR
3 CREATING REVERSIBLE ERROR, BASED ON THIS CHILDRESS
4 CASE. I DON'T AGREE WITH THE CHILDRESS CASE.

5 I THINK HER TESTIMONY SHOULD BE ADMITTED.
6 I THINK THAT ANY CHILD ABUSE CASE SHOULD BE ADMITTED;
7 ANY CONTACT TESTIMONY SHOULD BE ADMITTED; AND AS A
8 WITNESS TO THE CASE, PERHAPS, SHOULD BE ADMITTED.

9 SO I DON'T AGREE WITH THE CHILDRESS FINDINGS,
10 BUT IT IS THE ONLY CASE LAW THAT I HAVE BEEN PROVIDED.
11 AND I AM AFRAID WE'RE GOING TO CREATE REVERSIBLE ERROR
12 IN THIS COURT BY ADMITTING THE TESTIMONY OF THE YOUNGER
13 GIRL DURING THE COURSE OF THIS TRIAL. AND, ULTIMATELY,
14 IT WILL BE REVIEWED; AS WILL, I ASSUME, THE TESTIMONY
15 OF ANGELA, BY HEARSAY.

16 BUT IF YOU THINK IT IS THAT ESSENTIAL TO
17 GET IT IN, I WILL BE GLAD TO HEAR WHATEVER ADDITIONAL
18 ARGUMENT THAT YOU HAVE, BUT I DON'T WANT TO CREATE ERROR.

19 MR. BENDER: YOUR HONOR, THE ONLY OTHER POINT I
20 WOULD MAKE -- AND I UNDERSTAND YOUR REASONINGS, AND I
21 RESPECT THEM AND I AGREE WITH THEM TO A POINT.

22 I AGREE WITH YOU THAT CHILDRESS IS ALSO, I
23 THINK, BAD CASE LAW. HOWEVER, I THINK THERE MAY BE
24 ANOTHER EXCEPTION WHICH WE CAN LOOK AT AS TO THE THEN
25 EXISTING MENTAL, OR EMOTIONAL, OR PHYSICAL CONDITION

1 OF MICHELLE ██████, WHICH WOULD BE 90.803 SUBSECTION (3).

2 THE COURT: ARE YOU TALKING ABOUT RES GESTAE?

3 90.803, WHAT?

4 MR. BENDER: UNDER THE HEARSAY EXCEPTIONS 90.803
5 SUBSECTION (3): "A STATEMENT OF THE DECLARANT'S THEN
6 EXISTING STATE OF MIND, EMOTION, OR PHYSICAL SENSATION,
7 INCLUDING A STATEMENT OF INTENT, PLAN, MOTIVE, DESIGN,
8 MENTAL FEELING, PAIN, OR BODILY HEALTH, WHEN SUCH
9 EVIDENCE IS OFFERED TO: PROVE THE DECLARANT'S STATE
10 OF MIND, EMOTION, OR PYSICAL SENSATION AT THAT TIME
11 OR AT ANY OTHER TIME WHEN SUCH STATEMENT IS AN ISSUE
12 IN THE ACTION."

13 I THINK CLEARLY IF WE'RE NOT GOING TO ALLOW
14 IT IN UNDER THE HEARSAY EXCEPTION, WHICH HAS BEEN
15 PROVIDED FOR CHILDREN UNDER THE AGE OF ELEVEN, THEN
16 CLEARLY IT MAY BE ADMISSIBLE UNDER SUBSECTION (3) OF
17 THE STATUTE.

18 THE COURT: THE EXCEPTION IS THAT THE SUBSECTION
19 DOES NOT MAKE IT ADMISSIBLE, AN AFTER-THE-FACT STATEMENT
20 OF MEMORY OR BELIEF TO PROVE THE FACT REMEMBERED OR
21 BELIEVED. AND THAT'S WHAT YOU'RE OFFERING IT FOR.

22 MR. BENDER: I BELIEVE IT'S SO CLOSE IN TIME --
23 WE'RE TALKING SEVERAL HOURS LATER. AT THE TIME OF
24 BREAKFAST.

25 AND EVEN IF YOU DON'T LOOK AT THAT, THEN

1 I THINK THE EXCITED UTTERANCE EXCEPTION WOULD APPLY.
2 THERE IS EVIDENCE THAT FIVE, SIX HOURS LATER WOULD
3 ALLOW THAT EXCEPTION TO APPLY.

4 I THINK, CLEARLY, WHEN WE LOOK AT THE OVERALL
5 CIRCUMSTANCES AS TO WHY THESE GIRLS WOULD BE TELLING
6 THEIR MOTHER AT BREAKFAST, FIVE OR SIX HOURS AFTER THE
7 INCIDENT OCCURRED, WE HAVE TO LOOK AT THE CIRCUMSTANCES
8 SURROUNDING IT AND THE CONTENT.

9 AND, INDEED, THAT IS AN EXCITED UTTERANCE
10 BY THE FACT THAT THEY HAVE NOT HAD TIME TO REFLECT ON
11 IT, AND BECAUSE THEY ARE SCARED BECAUSE THEY HAVE BEEN
12 THREATENED WITH BODILY HARM IF THEY TOLD.

13 IF THE COURT IS INCLINED NOT TO ALLOW IT,
14 I WOULD HAVE TO INSTRUCT THE WITNESSES, BOTH MRS. ██████████
15 AND OFFICER ROACH, TO MERELY TALK ABOUT WHAT ANGELA
16 TOLD THEM AND NOT MICHELLE.

17 THE COURT: THAT'S RIGHT.

18 MR. BENDER: BUT I WOULD HOPE YOU WOULD BE ABLE
19 TO CARVE OUT OR FIND AN EXCEPTION AMONG THOSE PROVIDED.
20 AND THAT'S ALL THE ARGUMENT WE HAVE, YOUR HONOR.

21 MR. EIDE: WE WOULD LIKE ARGUMENT, YOUR HONOR,
22 IF THE COURT WAS PERSUADED BY THAT.

23 THE COURT: NO, I'M NOT PARTICULARLY PERSUADED
24 BY 90.803 SUBSECTION (3), THAT ARGUMENT.

25 AND I DON'T AGREE WITH THE CHILDRESS CASE.

1 I JUST THINK THAT THE INTERPRETATION IS EXTREMELY
2 NARROW OF THE STATUTE -- I DON'T KNOW WHERE THEY GET
3 THE IDEA THAT THE TITLE -- BECAUSE I'VE SEEN A LOT OF
4 CASE LAW THAT SAYS THE TITLE IS NOT A DIRECT STATEMENT
5 OF LEGISLATIVE INTENT.

6 IT'S SOME CLERK UP THERE WHO TRIES TO
7 PARAPHRASE THE ACTION IN THE ACT WHEN IT'S ENACTED,
8 AND THE WHEREAS CLAUSE AS ADOPTED BY THE COMMITTEE
9 THAT REPORTS OUT THE BILL, OR MAY FILE IT AND REPORT
10 IT OUT, AS FAR AS LEGISLATIVE INTENT.

11 BUT A TITLE, A SYNOPSIS OF A STATUTE OR
12 SECTION OF THE STATUTE IS OBVIOUSLY MISLEADING, AND
13 IT IS NOT EVIDENCE OF LEGISLATIVE INTENT. SO I DON'T
14 AGREE WITH THEIR INTERPRETATION.

15 ALTHOUGH, I HAVEN'T LOOKED AT THE WISE CASE.
16 HOWEVER, I DON'T HAVE ANYTHING CONTRARY TO CHILDRESS.
17 AND I'M COMPELLED BECAUSE OF THAT TO PROHIBIT, IN AN
18 ABUNDANCE OF CAUTION, TO NOT CREATE THE POTENTIAL FOR
19 REVERSIBLE ERROR ON THE PART OF THE CHILD, TO NOT ALLOW
20 THE TESTIMONY OF THE YOUNGER GIRL, WHO IS MICHELLE.

21 SO THE COURT MAKES THE FINDING THAT CHILDRESS
22 WOULD PROHIBIT THE TESTIMONY OF MICHELLE AS BEING NOT
23 A NON-SEXUAL CHILD ABUSE OR BATTERY TYPE CASE, IN LIGHT
24 OF CHILDRESS. ALTHOUGH, I DON'T AGREE WITH CHILDRESS'
25 INTERPRETATION. SO THAT WOULD NOT BE ADMISSIBLE.