IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

APPEAL NUMBER 1D09-2332

Xxxxxxx
Appellant-Petitioner

v.

STATE OF FLORIDA
Appellee-Respondent.

A DIRECT APPEAL OF A JUDGMENT AND SENTENCE FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT DUVAL COUNTY, FLORIDA

ORIGINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Pages

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND OF THE FACTS

Xxxxxxx ("Xxxxxxx" or the "defendant")was a career Navy enlisted man, a Navy Chief Damage Control Officer [RI-3; RIII-329], having served twenty years when his then 23 year old adopted step-daughter came forward with an accusation that she and he had engaged in consensual sexual activities (fellatio and analingus) from her sophomore to her senior year in high school. [RIV-210] The step daughter making the allegations had been twice kicked out of her step-father's home because of her bad behavior, in particular her relationship with a convicted felon, with whom she ultimately bore three children out of wedlock. [RV-396-397; RV-215-218]

Xxxxxxx had numerous persons, neighbors and commanding officers, who were prepared to testify as to his general reputation for good moral character and truthfulness, and some of these witnesses did testify at his bond hearing. [RIII-319-341] For example, his commanding officer, Lt. Commander Mark A. Quinn, who had known Xxxxxxx both professionally and personally for over ten years, testified that Xxxxxxx record of 20 years in the Navy was unblemished - - all his fitness reports were excellent or above average, no type of misbehavior whatsoever, multiple personal awards, Navy achievement awards and no less than five Navy good conduct medals. His professional performance was "stellar." This was true not just of his past ten years under Lt. Commander Quinn, but under his prior commands as well. Lt.

Commander Quinn described Xxxxxxx as a "personal friend," and he was supporting him in that capacity as well, not just based on his professional knowledge of Xxxxxxx. [RIII-328-329]

The trial was a "he said, she said" contest. The competing credibility of the accuser and the defendant was the crux of the matter the jury had to determine - - there was no confession and no witness to corroborate the accuser's claim. In the course of the investigation the Navy criminal investigator, Sara Griffin, had the step-daughter send an email to Xxxxxxx accusing him of sexual abuse in the past and demanding an explanation why he did the things she accused him of doing. [RV-225-226; RV-281]

There was no evidence that *the accusatory* email in question was in fact sent to Xxxxxxx other than the accuser saying so. The accusatory email was composed by the accuser at the behest of the Navy investigator, but the investigator was not present when the email was supposedly sent to the Xxxxxxx. Instead, the Navy investigator relied upon the accuser telling her that she had sent the email to her step-father. [RV-281; RV-283] In other words, this was not a "controlled email," and not analogous to a "controlled call," at which the investigator would be present and record what was done. [RV-226-227]

The accuser was not able to produce any responsive email from Xxxxxxx

replying to her accusatory email. [RV-282] So after a prolonged delay, during which there is no evidence that any law enforcement officer in any way monitored the accuser's email activity (i.e., the accuser could have sent a second email with various complaints short of sex abuse), the Navy investigator had the young woman make a controlled call, that is, a call at which the investigator was present, and recorded as it happened. This call was made from the accuser's cell phone to Xxxxxxx cell phone. [RV-225-227; RV-278-279] He testified that he was at the barber shop when he received the call. [RV-317]

Despite repeated attempts by the Navy investigator present during the call to prompt the young woman to bring up the sex abuse allegations (because the purpose of the call, like the abortive email, was to confront Xxxxxxx with the sex abuse allegation and obtain his response), the young woman repeatedly ignored the investigators promptings. [RV-228-229; RV-282; RV-284; RV-295-299; RV-303; DX-2][1]

During this call the young woman asked Xxxxxxx if he had gotten her email and he said yes, *but no explanation was offered to confirm that the email he acknowledged receiving was an email containing sex abuse allegations.* [RV-317-318] For all the record established there could have been a second email

[1] DX refers to Defense Exhibit. SX refers to State Exhibit.

unbeknownst to the Navy investigator in which the young woman repeated historical complaints other than sex abuse against her step-father, for example, complaints about having been twice kicked out of his home. In any event, Xxxxxxx testified and there was no evidence to the contrary, that the email he did receive, he deleted without reading, assuming it was the step-daughter rehashing old complaints (unrelated to any sex abuse accusations). [RV-372]

During the telephone conversation there was not one word offered by the young woman to confirm that the email she mentioned at the beginning of the conversation was an email containing allegations of sex abuse. The remainder of the lengthy phone conversation was a back and forth over past complaints and Xxxxxxx admittedly acknowledging that he felt bad for how he had treated his step-daughter.[2]

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[2] There was only one isolated instance during the lengthy conversation at which the young woman made a sex abuse reference and even that reference is totally ambiguous, and it is apparent from the transcript of the conversation that Xxxxxxx did not hear what she said. [RV-327] The accuser herself explained in the phone call how at another point she knew she was talking but he was not hearing, she assumed because he had hit the talk button. [RV-317] The one reference is:

10:09:22 18 After everything, I just -- I just don't
10:09:26 19 even believe you can't give me an answer
10:09:30 20 about pony rides, booty blows, licking and of
10:09:34 21 that. Pulling on your pants and licking, I
10:09:38 22 -- you know, it was wrong. And you still
10:09:40 23 let it happen. I just hope one day you can
10:09:44 24 give me an answer.

[RV-317-330]

A copy of the accusatory email was introduced in evidence over the defendant's objection as an adoptive admission. [RIII-402; RV-224; SX1] The jury was told by the state that Xxxxxxx' expressions of regret and remorse in the telephone call were in response to the young woman's accusation of sex abuse in the email.

Xxxxxxx testified in his own behalf and denied the sex abuse allegations without any equivocation. The state attacked his veracity and credibility on cross examination and argued in closing argument that Xxxxxxx had not told the truth. [RVI-487; RVI-497-499]:

14:29:34 14 With the e-mail and with the call,
14:29:40 15 ladies and gentlemen, the defendant has to
14:29:44 16 admit what he can't deny. And he's got to
14:29:48 17 deny what he can't admit. He has to admit he

14:29:50 18 got that e-mail. He has to admit that he was

[RV-327]

Xxxxxxx next recorded response is:

10:10:00 5 Said what, you don't know where?

This is not an adoptive admission, and yet it is the only reference in the phone call to the young woman's allegations, and unless you knew what she meant, this veiled reference alone does not alert the listener to the fact that it is meant to imply sexual abuse.

on the call but he has to deny reading the e-mail, and he has to deny understanding the call. Interesting. He says that well, I thought this was about the calling my daughter's baby a bastard. You'll have the e-mail, you'll see in the very last paragraph she's, like, ooh, by the way, you know, you thought you were slick that time when you called my baby a bastard, you know, but I heard it. She's confronting him then. That's the first time she's mentioned bastard, that bastard incident. He read that e-mail, he just can't admit it. He can't let you all know that. Says he only read the first few lines. Convenient and expected for him to say.

When the defendant was actually from the opening to the defense's case something that kept coming to my mind was a guilty conscience is the mother of invention, isn't it? A guilty conscience will dream up all these things that this is about, it's about her boyfriend. It's about the car. It's about the divorce. It's about custody. It's about him being the victim because all he was trying to do was be a father. And isn't it ironic that all these fatherly things that he wants you all to believe it's about have nothing to do with this case. Nothing to do with this case. But he wants y'all to believe that he's that father that he never was because if you see the truth then you know he's not. The truth doesn't sit well with him, makes him uncomfortable and he doesn't want to acknowledge that he is responsible. That's plain and simple.

14:31:50 5 And I'm sorry to keep bringing up
14:31:54 6 quotes, but quote by Mark Twain says no one
14:31:56 7 is willing to acknowledge his faults when a
14:32:02 8 more agreeable motive can be found for these
14:32:04 9 estrangement of his acquaintances.
14:32:08 10 So he was taking the easy way out. I'm
14:32:10 11 not going to acknowledge the truth because
14:32:12 12 it's too easy for me to make it about
14:32:16 13 something else, that people who don't
14:32:18 14 sincerely listen to the facts and sincerely
14:32:22 15 listen to the evidence, he's hoping you don't
14:32:24 16 do that and you just jump on all these other
14:32:28 17 things. So let's blame it all on Xxxxxxx.

[RVI-497-499]

Xxxxxxx attempted to introduce character witnesses to testify as to his general reputation in the community for good moral character and general reputation in the community for truthfulness pursuant to Florida Statutes, § 90.609. The state objected and the trial court excluded this evidence of his reputation for truthfulness ruling that general reputation evidence for truthfulness was not admissible as a matter of law under the evidence code. [RIII-381-384]

The trial court also overruled the defendant's objection to the trial court's admission of the accusatory email as an adoptive admission. The defendant objected that the state had the burden of proving to the trial judge as a foundation predicate for the hearsay email's admission under Florida Statutes, § 90.803(18), that the defendant had gotten the email in question, read and understood it, before his failure to respond

to it or his telephone conversation response could be admitted as an adoptive admission. The trial court disagreed, ruling instead that these were jury questions. [RIII-402]

The charging information alleged two counts of familial or custodial sexual battery. Count two alleged penetration of the defendant's anus by the victim's tongue. [RI-37] Florida Statutes, § 794.011 requires proof of penetration, as opposed to mere union, when the object touching or penetrating the anus is an object other than a sexual organ. Hence with contact between a tongue and the anus, penetration and not union is a required element. The state presented only evidence of union as to count two. [RIV-173] The defendant moved for judgment of acquittal, but it was denied on the basis of the state mistakenly representing that there had been evidence of penetration. [RIII-422]

The trial court sentenced Xxxxxxx to 15 years imprisonment and 10 years sex offender probation and entered an order finding him to be a sexual predator. [RII-262-269] He remains incarcerated at this time.

STANDARDS OF REVIEW

All three issues raised in this appeal were preserved by timely and specific objection or by timely motion for judgment of acquittal and as such are properly preserved for appellate review.

EVIDENTIARY RULINGS - ISSUES I AND II.

Section 90.104(1)(b), Florida Statutes, provides that "[i]f the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." *See In re Amendments to the Florida Evidence Code-Section 90.104,* 914 So.2d 940, 941 (Fla. 2005); *Rodgers v. State,* 948 So.2d 655, 663 (Fla. 2006).

The standard of review on appeal of an evidentiary ruling is abuse of discretion. *Carpenter v. State,* 785 So.2d 1182, 1201 (Fla.2001).

However, when a trial court misapplies the law, it abuses its discretion. Because the trial court misapplied Florida Statutes, §§ 90.609 and 90.903(18) in excluding the defendant's proffered reputation evidence and improperly admitting the state's hearsay email, its rulings were an abuse of discretion. "By definition, a court abuses its discretion when it makes an error of law." *United States v. Moye,* 454 F.3d 390, 398 (4th Cir.2006) (*en banc*) (citation and internal quotation marks omitted).

Little turns, however, on whether we label review of this particular

> question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. *Cooter & Gell*[3], *supra*, at 402, 110 S.Ct., at 2459. <u>*A district court by definition abuses its discretion when it makes an error of law*</u>. 496 U.S., at 405, 110 S.Ct., at 2460.

Koon v. United States, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047 (1996) (emphasis supplied).[4]

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[3] *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 110 S.Ct. 2447 (1990).

[4] *See e.g. Castaneda ex rel. Cardona v. Redlands Christian Migrant Ass'n, Inc.* 884 So.2d 1087, 1093 (Fla. 4th DCA 2004):

> Florida does not allow such discretion on the part of the trial courts to ignore the Rules of Evidence or the Rules of Civil Procedure. Failure to follow the Rules constitutes an error of law, not an abuse of discretion. While the application of the Rules to a particular fact pattern may require the use of discretion, the interpretation of the Rules does not. We therefore conclude that the trial court erred in refusing to permit Castaneda to use the deposition testimony from the Redlands employees.

See also, *State v. Simone*, 431 So.2d 718, 722 (Fla. 3rd DCA 1983):

> New trial orders are generally entitled to great weight in the absence of a showing of a clear abuse of discretion. However, an order granting a new trial on matters which the trial court views as errors of law should be reversed when, on appeal, it is determined such matters were not error, or constituted harmless error. *State v. Tresvant*, 359 So.2d 524 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1375 (Fla.1979). Here, the trial court's refusal to give the requested instruction on culpable negligence as a lesser included offense was not error. Accordingly, the order granting a new trial to the defendant is reversed, with directions to reinstate the jury verdict.

In an early Florida Supreme Court case, this precise rule was stated, in the context of

In *Cooter & Gell*, the Supreme Court had explained:

> Of course, *this standard* [*abuse of discretion*] *would not preclude the appellate court's correction of a district court's* legal errors, e.g., determining that Rule 11 sanctions could be imposed upon the signing attorney's law firm, [citation omitted], *or* relying on a materially incorrect view of the relevant law *. . . An appellate court would be justified in concluding that,* in making such errors, the district court abused its discretion. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swint, supra*, 456 U.S., at 287, 102 S.Ct., at 1789.[5]

Cooter & Gell v. Hartmarx Corp. 496 U.S. 384, 402, 110 S.Ct. 2447, 2459 (1990) (emphasis supplied).

The trial judge's discretion was misinformed by an error of law. "The trial court's discretion is limited by the rules of evidence." *Sparkman v. State,* 902 So.2d 253, 259 (Fla. 4th DCA 2005). Therefore, the trial court abused its discretion and the

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an appeal of a grant of injunction:

> [*T*]*he appellate or reviewing tribunal will not interfere with or control the action of the court below in such matters, unless it has been guilty of a clear abuse of that discretion;* and by abuse of discretion, within the meaning of the rule, is meant an error in law committed by the court. Unless, therefore, some established rule of law or principle of equity has been violated, the action of the court below will not be interfered with upon such an appeal.

Sullivan v. Moreno, 19 Fla. 200 (Fla. 1882) (emphasis supplied).

[5] *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781 (1982).

burden shifts to the state to show that the error was harmless.

III. MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT TWO, WHICH CHARGED PENETRATION, BUT ONLY UNION WAS PROVED.

The "sufficiency of the evidence" standard determines whether evidence presented is legally adequate to permit a verdict and is used to decide a motion for directed verdict. "In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt." *Tibbs v. State,* 397 So.2d 1120, 1123 (Fla. 1981). Sufficiency of the evidence is generally an issue of law that should be decided pursuant to the *de novo* standard of review. *Jones v. State,* 790 So.2d 1194 (Fla. 1st DCA 2001).

SUMMARY OF ARGUMENTS

I. THE COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE EXCLUDING DEFENDANT'S CHARACTER EVIDENCE AND EVIDENCE OF GENERAL REPUTATION FOR TRUTHFULNESS.

This trial was a pure he said, she said contest, with the 23 year old adopted step-daughter of the defendant, a recently retired Navy chief, claiming that from her sophomore year to her senior year of high school he had engaged in various sexual activity with her, short of intercourse. He testified and denied her allegations. He explained that he had twice had to kick her out of his home because of her association with a convicted felon, which ultimately led to her dropping out of college and having three children out of wedlock. There was a controlled phone call in which the step-daughter studiously avoided referring to sex abuse but manipulated to have the step-father acknowledge that he felt bad for how he had treated her. The defendant explained on the witness stand that his expression of regret in that phone call was for having been so hard on her, kicking her out of the home, which he felt contributed ultimately to the downward spiral of her life, her dropping out of college and having three children out of wedlock.

The state cross examined the defendant attempting to portray him as a liar and his denials as false. In closing argument the state argued that the defendant's denials

were not true.

In response the defense proffered the testimony of character witnesses who would have testified as to the defendant's *general reputation in the community* for truthfulness and good moral character. The trial court granted the state's pretrial motion in limine to exclude this testimony and renewed her ruling at trial over defense objection that such evidence was expressly permitted under Florida Statutes, § 90.609.

The trial court observed with pride that it had not permitted this trial to become "sidetracked" into "who tells the truth and who doesn't tell the truth," further observing that that was what the rules of evidence were intended to prohibit.

In this close case which turned strictly on the determination of the credibility of the accuser versus the credibility of the defendant, the improper exclusion of this evidence was an abuse of discretion and constituted reversible error, because the state will be unable to meet its burden of establishing that the error was harmless.

II. THE COURT ERRED IN ADMITTING OVER DEFENSE OBJECTION A SELF-SERVING EMAIL FROM THE ALLEGED VICTIM WHICH WAS HEARSAY BUT ADMITTED TO PROVE THE TRUTH OF THE MATTER CONTAINED IN THE EMAIL.

At direction of the Navy criminal investigator, the accuser allegedly sent an email to her step-father accusing him of sexual abuse against her in years past and

asking him to explain why he had done what she accused him of doing. There was no response to this email. Lacking a response, the Navy investigator then set up a controlled call to the step-father in which the Navy investigator wanted the step-daughter to repeat her accusations on the telephone and get a recorded response. During this telephone call, one cell phone to another, the young woman studiously avoiding asking any of the sex abuse questions that the Navy investigator, who was present for the call, was prompting her to ask. Only one time did she mention her sex abuse accusations - - and even then one cannot tell from what she says that it is a sex abuse allegation - - and the record is clear that the defendant did not hear the isolated accusation, because his side of the conversation at that point was completely non-responsive - - not evasive - - it appeared that for whatever reason he had not heard her end of that part of the conversation because the transcript of his side of the call at that point shows him talking about a different subject.

Indeed, the defendant testified without any evidence to the contrary, that although he got *an* email from the step-daughter prior to this phone call (and in the phone call he acknowledged having received *an email* from the step-daughter, there was no evidence presented to show that the email he acknowledged receiving was the accusatory email, and in any event he testified that he immediately deleted the email he received from the step-daughter, without reading it, thinking it was further

argument from her concerning an unrelated complaint.

The state sought to admit the accusatory email. Acknowledging that the email was hearsay, the state argued that it would only be admissible under a hearsay exception if the trial court found it to be an adoptive admission. At first the trial court ruled that the email was admissible under the rule of completeness and finding that it was *not* an adoptive admission on the defendant's part.

The state correctly explained that it was not admissible under that rationale but instead could only be admitted if the court found it to be an adoptive admission. Thereupon the trial court changed its first ruling and decided that it was an adoptive admission and would be admitted under that basis.

Responding to the defendant's arguments that the state could not establish that the email had ever been received and read by the defendant, the state argued and court agreed that those factors were for the jury to determine, and were not foundation predicates which the state had to prove to the trial judge as a condition to the email's admission.

This ruling was incorrect. The trial judge misapplied the governing rule of evidence. The burden was on the state to establish as a foundation to the admission of the email that the defendant had received the accusatory email and that the defendant had read and understood it. There was no evidence to support such a

finding, nor did the trial judge make any findings in this regard. The trial judge's initial conclusion was the correct one: this was not an adoptive admission and was not admissible under Florida Statutes, § 90.803(18).

This email, which was never received or read by the defendant, then had the effect of placing the entire conversation he had with his step-daughter in a *false context* and prejudiced the defendant, because this telephone conversation when viewed in the context of the preceding email, was the key evidence against the defendant. The misapplication of the governing rule of evidence was a *per se* abuse of discretion. The state cannot meet its burden of showing that the error was harmless beyond a reasonable doubt.

III. THE COURT ERRED IN DENYING Xxxxxxx MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT TWO, WHICH CHARGED PENETRATION, BUT ONLY UNION WAS PROVED.

Count two required the state to prove *penetration.* The state only proved union. The evidence was legally insufficient. The defendant's motion for judgment of acquittal should have been granted.

ARGUMENTS

I. THE COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE EXCLUDING DEFENDANT'S CHARACTER EVIDENCE AND EVIDENCE OF GENERAL REPUTATION FOR TRUTHFULNESS.

The state filed a pretrial motion in limine to exclude the defendant's character witnesses. [RI-47-48] A pretrial hearing was conducted on the state's motion. The defendant explained:

> Judge, as to the second motion in limine, we are not asking these witnesses to come in and testify as to his propensity to commit the act, we're not going to ask them, did you - - is he the kind of guy that would do this. *They are going to be asked questions as to his honesty*, his character his moralness, *his general reputation in the community,* nothing to do with, is he the kind of guy that would commit a sexual battery. Obviously, we – that - - I agree with the state, that's not admissible.

[RIII-381; emphasis supplied]

The Court however responded:

> But it would not be admissible to bolster his credibility either.

[RIII-381]

Defense counsel attempted to explain the applicable rule of evidence to the trial court:

> The rule allows us to talk about the general reputation in the community
>
> . . .

[RIII-382]

The trial court again stated:

> But his truthfulness is not an element of this crime, so they would only be there to bolster his in court testimony as being truthful.

[RIII-382]

Defense counsel argued in rebuttal:

> [I]t's . . . ultimately at the end of the day, his word versus her word . . . character evidence is admissible as to the general reputation in the community. It's up to the jury to decide whether or not he's believable. But these witnesses can certainly come in and talk about what his general reputation in the community is. I'm not asking them to come in and tell the jury, yeah, he tells the truth all the time.

[RIII-384]

The trial court ruled against the defendant and granted the state's motion in limine to keep out the defendant's character evidence, including general reputation

in the community for truthfulness:

> And I understand your argument, and I think that's precisely what is not supposed to be admitted. So, having noted these arguments, and I certainly will let you proffer those witnesses' testimony, to make a record of the issue, but I will grant the State's second motion in limine.

[RIII-384]

Additionally, at trial, when the defendant himself testified, the trial court sustained the state's objection to the defense attempting to introduce through the defendant himself, evidence of his good character. For example, the defendant testified that he was retired from the United States Navy. When asked if he had received any commendations or medals the state immediately objected. The court sustained the objection. [RV-366]

At trial the alleged victim, the defendant's now adult step-daughter testified that from her sophomore year in high school until she was 18 years old, that she and the defendant engaged in consensual sexual activity, which according to her consisted of her licking his butt and acts of fellatio. The defendant, who was a recently retired career navy chief, testified that it never happened. The state cross examined the defendant in an effort to show that he was lying, and that the adopted daughter was telling the truth. In closing argument, the state argued that the defendant's testimony

was not truthful and should not be believed.

Again, the trial court excluded the defendant's proffered character evidence including general reputation evidence of his truthfulness.

> [DEFENSE COUNSEL] And then I would have - - if I can just make a proffer on the character witnesses that the court ruled in the motion in limine that we could not have, we had - - we were going to call four witnesses, three to four witnesses, the same as these, to talk about his moral character, his reputation in the community, and we would limit it to that. They weren't going to discuss any of the issues related to her sexual proclivity or anything like that, was just his reputation and his moral character in the community.
>
> [THE COURT] All right. I believe we had a hearing on this and the court previously ruled that inadmissible but to preserve the record I did want counsel to proffer that.

[RVI-426-427]

After the guilty verdicts the defendant filed a motion for new trial again raising the court's exclusion of his character evidence and evidence of his reputation for truthfulness. [RII-205-213; RII-211] At the hearing on the motion for new trial, the defense argued:

Just to kind of amplify what we're saying here in this, is that Mr. Xxxxxxx' credibility was attacked when he was on the - - when he took the stand, which is certainly within the state's right to do that, and I'm not criticizing that. However, once his credibility is attacked, we are, by law, allowed to put on character evidence . . . what his character is, and even to that extent, his truthfulness. We were not allowed to do that, and I think that had we been allowed to, given that I believe the jury focused solely on this audiotape, the jury would have been more inclined to listen to Mr. Xxxxxxx' position on this issue and given more credibility and weight to what he had to say.

[RIII-424-425]

Later in the hearing on the motion for new trial the defendant elaborated:

[DEFENSE COUNSEL] Once however the state attacked his credibility, then we would have put on those witnesses to address his general reputation in the community for truthfulness . . .

[THE COURT] So, essentially, your argument would be that any witness that takes the stand and is cross-examined, then they should be allowed to bring in a witness testifying to their general reputation for truthfulness?

[DEFENSE COUNSEL] No. If their credibility is attacked, then the reputation for truthfulness [is admissible] . . . if they're - - if their - - if their credibility is attacked, on rebuttal you can bring that evidence in, yes.

[THE COURT] In what way, credibility attacked in what way?

[DEFENSE COUNSEL] Well, as to truthfulness.

[THE COURT] Right. He was cross-examined.

[DEFENSE COUNSEL] Yes.

[THE COURT] But in what specific way was his credibility attacked, other than in closing argument saying, it's her word and his word, and we suggest you believe her word . . .

[DEFENSE COUNSEL] There were - - there were several inferences when the state was cross-examining where, from my perspective, it was that the impression that the jury was getting was that he was being dishonest.

. . .

[THE COURT] So, essentially, it's your position that whenever a person takes the stand and they are cross-examined and impeached in any way, then it is proper testimony for other witnesses to come in and say they're

truthful?

[DEFENSE COUNSEL] Yes.

[THE COURT] And, essentially, that is what I believe my ruling at the trial level was with this same argument. although I'm not sure we had correct - - specifically this argument about truthfulness, but the issue is, I don't believe the evidence code permits that, and I don't believe that the evidence code permits a trial to become an issue of conflicting witnesses talking about reputation for truthfulness. . . . *The trial did not get sidetracked into* who is a good person and who is a bad person and *who tells the truth and who doesn't tell the truth and I think that's what the evidence code intends to prohibit*. Any other arguments you want to put on the record?

[DEFENSE COUNSEL] Judge, just real quickly on that, just in rebuttal, and again to preserve it for the record, I'm looking at relying on 90.609, which is character witnesses impeachment. In there it says: A party may attack *or support the credibility of any witness, including an accused, by evidence in the form of reputation.* You know, so our position is exactly that.

[RIII-427-430; emphasis supplied]

The trial court erred in excluding the defendant's proffered character evidence, particularly the proffered general reputation for truthfulness evidence.

> Pursuant to section 90.609, Florida Statutes, a party may use character evidence to attack the credibility of a witness if the evidence relates to the witness's reputation for truthfulness.

Morrison v. State, 818 So.2d 432, 449 (Fla. 2002).[6]

Under Florida law, a witness may be impeached by any means recognized in the Evidence Code. See *Rose v. State*, 472 So.2d 1155, 1157-58 (Fla. 1985) (holding that a trial court properly refused to allow impeachment by a means not listed in section 90.608, Florida Statutes. Section 90.608 provides a complete list of the proper ways to attack a witness' credibility:

> (1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
>
> (2) Showing that the witness is biased.
>
> (3) *Attacking the character of the witness in accordance with the provisions of s. 90.609* or s. 90.610.

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[6] In *Morrison* the Court affirmed the lower court's exclusion of the evidence on the basis that the lower court correctly found that "in the court's view of her proffered testimony, she was basing her conclusion on her own personal experience of having caught Brown in a lie on one occasion rather than on Brown's reputation in the community." *Morrison*, at 450.

(4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.

(5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

Section 90.609(1) permits credibility attacks in the form of evidence that the witness has a poor reputation for truthfulness. *Pantoja v. State*, 990 So.2d 626, 629 (Fla. 1st DCA 2008). The trial judge simply misunderstood and failed to correctly apply Florida Statutes, § 90.609. As such her error constitutes an abuse of discretion. Abuse of discretion is a liberal standard when the error is dependant upon a trial judge's exercise of her discretion, but when the trial judge failed to understand that evidence was admissible, when it was, she was not exercising discretion in excluding the evidence, but was simply misapplying the applicable evidence code provision. That error is not itself subject to an abuse of discretion standard, as such, but itself constitutes an abuse of her discretion.[7]

The trial court made clear her complete misunderstanding of the governing law when she ventured that if the defense position were correct, then the state, too, could

[7] The legal support for this argument is set forth in the separate section of this brief addressing the standards of review applicable to the issues on appeal. *See* the Standards of Review, *supra*.

offer character evidence to show reputation for truthfulness of the victim. The trial judge thought that this proposition was self-evidently incorrect. The opposite is the case, such evidence would be admissible and would have been in this case, had the state sought to admit such evidence. "Character testimony regarding a victim's reputation for truthfulness is admissible. § 90.404(1)(b), 90.609, Fla. Stat. (2006)." *Pintado v. State*, 970 So.2d 857, 859 (Fla. 3rd DCA 2007).

The trial judge proudly asserted that she had not let this trial become "sidetracked" into "who tells the truth and who doesn't . . ." .

> [THE COURT] And, essentially, that is what I believe my ruling at the trial level was with this same argument. although I'm not sure we had correct - - specifically this argument about truthfulness, but the issue is, I don't believe the evidence code permits that, and I don't believe that the evidence code permits a trial to become an issue of conflicting witnesses talking about reputation for truthfulness. . . . *The trial did not get sidetracked into* who is a good person and who is a bad person and *who tells the truth and who doesn't tell the truth and I think that's what the evidence code intends to prohibit*. Any other arguments you want to put on the record?

The trial judge's understanding of the function of the trial process and the

purpose of the evidence code was sadly mistaken. The trial is meant to be a search for truth, which witness is being truthful and which witness is not, and the evidence code is meant to further that search for truth within the crucible of cross-examination. The trial court prohibited that in this trial, and did so because she thought the evidence code required her to do so. Her error was an abuse of discretion, and it prejudiced the search for truth. The state cannot meet its burden of establishing in this simple case of "she said, he said" that the error did not affect the outcome of the proceeding.

II. THE COURT ERRED IN ADMITTING OVER DEFENSE OBJECTION A SELF-SERVING EMAIL FROM THE ALLEGED VICTIM WHICH WAS HEARSAY BUT ADMITTED TO PROVE THE TRUTH OF THE MATTER CONTAINED IN THE EMAIL.

During the investigation of the case at the direction of the Navy Criminal Investigative Agent assigned to the case, Special Agent Sara Griffin, the accuser, Xxxxxxx Xxxxxxx, sent an email to the defendant, which set forth her accusations and asked him to respond and explain why he had done these things to her. The defendant never replied to that email. After not getting any reply Agent Griffin arranged to have Xxxxxxx Xxxxxxx call her step-father and engage him in conversation about the matter. That call was tape recorded and the tape recording of the call was introduced as evidence by the state and became a key feature of the case. During the call the defendant was asked whether he received the email she sent (without specifying what email, that is, the email and its contents was not identified in any way to show that the email being asked about was an email containing sex abuse accusations). In the telephone call the defendant stated that he received the email but does not state that he read the email or what the contents of the email were that he acknowledged receiving. The defendant testified in his own defense and explained that he received an email but promptly deleted it without reading it, thinking it was an argumentative email from the step-daughter complaining about

something else. He denied ever having read any allegation of sex abuse in any email from the step-daughter.

The state argued that the email, although hearsay, was admissible under the adoptive admission exception. [RIII-397] The trial court at first concluded that it was *not* an adoptive admission, agreeing with the defense:

> [THE COURT] Well actually, the Court is not - - the two of you are stuck on the admission [adoptive admission] part of this transaction. I'm more concerned with the fact that it is, and the rule of completeness puts the entire controlled call in perspective. So, my inclination is that that's really what it is, because it is an e-mail by the victim, not the defendant. Any certainly you can each make your arguments that are proper comments on the evidence to the jury. *I'm not going to label it an adoptive admission,* I think that's a label that she's [the state] put on it, because he admitted it. But my main concern is it puts the controlled call in perspective. So, my inclination at this time is to let them present all of that evidence, and then you [the defense] can certainly tell the jury *there is no indication he read it*. . . . But I do think that they [the state] wold be entitled to do that, *and it is not a statement by your client* [the defendant], so.

[RIII-399-400]

The state pointed out to the Court after this that the rule of completeness would not suffice to allow admission of the e-mail, because it would still be hearsay, hence some exception to the hearsay rule would be required to admit the e-mail in the first place, and according to the state, the only way to do that was through the adoptive admission exception:

> [THE STATE] Your Honor, the state absolutely, when first addressing this issue of the e-mail, the first thought of course, is it relevant in setting the stage for the controlled call to give the entire picture, as the Court stated, as to what is being referred to in the controlled call, to give the entire controlled call context. My concern with just simply arguing that would be the fact that it's still hearsay, so the state's argument that it's an adoptive [admission] - -
>
> [THE COURT] I understand that's how you want to get it in.
>
> [THE STATE] Correct.
>
> [THE COURT] Absolutely. You're labeling it in order to make it admissible evidence.
>
> [THE STATE] And we're simply asking the Court to agree there is sufficient evidence for it to come in as that. *But ultimately the jury*

decides whether or not he got it, whether or not he read it, whether or not he understood it.

[THE COURT] I understand your argument. I understand your argument. And I am inclined to agree that that is the method which it becomes admissible, *but it becomes a jury question*.

[RIII493-494; emphasis supplied]

The contents of the email were then used by the state to portray the telephone conversation as one long admission and apology by the defendant, which had he in fact received and read an email containing sex abuse allegations it would seem to be. But without the email, the telephone conversation and apologies from the defendant during that conversation, would be consistent with the defendant's testimony at trial, that his apologies to the step-daughter were for having kicked her out of his home, which led to her full time relationship with a convicted felon and having three children out of wedlock.

The introduction of the email created a *false context* in which the state was able to argue that the defendant's apologies and regrets were for having sexually abused his step-daughter. There was no legal basis to admit the email as an adoptive admission, because the record did not satisfy the predicate requirements for an adoptive admission.

The evidentiary foundation for introduction of adoptive admissions into evidence is Florida Statutes, § 90.803(18). When an adverse party manifests a belief in or adopts the statement of another person as his or her own, the statement is treated as an adoptive admission under section 90.803(18)(b). An adoptive admission occurs when there is an express statement agreeing with the statement of another. The opposing party is treated as if the party had made the statement since the statement was affirmatively adopted.

That did not happen here. However, Xxxxxxx acknowledges that not all adoptive admissions involve a direct expression by the adverse party assenting to the statement of another. An adoptive admission can also occur when the conduct of an adverse party circumstantially indicates the party's assent to the truth of a statement made by another person. Such adoptive admissions are sometimes called tacit admissions or admissions by silence. McCormick, *Evidence* §§ 261 to 262 (2009); *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981) (possession of written statements was an adoption of their contents.). The failure to respond to a letter may be a tacit admission. See *Sullivan v. McMillan*, 26 Fla. 543, 8 So. 450 (1890); McCormick, *Evidence* § 262 at 179 to 181 (4th ed. 1992). However, the failure to respond to a demand letter will not be treated as an admission. See *Nicolaysen v. Flato*, 204 So. 2d 547, 550 (Fla. 4th DCA 1967); *Southern Stone Co., Inc. v. Singer*,

665 F.2d 698, 703 (5th Cir. 1982) ("[F]ailure to respond to a letter does not indicate an adoption unless it was reasonable under the circumstances for the sender to expect the recipient to respond and to correct erroneous assertions."); *State v. Carlson*, 311 Or. 201, 808 P.2d 1002 (Oregon 1991) ("A party adopts the proffered statement of another person when that party's words or conduct 'indicate that [he or she] "intended" to adopt the statement …. A Party manifests a belief in the truth of another's statement when the party intends to embrace the truth of the statement, i.e., intends to agree with or approve the contents of the statement.' ").

A statement made in the presence of an adverse party may be a tacit or adoptive admission. A tacit admission only occurs when the proponent introduces evidence from which the trial judge may find that the silence of the adverse party was intended as an assent to the statement. *State v. Hernandez*, 875 So. 2d 1271, 1273 (Fla. 3rd DCA 2004) (Defendant's statements during a taped controlled call with co-defendant were *not admissible* under section 90.803(18). Decision found that the foundation requirements for admission as adoptive admission were not present and suggests that statements which are a "direct product of police officers who directed the co-defendant to make the statements so that [the defendant] would incriminate himself" was relevant to the issue of admissibility.

Similarly, in *Privett v. State*, 417 So. 2d 805, 806 (Fla. 5th DCA 1982) the Court

held that

> The hearsay statement can only be admitted when it can be shown that in the context in which the statement was made it was so accusatory in nature that the defendant's silence may be inferred to have been assent to its truth.

In Xxxxxxx' case, had the trial court not admitted the email, then the telephone conversation itself would not have been admissible, because the email was the foundation for the admission of the telephone conversation, hence the prejudice from the wrongful admission of the email was two-fold, first it placed the telephone conversation in a false light, and second, it resulted in the admission of a telephone conversation that otherwise would have been inadmissible hearsay itself.[8]

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[8] For otherwise the telephone conversation was too uncertain to allow its admission as an adoptive admission based on the telephone conversation standing alone. See *State v. Hernandez,* 875 So.2d 1271, 1272 -1275 (Fla. 3rd DCA 2004):

> In addition, the co-defendant's out of court statements do not meet the requirements for an adoptive admission. A careful reading of the conversation that took place between Hernandez and the co-defendant indicates that there was nothing in the statements made by the co-defendant that were so accusatory in nature that Hernandez's silence could be taken as an assent to its truth. Furthermore, portions of the conversation indicate that Hernandez was not sure what the co-defendant was asking or talking about. In fact, the co-defendant was evidently extorting money from Hernandez, who kept repeating that they should not be talking on the telephone. Thus, two of the requirements for admission of a statement as an adoptive admission, that the statement

Generally, in order to lay a necessary foundation for the introduction of a tacit admission, it is necessary to prove that the statement was made in the presence of an adverse party who heard the statement, that the adverse party understood the statement and was physically capable of denying the statement, and that the circumstances were such that a reasonable person would have denied the statement if it were not true. *Privett v. State*, 417 So. 2d 805, 806–07 (Fla. 5th DCA 1982). If the court finds from the circumstances that it was not reasonable to expect the party to deny the statement, because of the facts surrounding the statement or because of the party's mental or physical condition, it will not admit the silence as an adoptive or tacit admission even though the other requirements are met. If all the requirements of the exception are present, the silence is construed as an adoptive admission of the truth of the statement made in the presence of the adverse party. *Globe v. State*, 877 So. 2d 663, 672–73 (Fla. 2004).

Several factors should be present to show that an acquiescence did in fact

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> must have been heard by the party claimed to have acquiesced *and that the statement must have been understood by the defendant*, were not met.

There was only one point in the telephone conversation in which the adopted daughter even introduced the idea of sex abuse and the transcript makes plane that the defendant did not hear that part of the conversation. This was a conversation between two cell phones and the connection was poor as occurs between two cell phones where one speaker has the effect of muting the other.

occur. These factors include the following:

1. *The statement must have been heard (or read, as the case may be) by the party claimed to have acquiesced*.

2. The statement must have been understood by him.

3. The subject matter of the statement is within the knowledge of the person.

4. There were no physical or emotional impediments to the person responding.

5. The personal make-up of the speaker or his relationship to the party or event are not such as to make it unreasonable to expect a denial.

6. The statement itself must be such as would, if untrue, call for a denial under the circumstances.[9]

The essential inquiry in Xxxxxxx's case becomes whether the state met its evidentiary foundation burden of proving that Xxxxxxx read and understood the email in question. It did not. It did not attempt to do so, instead it argued this was a jury question.

The trial judge misunderstood and misapplied the governing law. The trial

[9] The foregoing argument was taken in part from Ehrhardt, *Evidence*, § 803.18b (2009).

judge never made the required findings that Xxxxxxx had ever received the email in question, whether he read the email in question, and whether he understood the email in question. These findings were required to be made by the trial judge in order to satisfy the predicate for admission as an adoptive admission. Instead of making any findings, the judge simply admitted the email, and agreed with the state that those findings were for the jury to make.[10]

The evidence established only that Xxxxxxx acknowledged receiving "an email," not the email in question, and as to the email he acknowledged receiving, he

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[10] We anticipate that the state may argue in its Answer Brief that the jury implicitly made the required findings because by its guilty verdict it implicitly rejected Xxxxxxx' testimony, and therefore the error is harmless. That conclusion would be error, because that conclusion could as well have been predicated on circular reasoning, that is, the telephone conversation supports the conclusion that Xxxxxxx got and read the email if you assume Xxxxxxx got and read the email. The conversation standing alone is too ambiguous to otherwise be admissible, and yet that is how the jury reached its conclusion, it did so in the context of the telephone conversation which came after the email. The jury cannot be expected to have compartmentalized the finding as the trial court was required to do, that is, to first determine whether Xxxxxxx got and read the email in its entirety, then after it is admitted, consider the email in the context of the telephone conversation. The jury was not instructed by the court to proceed in that fashion and for a certainty it did not do so. This is why judges trained in the rules of evidence make evidentiary rulings instead of simply opening the floodgates to the jury to make distinctions based on legal requirements the jury is unable to make. In addition, the jury reached its verdict without being permitted to consider the reputation for truthfulness evidence Xxxxxxx was prepared to present, and which we argue *supra* he was entitled to present. The improper exclusion of this evidence render invalid any inference from the jury verdict which otherwise might obtain.

testified that he deleted it in the inbox without reading it. That is an insufficient predicate upon which to admit as an adoptive admission by silence or otherwise, the email law enforcement officers had the step-daughter prepare.

Finally, in reliance upon the holding in *Hernandez*, we argue that even if otherwise admissible as an adoptive admission, that the e-mail was not admissible nor the telephone conversation which ensued, due to the fact that law enforcement created the entire scenario:

> The State further claims that the co-defendant's statements come within the adoptive admission exception to the hearsay rule. We disagree. *The co-defendant's statements are not admissible as adoptive admissions because the out-of-court statements were the direct product of police officers who directed the co-defendant to make the statements so that Hernandez would incriminate himself* and also because the out-of-court statements do not meet the requirements for admission as adoptive admissions.

State v. Hernandez, 875 So.2d 1271, 1272-1275 (Fla. 3rd DCA 2004).

Because the trial judge misapplied the governing law, admitting the objected to evidence without making any required fact finding predicates to support its admission under Florida Statutes, § 803.18, the ruling is entitled to no deference and

is *per se* and abuse of discretion. The telephone call placed in the false context of this e-mail was the key evidence in the case, therefore it cannot be said that the improper admission of this email was harmless error. Accordingly the conviction on counts one and two must be vacated and set aside due to this prejudicial error.

III. THE COURT ERRED IN DENYING Xxxxxx MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT TWO, WHICH CHARGED PENETRATION, BUT ONLY UNION WAS PROVED.

Count two of the two count information in this case charged Xxxxxxx with sexual battery by "placing the tongue of Xxxxxxx Xxxxxxx into the anus of Xxxxxxx" contrary to the provision of Florida Statutes, § 794.011(8)(b). [RI-37] Florida Statutes, § 794.011(1)(h) provides that "sexual battery" means oral, *anal, or vaginal penetration by, or union with*, the *sexual organ* of another *or* the *anal or vaginal penetration* of another *by any other object*; however, sexual battery does not include an act done for a bona fide medical purpose. See *Russ v. State*, 971 So.2d 851, 852 (Fla. 3rd DCA 2007).

The state failed to prove penetration, only union, as to count two.

Since sexual battery is defined as vaginal *penetration* if the contact is not with the sexual organ of the offender (in which case union suffices), in order to convict defendant of sexual battery, the state must prove that the defendant caused his anus to be *penetrated* by Xxxxxxx Xxxxxxx' tongue. "Penetration" requires some entry into the relevant part, however slight. *Richards v. State*, 738 So. 2d 415 (Fla. 2nd DCA 1999); *Barton v. State*, 704 So. 2d 569 (Fla. 1st DCA 1997). If a defendant uses or causes to be used an object other than his sexual organ, in this case, Xxxxxxx Xxxxxxx' tongue, to accomplish the crime, then only penetration of, and not mere

union with, the anus will render defendant guilty of sexual battery and the statute is not violated by proof of union with an object in the absence of penetration. *Seagrave v. State*, 802 So. 2d 281 (Fla. 2001).

This is confirmed by the Standard Pattern Jury Instruction for Criminal Cases, 11.6, which reads in pertinent part:

> To prove the crime of Sexual Battery Upon a Child by a Person in a Familial or Custodial Authority, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. (Victim) was 12 years of age or older but less than 18 years of age.
>
> 2. (Defendant) stood in the position of familial or custodial authority with regard to (victim).
>
> 3. (Defendant) committed an act upon (victim) in which:
>
> a. [the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)]].
>
> b. [the [anus] [vagina] of (victim) was penetrated by an object].

See also *Gill v. State*, 586 So.2d 471 (Fla. 4th DCA 1991)(reversing where union with anus was permitted basis for verdict instead of penetration).

Xxxxxxx filed a timely written motion for judgment of acquittal raising this argument. [RII-216-217] The state argued in response in a written filing without any record citation that the evidence established that Xxxxxxx Xxxxxxx' tongue in fact

entered the defendant's anus:

> During the trial, the jury was presented with the direct evidence of Xxxxxxx Xxxxxxx' testimony that on numerous occasions, she licked the anus of the Defendant. When asked directly as to whether or not her tongue ever entered the Defendant's anus, Xxxxxxx Xxxxxxx responded in the affirmative.

[RII-221]

The state's recollection of the testimony (which was described without any record citation in its response to the defendant's motion for judgment of acquittal) was incorrect. The state was correct that Xxxxxxx Xxxxxxx repeatedly testified that she merely "licked" the defendant's anus, but when pressed, *by the state* to provide testimony of penetration, and not mere union, the pertinent exchange went as follows:

> 15:10:52 5 Q When you licked his anus was your tongue
>
> 15:11:00 6 actually on his anus, in his anus?
>
> 15:11:02 7 A <u>*On it*</u>, yes.

[RIV-173; emphasis supplied][11]

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[11] Counsel searched the testimony of Xxxxxxx Xxxxxxx using the computer .txt file and the computer search feature for the word "anus" and did not find any testimony from the alleged victim other than licking and licking on the anus, no testimony of penetration, however slight.

On this record, the state failed to prove penetration, and count two must be vacated.

CONCLUSION

Appellant, Xxxxxxx, respectfully requests this Honorable Court vacate his judgment and sentence as to both counts one and two and remand his case to the Circuit Court for a new trial on count one, subject to the evidentiary rulings argued herein, but with instructions that retrial on count two is barred by Double Jeopardy. The State failed to present factually and legally sufficient evidence of guilt beyond a reasonable doubt or to the exclusion of every reasonable doubt as to count two therefore the Double Jeopardy provision bars retrial. *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished first class postage prepaid to the Office of the Attorney General, the Capitol, Tallahassee, Florida, this 28th day of October, 2009.

_____

William Mallory Kent