

WOOA

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

**AUG 13 1984**

CLERK, SUPREME COURT

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Chief Deputy Clerk

GEORGE WICKER, JR.,  
Petitioner,

v.

Case No. 64,958

STATE OF FLORIDA,  
Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE FACTS

Petitioner, George Wicker, Jr., was charged with Burglary, Sexual Battery and Robbery. At trial on these charges the following testimony was presented:

Elouise Rubin, age twenty-nine, testified that on November 15, 1981, she was in her apartment at 1672 Thirteenth Avenue South. (R64) Sometime in the evening after 8:00 p.m. she had fed her children, put them to bed and lay down to watch T.V. for a while. (R66) After falling asleep, she was awakened in the middle of the night by someone sitting on the couch and putting their hand over her mouth. The man told her to be quiet, not to scream or she would be killed. She stated that there was also someone in the bedroom with the kids and she was told if she screamed or moved they would shoot the children also. (R67)

She was asked if she had any money. She couldn't say anything because of the hand over her mouth so she held up her left hand and motioned with her five fingers three times that she had fifteen dollars. (R68) All the lights in the house were off, although she had left the lights on before falling asleep. (R69)

After telling her to be quiet, the heavier of the two men turned to the other whom he referred to as "Willie" and whispered something in his ear. "Willie" told her to be still and he proceeded to pull off her underwear. (R70) The heavy set man then proceeded to have intercourse with her. (R71) When he finished he pulled something down over her face which she

later found out was a curtain. He also told her to put her hand on his back and not to touch his hair, although she determined that his hair was either plaited or tightly curled. (R72) With the curtain over her head, "Willie" got on top of her. The heavier man went to the bathroom and turned on the light. She lifted the curtain up just enough to see from underneath as the heavy set man was wiping himself off. (R73) When "Willie" finished having intercourse with her, the heavy set man turned off the bathroom light. Then they threw a heavier item over her head which she found out later was her coat.

They told her to count to a hundred and not to move or she would be killed. (R74) After hearing them leave she counted a little longer and then ran across the street to her landlord to report the incident. (R75) Subsequently, she determined that her purse containing food stamps and fifteen dollars had been taken. (R76)

Subsequently, she was shown a photopak from which she selected a picture of the heavy set man. (R86) Ms. Rubin identified Wicker as the heavy set man she had seen in her apartment. (R90)

Officer Charles Barnes testified that he was dispatched to the scene. The victim, Mrs. Rubin, seemed extremely upset and was crying. (R118) Upon entering her apartment he noted that the telephone was lying on the floor with the wires cut and there was a pair of woman's panties lying near the end of a couch on the floor. (R119) Entry to the apartment had been gained through a

wood frame window located on the south side of the residence. (R120).

Kendall Pinckney, age twenty, testified that on September 22, 1981, she was living at 765 22nd Avenue South in a small duplex. (R131) On the night in question she fell asleep while watching the football game. The next thing she remembered was a pillow over her face and hearing a voice saying, "Aha, I knew I would get you." She proceeded to struggle; the man told her to wait a minute and calm down. At that point she stopped struggling and started crying, whereupon the man put a knife to her throat. He told her if she screamed he would hurt her or her children. (R133) With the man behind her she went to the back door of the house where he told her to open it and let in his friend. (R134) She stated that one man was skinny and the other was fat. The fat man also had plaited hair. (R136)

They took her to her bedroom where they made her take off her clothes and the fat man raped her. (R138) After the fat man raped her, the thinner man did also. (R139) The thin man then told her to get up and put on her clothes, which she did. He then took her bedspread and put it over her head and told her to walk to the front room. The fat man had apparently left, but he came back in a few minutes. They asked if she had any money and she replied that she did not. (R140) When the fat man came back he had a bag with him into which they put all the food in the house. They then told her before she left the house to count to a hundred. (R.141). Ms. Pinckney subsequently picked out a

photograph of Petitioner from a photopak and identified Wicker as the man that had come in the house on that night. (R144)

Shirley White, age thirty, testified that on December 14, 1981, she was living at her apartment at 616 11th Avenue South. On the night in question she was there alone lying in bed watching TV when she fell asleep. (R164) The next thing she recalled was someone standing over her and telling her to roll over. Although the house was dark and she could not see the men, she said they sounded like they were black. (R165)

She did state that one was fat and the other was slim. The heavy set man raped her first and then the skinny man. They told her if she didn't shut up they would kill her. She also felt a sharp object at her neck and her stomach. (R166) They then asked where her money was and she told them it was in the front room. They went and got her purse and dumped the contents on the floor which they took. (R167) Subsequently they covered her with a quilt and proceeded to ransack her house. She stated they ate the food she had prepared for the next day. (R169) As they left they told her to count to one hundred. (R171)

Dr. Donna Brown, Associate Medical Examiner, testified that an examination after the incident revealed physical evidence consistent with recent sexual intercourse. (R190) She also determined the victim, Ms. Rubin, was type "O" blood and a non-secretor. (R191) She stated that a foreign blood group was found in Ms. Rubin which was determined to be of blood group "B" no-secretor types. (R193)

Her examination of Shirley White subsequent to her rape also indicated recent sexual intercourse. (R195) The foreign blood group found in Mrs. White was a type "B" secretor. Mrs. White's blood type was "O" secretor. (R196)

Dr. Edward Coran, a former associate medical examiner testified that his examination of Kendall Pinckney, subsequent to her attack indicated recent intercourse. It was also determined that Mrs. Pinckney was blood group "O" non-secretor. (R216) The foreign blood group found in Ms. Pinckney was of a type "B" secretor. (R217) Dr. Coran also stated that the percentage of "B" secretors in the black population would be approximately sixteen percent while "B" non-secretors would amount to about four percent. (R221)

Ruth Wilbarger, a serilogist with the Florida Department of Law Enforcement testified that she had received blood and saliva samples of Petitioner, George Wicker. (R284) Wicker was determined to have "B" blood type and was a secretor. (R285-286)

Officer William Feathers testified that he was involved with the subsequent arrest of Petitioner on June 29, 1982. He was advised that Wicker was employed at the American Freezer Corporation and was given a description of his vehicle. (R296) A surveillance was set up at the parking lot of the American Freezer Corporation where Petitioner's vehicle was parked. Around twenty 'til five, Petitioner's vehicle left the lot, came out onto 28th Street and went north. Wicker pulled the vehicle over at the corner of Fairfield and 28th, got out and went to a



telephone booth. (R298) As he proceeded to get back in his car, the officers moved in. Uniform units moved in first and as they approached Wicker he ran. (R299) Petitioner ran to a nearby business where he went to the front door and went inside. Officer Feathers went to the east side of the business where he caught Wicker coming out of the side door and placed him under arrest. (R300)

Detective SanMarco testified that when Wicker was first arrested he was wearing his hair in plaits or braids and that he was ten pounds heavier at the time. (R309) Detective SanMarco stated that he had interviewed Wicker after his arrest and that he had denied any involvement in any of the cases for which he was arrested. At that point, Detective SanMarco began talking about an individual who had been arrested several days earlier by the name of James Davis. Petitioner indicated that he knew James Davis, that he lived across the street from him. Initially, Petitioner told SanMarco that he ran because he thought the police were looking for him for back child support. However, after some discussion, Wicker told him that he ran because he knew they were going to pin all the cases on him. (R343)

After a break of several hours, the questioning resumed and Petitioner indicated that he had been involved in similar incidents for approximately a year and a half. When Detective SanMarco tried to get him to a specific number, he said he didn't know, it could be five, six, eight, or thirty of them. (R346) When Petitioner could not give any specific dates or times

when the incidents occurred, Detective SanMarco suggested he go through them all and refresh his memory and then have Wicker tell him a little about each one. Petitioner told SanMarco that he would go through the cases and only tell him yes or no. Wicker refused to give any specifics.

During the course of the interview, Petitioner said that he had been involved with Davis and that Davis was the instigator of these crimes. Davis came over to his house and told him he knew where a prostitute lived who they could rip off. (R347) When asked about Elouise Rubin, Petitioner admitted "yes" and in response to the case of Shirley White, he also stated "yes." (R350) As to the name of Kendall Pinckney, Petitioner stated that he was not sure. (R351)

Wicker did not testify, nor did he present any evidence in his own behalf.

ISSUE

WHETHER THE SECOND DISTRICT COURT  
OF APPEAL ERRED IN HOLDING THAT  
THE INFORMATION NEED NOT ALLEGE  
ALL OF THE ELEMENTS OF ASSAULT  
FOR THE BURGLARY COUNT.

ARGYUMENT

The lower court did not err, its rulings conform to this Honorable Court's decisions. In Lindsey v. State, 416 So.2d 471 (Fla. 4th DCA 1982) the Fourth District Court of Appeal posed the issue:

"The question, simply put, is whether the State can charge burglary with an assault without stating the factual elements of the assault."

(416 So.2d at 472)

That court concluded that the information must contain such a written statement. This Court reversed. State v. Lindsey, 446 So.2d 1074 (Fla. 1984). Relying on State v. Waters, 436 So.2d 661 (Fla. 1983) the Court reasoned that the present discovery rules provide defendants with a much better means for avoiding surprise or embarrassment in the preparation of a defense than just the terms utilized in the charging document. 446 So.2d at 1076. The Court concluded:

"We find that the information did allege all the essential elements of first degree burglary, including the element that an assault was committed during the course of the crime."

(446 So.2d at 1076)

This Court further demonstrated that Lindsey was not predicated upon the specific fact pattern presented therein in the follow-up discussion of State v. Oliveria, 466 So.2d 077 (Fla. 1984):

"The principal issue in this case is whether an information charging burglary during which an assault was committed must allege the specific facts constituting the offense of assault. We have today answered the question in the negative. State v. Lindsey, 446 So.2d 1074 (Fla. 1984). On the basis of that decision, we hold that the information in this case was sufficient."  
(446 So.2d at 1077)

Petitioner argues that the information must be so vague as to confuse him because the Second District Court of Appeal found the sexual battery charge to be the assault in the burglary assault charge (Brief, p. 8). This "confusion" argument is precisely the one adopted by the Fourth District Court of Appeal in Oliveria v. State, 417 So.2d 1004 (Fla. 4 DCA 1982):

". . .and even on appeal it is not precisely certain what facts were relied on at trial as constituting the alleged but ill-defined assault."  
(417 So.2d at 1005)

Since this Court apparently rejected that analysis in the March 8, 1984 opinion reinstating the aggravated battery conviction of Mr. Oliveria, the instant argument also should meet the same fate.

Respondent further notes that the trial judge in denying Petitioner's Motion to Dismiss opined that Wicker was not surprised in that the original information had not been attacked (prior to the amendment) and there had been full discovery (R57).

Also, the testimony is clear that there was an assault, separate from the sexual battery. The victim Elouise Rubin testified that she was awakened in the middle of the night by a man who put his hand over her mouth, told her to be quiet, don't scream or she would be killed. (R67) She then described being raped by two assailants. (R68-76) Obviously, discovery of Rubin's testimony via pre-trial deposition would have sufficed to prepare the accused for trial.


This Court's decision in Lindsey, supra and Oliveria, supra, require affirmance of the lower court's ruling.

#### CONCLUSION

Based on the foregoing reasons, argument and authorities, the decision of the lower court should be affirmed.

Respectfully submitted,

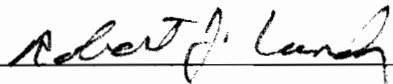
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, 5100 144th Avenue, North, Clearwater, Florida 33520 on this 10<sup>th</sup> day of August, 1984.

  
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Of Counsel for Respondent