

O/a 6-6-89

IN THE SUPREME COURT OF FLORIDA

MAR 20 1989

CLERK, SUPREME COURT

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DERINDA EDWARDS,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

Case No. 73,286

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREI TATEMENT

Petitioner was the defendant, and respondent was the prosecution, in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida. Petitioner was the Appellant and respondent was the Appellee, in the District Court of Appeal, Fourth District.

In the brief, the parties will be referred to as they appear before this Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

This case arises under this Court's "conflict" jurisdiction. Jurisdiction was accepted by order of this Court filed February 23, 1989.

The opinion of the Fourth District Court of Appeal under review addressed three issues. The first issue involved Petitioner's attempt to cross examine a state witness on her prolonged use of drugs.

The witness was Sandra Day, the victim, who received knife wounds in a fight with Petitioner. Day testified that the fight occurred on the street shortly after Day received a visit from Mann Latimore, with whom Day said she had been "involved" at one time (R 57, 66, 72-76). Latimore's wife testified for the defense that Latimore had previously had an affair with Petitioner, who had worked for him as a secretary, and that he was currently having an affair with Day (R 283-285). Day testified that her involvement with Latimore had cooled down before the incident (R 57), while Petitioner testified on her own behalf that her affair with him had ended a year and a half before but that Day's had continued (R 305-306).

Day testified that both she and Petitioner had been at the Latimores' home earlier on the evening of the incident. Day went there to ask for some eyedrops, and Petitioner was there and said there weren't any (R 63-64). Day turned around and walked out (R 65).

Shortly after Day returned home, Latimore went over to her house and sat and talked for 30 to **45** minutes. During this period Petitioner called three or four times for Latimore. Day hung up and told Petitioner she couldn't speak to Latimore. Day told Latimore to leave (R 66-69).

After Latimore left, Day walked down to a nearby "drug corner" to look for her son (R 70). She found him and told him to go home (R 71). She met Petitioner on the street as she headed back home (R 72).

Day testified that Petitioner said something to her about Latimore and then pulled a knife (R 72). Day picked up a "strip" from a trash pile and knocked the knife out of Petitioner's hand (R 75). They started fist-fighting. They fought for about five minutes. Then Petitioner picked the knife up off the ground and cut Day on the hand and face (R 76).

As Day left the scene, she told Petitioner not to be there when she came back. Petitioner told Day to stay out of her business (R 77). Day stated that she hit Petitioner one or two times with the "strip" before knocking the knife out of her hand (R 78). (At the scene the police found a PVC pipe with blood on it (R 199, 205).)

The defense proffered its proposed cross examination of Day concerning her drug use. On the proffer, Day testified that she had been using drugs -- alcohol, heroin, and cocaine -- for 20 years (R 91-92). She had started snorting and injecting heroin ten years ago (R 92). She had been "clean" for an interval of several years (R 91). In 1985 and 1986 she had been using

cocaine until she went into a drug program in June, 1986 (R 90-91). In January of 1986 she had gotten into a methadone program for heroin addiction and had "detoxed out" in June (R 94).

Day stated that in June 1986 she was not using drugs (R 90). (The incident in the instant case occurred in November (R 451).) She started back injecting heroin in December (R 94). She stated that at the time of her testimony she was not on any drugs. However, a week earlier she had taken bromocryptine, a prescribed medication for her craving for heroin and cocaine (R 95).

On examination by the state on the proffer, Day testified that she did not take any drugs between June and the time she got cut, although she had "a drink." She was a member of Hope Without Dope and went to Narcotics Anonymous meetings. She did not feel the effects of not taking drugs nor go through withdrawal. During November she had no problems with drugs or alcohol (R 96-97). When she went into surgery for her cuts near the end of December, the doctor noticed fresh needle marks from drug use (R 97-98).

The defense argued to the trial court that it should be allowed to argue to the jury that based on Day's testimony she was not a credible witness and that her drug use would impair her ability to perceive and remember. The defense argued that because Day had been on and off drugs she was not cured. Day interjected, "You're never cured" (R 99-100).

The trial court excluded the proffered testimony and ruled that the defense could question Day only about drug use on the days preceeding and the night of the incident. The later drug use could not be brought out unless there was some indication that Day didn't know what she was saying in her testimony or that the drugs she said she had taken a week before had some effect on her ability to remember (R 101-102).

In ruling on the trial court's exclusion of cross examination on Day's drug use, the District Court of Appeal stated that evidence is admissible for impeachment that a witness took drugs either when testifying or at the time of the incident involved; however, the court refused to "extend," as it put it, this rule to permit cross examination of the victim to show that her drug use and treatment, which occurred prior to the time of the offense, adversely or detrimentally affected her recollection of the events in question (page 2 of opinion, in Appendix).

The second issue addressed by the District Court of Appeal concerned the defense's impeachment of another state witness, James Jackson. Jackson testified for the state that he saw Petitioner in a bar in the evening prior to the incident. Petitioner came in and sat beside him (R 13). She was upset and crying and spoke about Latimore and Day. She pulled a knife out of her pocket and said she was going to hurt Day (R 14-16). She was drinking (R 17, 20-21). After 15 or 20 minutes Jackson went to the rest room, and when he came back Petitioner was gone (R 19).

The defense proffered cross examination of Jackson concerning his bias against Petitioner arising from Petitioner's role in an incident which led to the death of a friend of Jackson's. Jackson stated that he believed that it was Petitioner's fault that his friend was shot dead by another man (R 23-24). Defense counsel then requested the trial court to exclude further testimony that the other man had fired and hit Jackson's friend as a bystander when Petitioner pulled a knife on the other man (R 24). The defense argued that evidence of Petitioner's prior use of a knife would be improper "Williams Rule" evidence (R 29-33). The court, however, ruled that if the defense brought in the cross examination on the previous incident, then it would be "opening the door" to the further evidence that Petitioner used a knife (R 34).

The defense then went ahead with its proposed cross examination (R 45-47), and on redirect the prosecution brought forth the fact that Petitioner cut with a knife the man who did the shooting (R 48-50).

The District Court of Appeal stated on this issue that Petitioner had sufficient warning that she would "open the door" if she brought up the prior incident. The court stated that Petitioner could not initiate error and then seek reversal based on that error.

The remaining issue in the appeal to the District Court of Appeal concerned testimony by two police officers and a physician as to the details and extent of Day's injuries. Petitioner argued

that admission of this evidence was error because she was charged with aggravated battery committed with a deadly weapon rather than aggravated battery causing great bodily harm (R 238).

Over defense objection, one officer was allowed to testify that Day had a cut and much blood on the right side of her face, and that one of her hands was bleeding (R 193). The second officer was allowed to testify that the head laceration was very deep and bleeding profusely. It was a jagged cut which went from the temple to the jaw and it was so deep that it completely penetrated the cheek. You could see right through it, he said (R 243). The physician testified that the cut was down to the bone and an inch wide. The cut actually went into the mouth and might have been stopped by the teeth (R 262). Approximately 100 stitches were taken in Day's face (R 268). In addition, a cut on her thumb extended down to a nerve and required surgery (R 266-267).

The District Court of Appeal held that, while admitting testimony regarding the nature and extent of the injuries might have been error, it was nonetheless harmless and could not be said to have affected the verdict.

The remaining state witness at the trial was a neighbor of Day's who testified that she was at Day's house that evening with Day and Latimore when Day received three or four phone calls. Day told Latimore to leave after the calls and he did so. After the neighbor left, Day went down the street and the neighbor saw a scuffle (R 170-174).

Petitioner testified that she did not have a knife when she went into the bar before the incident; a bartender lent her one to cut up some ribs and chicken she had brought with her, but she gave it back and didn't have it when she left (R 310-312).

After Petitioner left the bar, she waited on a corner for her father to pick her up. Petitioner saw Day approach from a "crack house" across the Street (R 317). Day approached and started swinging, saying she wanted to "fuck me up." A knife appeared in Day's hand (R 313-314). Day cut Petitioner on the arm and chest (R 315). Petitioner hit Day and Day dropped the knife. As they fought, Petitioner picked up the knife and Day picked up a white stick. Day swung the stick and Petitioner swung back with the knife (R 319-321).

In closing argument, the defense argued, among other things, self defense, and referred to the conflict on this issue between the testimony of Day and the testimony of Petitioner (R 410-412). The jury was instructed on self defense (R 431-432).

SUMMARY OF ARGUMENT

I.

The defense was not allowed at trial to cross examine the victim on her long term drug abuse and addiction because she claimed that she was not on drugs at the time of the incident or of her testimony. The decision of the District Court of Appeal affirming this ruling was incorrect because even though the victim was not on drugs at those moments, she was nonetheless still an addict at those moments. Her addiction was therefore relevant to her capacities to observe, to remember, and to recount her observations truthfully. This is the position taken by the First District Court of Appeal and by the Illinois Supreme Court.

11.

The defense should have been allowed at trial to cross examine a state witness on his bias against Petitioner for her role in the death of his friend without the state bringing out on redirect that Petitioner might have provoked another man to begin shooting and hit the friend when Petitioner pulled a knife. The District Court of Appeal ruled that the defense's cross "opened the door" to the redirect, and it therefore refused to review the issue on the merits. However, the law in Florida at the time required the defense to proceed with its cross in order to

preserve the point for appeal. This Court must proceed to the merits and hold that the prior use of a knife was improper under the "Williams Rule."

III.

The District Court of Appeal held harmless the admission of evidence of the victim's severe knife wounds, even though it acknowledged the admission to be erroneous because the charge was aggravated battery with a deadly weapon rather than aggravated battery causing great bodily harm. This Court must overturn the holding of harmless because the severity of the wounds could have inspired sufficient jury sympathy to tip the otherwise close balance on the question of who was the aggressor in the fight between Petitioner and the victim.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY AFFIRMED THE TRIAL COURT'S RULING EXCLUDING PROPOSED DEFENSE CROSS EXAMINATION OF THE VICTIM ON HER HABITUAL DRUG USE AND ADDICTION.

The victim of the aggravated battery charged in this case, Sandra Day, had been an habitual drug user and addict for 20 years. On proffered cross examination by the defense, Day admitted that she had been using drugs -- alcohol, heroin, and cocaine -- since age 15, with a few intervals for treatment and detoxification (R 91-94). The defense was not permitted by the trial court, however, to present to the jury this evidence of Day's prolonged drug use and addiction (R 101-102). The District Court of Appeal affirmed this ruling, stating that evidence of drug use was admissible only if it occurred at the time of the incident or at the time the drug user testified (page 2 of opinion, in Appendix).

Exclusion of the proffered testimony was a denial of Petitioner's absolute right to a fair and full cross examination of the witness. Coco v. State, 62 So.2d 892, 894 (Fla. 1953). Wide latitude is given in the cross examination of a witness to ascertain his opportunities for observation, his attention, his interest, and his truthfulness. Killingsworth v. State, 105 So. 834 (Fla. 1925). This Court recognized early that drug use may have an adverse effect on a witness' ability to observe an event and testify about it. In Eldridge v. State, 27 Fla. 162, 9 So.

448 (1891) and in Nelson v. State, 128 So. 1 (Fla. 1930), this Court stated that opium use is admissible if the witness was under the influence either at the time of the trial or at the time of the event about which the witness testifies. Eldridge, 9 So. at 453; Nelson, 128 So. at 3. (In fact, the drug at issue in Eldridge was morphine; in Nelson, it was cocaine.)

Eldridge and Nelson, however, dealt with discrete or occasional instances of drug use, rather than the habitual use and addiction involved in the instant case. Since in neither of those two cases did the discrete or occasional drug use occur at the time of the witness' observation or testimony, in each case it was excluded.¹ In the instant case, though, Sandra Day's use of drugs spanned most of her life. In fact, it appears that she was on drugs for more of her life than she was off them, and that during much of the time when she was off them she was undergoing treatment for addiction.

The times of the incident and of Day's testimony were merely two brief periods when she claimed to be off drugs. In June of 1986, four or five months before the incident, she had completed one program for heroin addiction and gone into another one for

¹ In Eldridge, the witness denied using morphine habitually; one rebuttal witness testified that she had seen him use it to excess during a period of one month, another had no knowledge other than that he had helped the witness pay for morphine, and a third knew the witness only slightly but said there was something peculiar about him that could not be attributed to anything but morphine. 9 So. at 453. In Nelson, the only evidence of drugs recited in the opinion was that the defendant said that the witness was drunk and that the liquor was "doped or something," and that the witness took some cocaine the day before the crime and offered some to the defendant. 128 So. at 3.

cocaine (R 90-94). She was free of drugs only until a few weeks after the incident; she acknowledged that she had started again, but she then claimed that she had stopped again before trial. However, she was taking medication for her craving for heroin and cocaine until a week before trial, and she was a member of Hope Without Dope and going to Narcotics Anonymous meetings at the time of the incident (R 95-97). Day acknowledged, "You're never cured" (R 99-100).

Thus, the instant case is substantially different from Eldridge and ~~Nelson~~. Sandra Day's brief periods without drugs -- coincidentally corresponding to the time of the incident and the time of trial -- do not bely her continuing condition of addiction. Even though Day may not have used drugs on a specific date, nonetheless she continued to be an acknowledged addict. Even if she did not use drugs on the specific days of the incident and of trial, she was on those dates an addict. Therefore, her continued pattern of drug use and addiction was a proper subject for cross examination. In effect, evidence of drug use on other dates still went to establish addiction on the dates of the incident and of trial.

The relevancy of drug use on other dates to show addiction on the dates of the incident and of trial is established by the line of cases from the First District Court of Appeal which is the basis for this Court's "conflict" jurisdiction in this case: Morrell v. State, 355 So.2d 836 (Fla. 1st DCA 1976): Cruz v. State, 437 So.2d 692 (Fla. 1st DCA 1983): Duncan v. State, 450

So.2d 242 (Fla. 1st DCA 1984). This line of cases is complementary and not contradictory to this Court's decisions in Eldridge and Nelson, and should be upheld.

Morrell, the lead case, like the instant case, dealt specifically with ongoing addiction, drug use, and treatment. The excluded defense cross examination was that the witness was addicted to narcotics and undergoing methadone treatment. It was the fact of addiction itself which the First District held to be a proper subject for cross examination. 335 So.2d at 838.² Morrell is entirely in keeping with Eldridge and Nelson because, although it acknowledged that the defense did not conclusively proffer proof that the witness was under the influence of drugs when the event occurred or when she was on the stand, its conclusion was that her addiction was relevant for the purpose of impeaching her credibility. Id.

Other jurisdictions as well are in line with Petitioner's position here.³ The Illinois Supreme Court takes the view that

² Cruz, on the other hand, need not have gone so far as to rely on Morrell, since the trial court there had excluded cross examination not only of drug use before the incident but also during the offense. 437 So.2d at 694. Plainly, Eldridge and Nelson were themselves sufficient authority for reversal.

³ The annotation at 65 ALR.3d 705, "Use Of Drugs As Affecting Competency Or Credibility Of Witness," points out that there is more than one view on the subject. The annotation does state as a general principle, though, that the vast majority of courts recognize that drug use may affect a witness' credibility. Id. at 712. Listed on page 728 of the annotation are decisions from several jurisdictions holding or recognizing that evidence of drug use by a witness is admissible for the purpose of impeaching credibility by showing a lack of veracity or tendency toward untruthfulness resulting from the use of drugs. In the discussion following the list there figure prominently cases involving habitual use or addiction.

the question of whether a witness is a narcotics addict is an important consideration in passing upon his credibility and that the testimony of a narcotics addict is subject to suspicion. People v. Lewis, 185 N.E.2d 168, 169 (Ill. 1962); People v. Strother, 290 N.E.2d 201, 204 (Ill. 1972); People v. Crump, 125 N.E.2d 615, 620 (Ill. 1955). The court has further stated that an addict's credibility is affected not only when he is shown to be under the influence of narcotics at the time of the occurrence or at the time of trial; "The effect of addiction on the ability to observe, accurately reflect and retain what was observed, and the general power and inclination towards truthfulness, all bring into focus the concern over the credibility of the addict's testimony." People v. Galloway, 319 N.E.2d 498, 501 (Ill. 1974). See also People v. Bazemore, 182 N.E.2d 649, 650 (Ill. 1962). As a result, the defense must be allowed to cross examine as to the witness' drug addiction for the purpose of impeaching his credibility. People v. Crump, supra, at 621.

Thus, the Illinois Supreme Court and the lower Illinois appellate courts have found reversible error in denial of cross examination on addiction even where the witness, like Sandra Day in the instant case, claims not to have used drugs at the time of the incident or at the time of trial. See People v. Lewis, supra (no use from a month before the incident to trial); People v. Strother, supra (no use claimed for ten years, but record showed use up to 16 or 17 days prior to trial); People v. Perez, 235 N.E.2d 335 (Ill. App. 1st Dist. 1968) (no use from two months

before the incident to trial; witness "kicking the habit"). In People v. DiMaso, 426 N.E.2d 972 (Ill. App. 1st Dist. 1981), it was held that evidence of the witness' treatment for addiction two months prior to the incident should have been admitted. Id. at 975. (Here, Sandra Day ended one treatment program and entered another four or five months before the incident.)

In the instant case, a prime issue was Sandra Day's credibility relevant to Petitioner's. Both Day and Petitioner testified that their fight was a mutual combat; they differed only as to who was the aggressor with the knife (R 72-78, 313-321). Petitioner asserted the defense of self defense (R 410-412), and there were no other direct witnesses to the fight besides her and Day. Denial of full cross examination for impeachment of Day's credibility was therefore highly prejudicial to the defense.

The denial was a denial of Petitioner's rights to due process and confrontation of witnesses under the Florida and United States Constitutions. This Court should quash the decision of the Fourth District Court of Appeal and remand with instructions to reverse for a new trial.

ARGUMENT

POINT II

THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY AFFIRMED THE TRIAL COURT'S RULING THAT DEFENSE CROSS EXAMINATION OF A STATE WITNESS ON HIS BIAS AGAINST PETITIONER WOULD "OPEN THE DOOR" FOR THE STATE TO BRING OUT IMPROPER "WILLIAMS RULE" EVIDENCE ON REDIRECT.

A.

Like the issue in Point I of this brief, the issue in this point was raised by Petitioner in her jurisdictional brief in this Court as one arising under this Court's "conflict" jurisdiction. The conflict is with State v. Wilson, 509 So.2d 1281 (Fla. 3d DCA 1987), which held that a ruling on a defense motion in limine regarding the permissible scope of the state's impeachment of a defense character witness was not reviewable where at trial after the ruling the defense decided not to call the witness.

In the instant case, the situation was the opposite: After receiving an adverse ruling on a motion to limit state redirect examination if the defense brought out a certain matter for impeachment on cross, the defense nonetheless went ahead with its cross and suffered the consequence of the state's redirect. Plainly, under Wilson, supra, the defense took the proper course to preserve the trial court's ruling for appellate review. However, the Fourth District Court of Appeal held that Petitioner could not seek reversal based on the error because the defense

had initiated the error. Like the trial court, the District Court of Appeal stated that Petitioner had "opened the door" (page 3 of opinion, in Appendix).

Even if this Court should agree with the position of the Fourth District Court of Appeal in the instant case, it must recognize that this will be a change in the law of Florida, which prior to the publication of the opinion under review here was represented by the contrary decision in Wilson. This being the case, Petitioner, who did the right thing under Wilson at the time of her trial, should be held to have properly preserved her point for appeal.

In any event, however, the conflict between Wilson and the instant case should be resolved by this Court. As the law now stands with the two contradictory decisions, the defense (or any party to any litigation, criminal or civil) faces a "Catch 22" when trying to decide how to react to an adverse ruling at trial and still preserve the ruling for appeal.

The necessary point of departure is the proposition that appellate review is available for matters presented to the trial court and ruled upon by the trial court. Section 90.104(1)(a), Florida Statutes (1987), provides that error may be predicated on a ruling, such as that in the instant case, admitting evidence where a timely objection appears on the record. A "contemporaneous objection" is the predicate for appeal of a trial ruling. Simpson v. State, 418 So.2d 984 (Fla. 1982). Any further motion after the trial court has already overruled a contemporaneous objection would be futile and is not required for preservation.

Id. at 986. That being the case, once an adverse ruling has been made, further actions by the offended party should have no retroactive effect on the prior ruling (except, of course, where subsequent events at trial render the ruling harmless, which is an independent inquiry and which can only be reached after resolution of the initial question of preservation).

It should be left up to the party aggrieved by an adverse trial ruling how to best cut its losses through subsequent trial strategy. Whether the defense in Wilson or in the instant case presented or did not present its witness or its impeachment does not change the fact that this was done in response to an adverse ruling which may have been legally incorrect. Therefore, the subsequent course chosen by the defense should have no effect on the initial question of appealability of the ruling. It should be the offended party's option whether to proceed with its planned course of action and "open the door" to the adverse consequences (like Petitioner in the instant case), or, by abandoning its plan (like the defendant in Wilson), to avoid what it deems to be devastating consequences resulting from the adverse ruling. In either case, the matter has already been presented to the trial court and a contemporaneous objection has been registered.

Allowing the aggrieved party the option of how best to cut its losses after an adverse ruling would be most advantageous as a matter of appellate procedure and judicial economy. Without the option, the party might find itself in a position of having to take a course **less** likely to result in a favorable verdict in

order to preserve an important legal issue for appeal. In this way, more unfavorable verdicts might result and therefore lead to more appeals which otherwise would not have been necessary. Thus, a rigid rule requiring one course of action or the other (and exalting form over substance because neither course affects the initial trial ruling) might well backfire.

B.

Whether this Court adopts the position giving the option to the aggrieved party, or concludes that only one course must be open but that Petitioner's choice at her trial was correct under then existing law as stated in Wilson, this Court must proceed to review the merits of the issue, which the Fourth District Court of Appeal did not do.

The specific matter at issue was Petitioner's impeachment of James Jackson, a state witness who testified that Petitioner made threats against the victim and showed a knife in a bar a short time before the incident (R 13-19). The defense's proffered cross examination of Jackson concerned his bias against Petitioner arising from Petitioner's role in the death of a friend of Jackson's. Jackson stated that he believed that it was Petitioner's fault that his friend was shot by another man (R 23-24). What the defense sought to exclude, and that to which the trial and appellate courts concluded the "door" had been "opened," was that the man who shot Jackson's friend was shooting after Petitioner had pulled a knife on him (R 24). After the trial

court's adverse ruling, both the admission of bias and the fact of the knife were brought out in the defense's cross and the prosecution's redirect before the jury (R 45-50).

The fact of the knife, which the defense sought to exclude, was improper "Williams Rule" evidence, as contended at trial (R 29-33). See Williams v. State, 110 So.2d 654 (Fla. 1959) and Section 90.404(2)(a), Florida Statutes (1987). It was especially prejudicial because the instant case proceeded from an identical accusation: that Petitioner attacked and cut the victim with a knife. Collateral crime evidence cannot be allowed to influence the jury to believe that because the defendant committed other crimes, he probably committed the crime charged. Craig v. State, 510 So.2d 857, 863 (Fla. 1987). Where the jury's attention is not focused on guilt or innocence of the crime charged but is diverted by information about unrelated collateral crimes, the Williams Rule is violated. Id. Evidence revealing collateral crimes is not admissible if relevant only to prove bad character or propensity. Williams v. State, supra; Jackson v. State, 451 So.2d 458, 461 (Fla. 1984). In the instant case, any possible probative value was greatly outweighed by the prejudice inherent in informing the jury that Petitioner had on a previous occasion cut someone with a knife, as she was accused of doing in the instant case. See Straight v. State, 397 So.2d 903, 909 (Fla. 1981).

The state in the instant case never even contended that the previous cutting was in any way relevant to the charges on trial, under the Williams Rule or otherwise. Nor did the trial court or

the appellate court ever address the question of relevancy. The courts went no further than the "open the door" rationale for admitting the evidence of the prior criminal conduct. In fact, the prior cutting was in no way relevant to the admitted bias of James Jackson, the sole issue for which the defense brought up the prior incident. As a general rule, all evidence, not just Williams Rule evidence, must be relevant to a material issue to be admissible. Craig v. State, supra, at 863. The Williams Rule, originally formulated as a rule of exclusion with certain exceptions, rather than a rule of admissibility, Straight v. State, supra, at 909, admits evidence of other crimes only if relevant. Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). Here, the prior cutting was not relevant to anything but the prohibited issue of criminal propensity.

Admission of the improper Williams Rule evidence was a denial of due process and a fair trial under the Florida and United States Constitutions. This Court must quash the decision of the District Court of Appeal and remand with instructions to reverse for a new trial.

ARGUMENT

POINT III

THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY AFFIRMED THE TRIAL COURT'S RULING ADMITTING EVIDENCE OF THE EXTENT OF THE VICTIM'S INJURIES.

This point involves the final issue addressed by the District Court of Appeal in its opinion. Although it is not claimed that the decision on this issue by itself confers jurisdiction upon this Court, once this Court has jurisdiction, it may, at its discretion, consider any issue affecting the case. Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986).

Petitioner contended in the trial court and in the District Court of Appeal that evidence of the extent of Sandra Day's knife wounds was irrelevant and should have been excluded because Petitioner was charged with aggravated battery committed with a deadly weapon rather than aggravated battery causing great bodily harm. The evidence came from three witnesses. A police officer was allowed to testify that Day had a cut and much blood on the right side of her face, and that one of her hands was bleeding (R 193). A second officer was allowed to testify that the head laceration was very deep and bleeding profusely. It was a jagged cut which went from the temple to the jaw and it was so deep that it completely penetrated the cheek. You could see right through it, he said (R 243). Finally, a physician testified that the cut was down to the bone and an inch wide. The cut actually went into the mouth and might have been stopped by the teeth (R 262).

Approximately 100 stitches were taken on Day's face (R 268). In addition, a cut on her thumb extended down to a nerve and required surgery (R 266-267).

The District Court of Appeal acknowledged that this testimony regarding the nature and extent of Day's injuries "might have been error" but nonetheless held it harmless. It has indeed been held that the degree of injury caused by an intentional touching is irrelevant to determining whether a criminal battery has been committed. D.C. v. State, 436 So.2d 203 (Fla. 1st DCA 1983). Where an aggravated battery case like the instant case goes to the jury as a deadly weapon case, evidence regarding injuries suffered at the hands of the defendant is immaterial. Lee v. State, 444 So.2d 580 (Fla. 5th DCA 1984). Evidence concerning medical treatment is also admissible only if relevant to the charge. McGriff v. State, 417 So.2d 300 (Fla. 3d DCA 1982). Evidence which might have been admissible had the aggravated battery charge been based upon an intent to cause great bodily harm is inadmissible if irrelevant to a charge based upon use of a deadly weapon. Woods v. State, 436 So.2d 278 (Fla. 5th DCA 1983).

The District Court of Appeal's conclusion in the instant case that admission of the evidence was harmless was incorrect and must be overturned by this Court. As noted in Point I in this brief, both Day and Petitioner testified that their fight was a mutual combat; they differed only as to who was the aggressor with the knife (R 72-78, 313-321). Petitioner asserted the defense of self defense (R 410-412), and there were no other

direct witnesses to the fight besides her and Day. In these circumstances, the evidence of the admittedly extreme extent of the knife cuts suffered by Day might well have engendered such sympathy that the jury's opinion was tipped in favor of her. If the extent of the knife wounds **was** admissible in the instant case, then the extent of virtually any wounds short of death would be admissible in any other case.


This Court must quash the decision of the District Court of Appeal on this point and remand with instructions to reverse for a new trial.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Petitioner respectfully requests this Court to reverse the decision of the trial court and remand this cause with proper directions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Carolyn McCann, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 16th day of March, 1989.



Of Counsel