O A 9-11-89

IN THE SUPREME COURT OF FLORIDA

THOMAS WAYNE SLAUGHTER,

Petitioner,

v. CASE NO. 73,743

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's Statements of the Case and Facts as being supported by the record; however, the State adds the following facts relevant to the resolution of Issue I herein:

Petitioner, Thomas Wayne Slaughter, is the natural father of K[redacted] (T 87). He and the girl's mother were divorced when K[redacted] was four years old (T 88). K[redacted] visited her father during the summer of 1985 when she was 14 years old (T 47). During that visit, Slaughter called K[redacted] into his bedroom on the pretext that he had to talk to her, and there ripped open her shirt, bound her arms and legs to the bed, disrobed and gagged her, and told her that one day she would thank him for what he was about to do. He then began playing what K[redacted] described as "wierd music" on a tape recorder and began kissing her body. He also injected K[redacted] with some drug; and, administered three electric shocks which went through her legs and stomach. He then inserted a bright neon pipe or tube into her vagina along with some type of gel which K[redacted] testified "was hot and it burned a lot." Slaughter then mounted his daughter and inserted his penis into her vagina. He then kissed her body again, including her vagina. He then untied her and forced her to sit astride him with his penis again inside her vagina, after which he forced her to perform oral sex on him. He concluded by holding a butcher knife to her throat and running it down her body as a warning not to tell. He then allowed her to leave the room (T 50-56).

As a result, Slaughter was charged and convicted with seven counts, including

1. sexual battery by inserting his penis into his daughter's vagina (Counts II of the Information and I of the Verdict);

2. sexual battery by inserting an object into her vagina (Counts III of the Information and II **of** the Verdict);

3. sexual battery by forcing his daughter to perform oral sex on him (Counts IV of the Information and III of the Verdict);

4. sexual activity of a person between the ages **15-18** by a person in a familial or custodial authority by inserting his penis into his daughter's vagina (Counts V **of** the Information and IV **of** the Verdict);

5. sexual activity of a person between the ages **15-18** by a person in a familial or custodial authority by inserting his penis into his daughter's mouth (Counts VI of the Information and V of the Verdict);

6. aggravated battery by touching K[redacted] with a knife against her will (Counts VII ***of*** the Information and VI of the Verdict); and

7. incest with his daughter (Counts VIII of the Information and VII **of** the Verdict) (R 42-43, **86-87**).

Note: Petitioner was originally charged with eight counts. Count I charged him with lewd and lascivious assault upon a child under 16 years of age. This count was dismissed upon motion. The remaining counts were renumbered 1-7 for purpose of the Verdict form (R 42-43, 47-48, 57).

SUMMARY OF ARGUMENT

Issue I: The offenses of sexual battery by force, sexual activity by a person in a familial or custodial authority, and incest are separate offenses, each containing an element that the other does not. Therefore, application of the "Blockburger" rule ends the inquiry and resolves the case, e.g., petitioner was properly charged and convicted of each such offense arising out of a single act.

Issue 11: The 1985 Amendment to the Committee Note to Fla.R.Crim.P. 3.701(d)(7) merely clarified that rule, not changed it; therefore, the trial court's assessment of a total of 100 points for victim injury do not violate the ex post facto clause of the United States Constitution.

Issue 111: Petitioner did not timely object at trial to the introduction of similar fact evidence and, therefore, has not preserved the issue for review. But, in any event, the similar fact evidence was relevant to corroborate the testimony of the victim, and did not become a feature of the case.

ARGUMENT

ISSUE I

PETITIONER'S MULTIPLE CONVICTIONS AND SENTENCES FOR HIS VARIOUS SEX ACTS ARE PROPER.

Slaughter sexually assaulted his natural daughter by twice raping her, once forcing her to perform oral sex on him and once by inserting an object into her vagina. While he does not challenge his conviction and sentence for sexual battery by use of an object, he does claim that

> his triple convictions for a single act of vaginal penetration and his dual convictions for a single act of oral penetration are contrary to the legislative intent and violate the principles **of** Carawan v. State, **515** So.2d 161 (Fla. **1987)** and (itsprogeny).

Petitioner'sbrief, p. 15.

While the evidence showed two discreet acts of sexual battery by penile penetration of K[redacted] vagina, e.g., once with Slaughter on top of her, and another with K[redacted] **on** top (T **54-55),** Slaughter was only charged with one count each of sexual battery by penetrating her vagina with his penis (Count 11), sexual activity by penetrating her vagina with his penis while in a familial or custodial authority (Count V), and incest (Count VIII).

Neither the Information nor the Verdict form identify which act a particular count refers. In the opinion below, the court noted the commission of both acts and held, "Carawan is therefore no impediment to separate convictions and sentences for each of those attacks as charged in Counts II and V of the Information." Slaughter v. State, 538 So.2d 509, 511 (Fla. 1st DCA 1989) (footnote omitted). Thus, Slaughter's argument at page 15 of his brief that he was thrice convicted and sentenced for a "single act of vaginal penetration" is an inaccurate statement. But were it otherwise, such multiple convictions, as well as his dual convictions for sexual battery and sexual activity by a person in a familial or custodial authority arising out of a single act of oral penetration, are authorized under the law for the following reasons:

The legislature abolished the "single-transaction" rule in 1983 by enacting Ch. 83-156(1), Laws of Fla., which codified the so-called "Blockburger rule." See, e.g., Sec. 775.021(4), Fla. Stat. In Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), the court held that a single act may be an offense against two statutes if "each statute requires proof of an additional fact which the other does not." 284 U.S. at 304, 76 L.Ed.2d at 309.

In Carawan, the majority reached its decision by stating that the so-called "rule of lenity" prohibited multiple convictions for crimes arising "out of a single evil." In

response, the legislature enacted Ch. 88-131(7), Laws of Fla., which amended Sec. 775.021, and reaffirmed its intent that multiple offenses were to be measured by the "Blockburger rule" and not the rule of lenity.

This latest amendment was not a substantive change in the law, but merely "explains the meaning of 775.021(4)(a)." State v. Barritt, 531 So.2d 338, 341 (Fla. 1988) (f/n 1; J. Shaw specially concurring). This court has held that courts "will show great deference" to laws passed to clarify existing law. Lanier v. State, 464 So.2d 1192, 1193 (Fla. 1985). ~~See also~~, Lowery v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985), wherein this court stated,

> When...an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.

Applying the "Blockburger rule" to the instant facts,

> It is quite clear that such test is satisfied, for the crime of sexual battery under Section 794.011(5) requires the use of physical force and violence which is not an element of the crime of engaging in sexual activity by a person in familial authority under Section 794.041(2)(b); and the latter crime requires as an element that the offender be in familial authority over the victim which is not a requirement of Section 794.011(5).

Slaughter, supra., at 511.

Furthermore, incest under Sec. 826.04, Fla. Stat., is limited to "sexual intercourse" within a narrowly defined relationship. Neither such limitation is present in the crimes of sexual battery or sexual activity by a person in familial authority; nor, are physical force and violence, nor familial authority elements of incest.

Slaughter candidly admits that "each offense contains an element that the other does not" (Petition, p. 14); ergo, as stated in State v. Barritt, supra., at **340** (Fla. 1988) (J. Shaw, specially concurring), "Application of section 775.021(4) ends the inquiry and resolves the case."

ISSUE II

THE TRIAL COURT DID NOT IMPROPERLY ASSESS VICTIM INJURY POINTS IN THE SENTENCING GUIDELINE SCORESHEET.

The sentencing guideline scoresheet prepared in this case includes 20 points for "contact but no penetration" and 80 points for "penetration or slight injury" under the "Victim injury" category (R 102). Slaughter argues that this is erroneous and requires resentencing on the ground that the amendment to the Committee Note to Fla.R.Crim.P. 3.701(d)(7), which added language that each count of a victim's injury should be scored, occurred subsequent to the instant offenses and, therefore, do not apply to him; and, that his scoresheet should reflect only 40 points.

Slaughter's claim must fail for the following reason:

At the time of the subject amendment, Rule 3.701(d)(7) provided that

> Victim injury shall be scored if it is an element of any offenses at conviction.

In The Florida Bar: Amendment to Rules of Criminal Procedure, 468 So.2d 220 (Fla. 1985), the Supreme Court approved certain changes to the sentencing guidelines, including the Committee Note cited by Appellant,

> to clarify that victim injury is to be scored for each victim and each occurrence in excess of one where the same victim is

> involved. The present text of the rule has caused confusion.

Id., footnote at 221 (emphasis supplied).

This clarification was repeated again in The Florida Bar Re: Rules of Criminal Procedure (Sentencing Guidelines 3.701, 3.9881, 482 So.2d 311 (Fla. 1985), which was approved by the legislature in Ch. 86-273, Laws of Florida. **See**, Sec. 921.0015, Fla. Stat. (1986 Supp.).

Thus, the amendment merely clarified an existing rule, not changed it. Accordingly, Slaughter's reliance upon Miller v. Florida, 428 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), is misplaced. That case held that applying a change in the sentencing guidelines subsequent to the commission of the offense and which results in a harsher penalty is violative of the ex post facto clause of the United States Constitution.

Slaughter's reliance upon this court's recent opinion in Fennell v. State, 14 FLW 265 (Fla., June 1, 1989), is also misplaced. There, this court held that the amendment to Fla.R.Crim.P. 3.701(d)(7), which changed the requirement that victim injury can only be scored when such injury is an element of the offense, could not be applied retroactively to crimes committed prior to the effective date of such amendment.

Accordingly, the trial court did not err in scoring a total of 100 points for victim injury in Slaughter's sentencing guideline scoresheet.

ISSUE III

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ALLOWING THE INTRODUCTION OF SIMILAR FACT EVIDENCE.

Prior to trial, the State served notice of its intent to introduce evidence of other crimes, wrongs or acts, to-wit: "multiple acts of Lewd and Lascivious Assault upon K[redacted] Slaughter...by touching and/or fondling (her)breast and vaginal areas... ." (R58-59).

During the trial, K[redacted] testified, without objection, that when she was a little girl, and while her mother worked nights, her father would put her in bed with him and rub her breasts and vagina. This same fondling continued after her parents divorced and during her father's visitation periods (T 40-46).

While Slaughter apparently moved in limine to prevent this testimony (T 6-9), he did not timely object when the testimony was presented, even though cautioned by the trial court to do so (T 10-11). "The rule requiring a contemporaneous objection at trial under such circumstances is firmly established." Crespo v. State, 379 So.2d 191 (Fla. 4th DCA 1980).

Therefore, this issue has not been preserved for review; but, even if it had been, the similar fact evidence was admissible for the following reason:

Sec. 90.404(2)(a), Fla. Stat., provides that similar fact evidence is admissible when relevant to prove a material fact in issue. The true test is relevancy. Once this threshold has been met, it matters not whether such evidence is prejudicial, Ashley v. State, 265 So.2d 685, 694 (Fla. 1972); or, even necessary to prove the charged offense. Ruffin v. State, 397 So.2d 277, 279 (Fla. 1981).

As noted by Judge Campbell in Rush v. State, 399 So.2d 527, 529 (Fla. 2d DCA 1981),

> Sexual molestation cases by their very nature, occur, more often than not in seclusion without other witnesses present.

Thus, use of collateral crime evidence in these cases is held to be

> simply relevant to corroborate the victim's testimony, and (its) probative value outweighs its prejudicial effect.

Heuring v. State, 513 So.2d 122, 125 (Fla. 1987).

Slaughter claims Heuring is inapplicable since "no other witness corroborated her testimony about the prior acts." Petitioner's brief, p. 28. Slaughter also takes the remarkable position that since the court in Heuring

> focus(ed) upon the corroborative value of similar fact evidence, the Court implicitly rejected other justifications for admitting this type of evidence, such as pattern of criminality.

Petitioner's brief, p. 30-31. The recent opinion of Smith v. State, 538 So.2d 66 (Fla. 1st DCA 1989), resolves both claims in favor of the State, e.g.,

> Evidence of prior, similar sex acts with a minor victim is admissible, where the relevancy test is met, to show a pattern of conduct. Section 90.404(2), Fla. Stat. (1987); Gibbs v. State, 394 So.2d 231 (Fla. 1st DCA), aff'd 406 So.2d 1113 (Fla. 1981). Appellant here argues that the rule applies only where the testimony is from a witness other than the victim. We do not agree. Evidence that deals only with similar sex acts against the victim in the case being tried is far less subject to objection than evidence of similar acts against other victims. 394. So.2d at 232.

Id., at 67 (emphasis in original).

Slaughter also claims that "(t)he prior bad acts became a feature of the trial and were highly prejudicial." Petitioner's brief, p. 34. Such claim must fail for the following reasons:

First, the State prosecutor's opening statement includes four typed pages of the trial transcript (T 17-20); however, her reference to the similar fact evidence takes no more than one-half of one page (T 18). In addition, the trial court gave two cautionary instructions to the jury that an "opening statement is not evidence" (T 12, 22).

Secondly, the similar fact evidence takes only portions of seven pages (T 40-46) of some 240 pages of trial testimony (T 32-270).

Thirdly, the prosecutor's closing argument accounts for more than 30 of the transcript (T 272-294, 314-324); yet, Slaughter can only identify portions of six pages of the prosecutor's closing argument that even remotely touch upon the similar fact evidence. Petitioner's brief, p. 35.

In Snowden v. State, 14 FLW 257, 260 (f/n 4) (Fla. 3d DCA, January 24, 1989), the court noted, "it follows, of course, that a relatively small amount of similar fact evidence will not by itself be deemed to infringe upon defendant's fair trial right.''

In Snowden, the court held that

> The similar fact evidence introduced in this case was not a needless attack on the defendant's character. It did not become a feature of the case in any respect, and its introduction did not. transcend its relevance.

Id., at 260. Crucial to this holding, in addition to the small amount of similar fact evidence introduced at trial, was the court's observation that

> Both the State's and the defendant's closing arguments centered on the acts charged in the information and the credibility of (one of the sex abuse victims)...(and) both counsel's arguments reminded the jury that their duty was limited to deciding the narrow question of the defendant's guilt.

Id., at 259.

So it is in the present case. The introduction of Slaughter's "lifetime" sexual molestation of his daughter did not become a "feature" of the case, was not a needless attack on his character, and did not transcend its relevance.

CONCLUSION

Based upon the record, argument and citation of authorities, the decision in Slaughter v. State, 538 So.2d 509 (Fla. 1st DCA 1989) must be approved.

Respectfully submitted,

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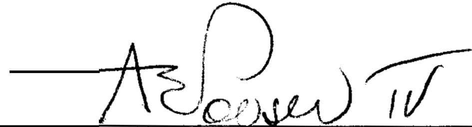
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and. correct copy of the foregoing has been forwarded via U. S. Mail to Paula S. Sanders, Assistant Public Defender, Leon County Courthouse, Fourth Floor (North), 301 South Monroe Street, Tallahassee, Florida 32302, this 26th day of June, 1989.



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