OA 9-11-89

IN THE SUPREME COURT OF FLORIDA

THOMAS WAYNE SLAUGHTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 73,743

PETITIONER'S REPLY BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PAULA S. SAUNDERS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 308846
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

COUNSEL FOR PETITIONER

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I PRELIMINARY STATEMENT

This brief is submitted in reply to Issues I and III of Respondent's Reply Brief on the Merits. Petitioner will rely upon his initial brief as to Issue 11. Respondent's brief will be referred to herein as "RB." All other references will be as set forth in Petitioner's Brief on the Merits.

II ARGUMENT

ISSUE I

PETITIONER WAS IMPROPERLY CONVICTED OF MULTIPLE CRIMINAL OFFENSES BASED UPON A SINGLE ACT.

In its opinion, the district court found that because the victim testified that petitioner committed two discrete acts of vaginal intercourse, Carawan v. State, 515 So.2d 161 (Fla.1987) is no impediment to separate convictions and sentences for each of the attacks charged in Counts II and V. Slaughter v. State, 538 So.2d 509, 511 (Fla. 1st DCA 1989). Respondent argues in

its brief that the evidence below showed two discrete acts of sexual battery by penile penetration of K[redacted] vagina, but acknowledges that "Neither the Information nor the Verdict form identify which act a particular count refers" (RB 6). Because of this deficiency in the information and the jury's verdicts, it cannot be assumed that petitioner was, in fact, charged with and convicted of two separate acts of sexual battery by vaginal penetration. If the lower court is correct, however, that the jury convicted petitioner of two separate acts of vaginal penetration, the convictions cannot stand because it is impossible to determine which of the alleged acts the jury found petitioner guilty of having committed. See Stromberg v. California, 283 U.S. 359 (1930); Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1980). Petitioner would, therefore, be entitled to a new trial on Counts II, V and VIII.

It is a fundamental principle of due process that a person called upon to respond to criminal charges must be notified by the accusatory pleading of all the offenses for which he may be convicted. *See*, generally, Florida Rule of Criminal Procedure 3.140(d)(1); Blow v. State, 386 So.2d 872, 874 (Fla. 1st DCA 1980). Generally, an information is sufficient if it follows the language of the statute, and need not set forth proof with which the state intends to establish its case. See Martinez v. State, 368 So.2d 338, 340 (Fla.1979). However, the information must be sufficient to inform the defendant of the nature of the offenses charged, so that the defendant is not misled or embarrassed in the preparation of his defense or subjected to double

jeopardy. Padgett v. State, 126 Fla. 57, 170 So. 175 (1936). Furthermore, an accused is entitled to have the charge proved substantially as laid; he cannot be charged with one offense and convicted of another, even though the offenses are of the same character and carry the same penalty. Ables v. State, 338 So.2d 1095, 1096 (Fla. 1st DCA 1976), cert. denied, 346 So.2d 1247 (Fla.1977).

If it is true, as the court below held and respondent here alleges, that petitioner was convicted of two separate acts of vaginal penetration, petitioner was denied his fundamental due process right to be informed of all the offenses with which he was charged. See Russell v. United States, 369 U.S. 749 (1962); Cole v. Arkansas, 333 U.S. 196 (1948). As stated by the high Court in Cole v. Arkansas, 333 U.S. at 201-202:

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . .

In Ables v. State, the defendant was charged by indictment with felony murder while engaged in the perpetration of a kidnapping; the indictment did not allege premeditated murder. At trial, however, the judge instructed the jurors on the various ways in which first degree murder could be committed, including premeditation, and led the jury to believe it could convict the defendant if it found that he killed the victim from a premeditated design or in perpetrating a kidnapping. This instruction thus exposed the defendant to a jury determination of his guilt on a charge not made by the indictment. Despite the fact that

"[t]here was abundant evidence that [Ables] premeditatedly shot and killed the victim who was resisting kidnapping,'' 338 So.2d at 1096, the District Court of Appeals reversed the conviction, stating:

> The court's charge thus potentially exposed appellant to a jury determination of his guilt on a charge not made by the indictment. That was error, for an accused is entitled to have the charge proved substantially as laid; he cannot be charged with one offense and convicted of another, even though the offenses are of the same character and carry the same penalty. See Perkins v. Mayo, 92 So.2d 641 (Fla.1957); Penny v. State, 140 Fla. 155, 191 So. 190 (1939); Art. I, s 16, Florida Constitution.

Id. The court explicated that while it is entirely proper to instruct the jury that the charge could be proved by evidence that the killing was committed in the commission of one of the designated felonies where the information charges premeditated murder, the converse is not true. Since the indictment charged that the murder was committed while perpetrating a kidnapping, the jury could not have convicted Ables of a killing committed in the perpetration of a rape or aircraft piracy, or committed from a premeditated design. The court concluded that regardless of the evidence, the jury could not convict Ables of an offense with which he was not charged.

Here, petitioner was originally charged with one count of sexual battery by oral and vaginal penetration with the use of or threat to use a deadly weapon, one count of sexual battery by oral and vaginal penetration by use of familial or custodial authority, and one count of lewd and lascivious assault (R 16).

After a mistrial, the state amended the information, alleging one count of sexual battery by vaginal penetration by physical force or violence not likely to cause serious personal injury (Count II),[1] one count of sexual battery by vaginal penetration by familial authority (Count V),[2] and incest (Count VIII).[3] The

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[1] Count II of the information alleged that
> THOMAS SLAUGHTER . . . did then and there unlawfully commit a sexual battery upon K[redacted] S[redacted], . . ., without the consent of K[redacted] S[redacted], by putting his penis inside her vagina, and in the process thereof used physical force and violence not likely to cause serious personal injury, . . .

(R 42).

[2] Count V of the information alleged that:
> THOMAS SLAUGHTER, . . ., standing in a position of familial or custodial authority to K[redacted] S[redacted], . . ., did then and there engage in sexual activity with K[redacted] S[redacted] by vaginal penetration of the said K[redacted] S[redacted] with his penis, . . .

(R 43).

[3] Count VIII of the information alleged that:
> THOMAS SLAUGHTER, . . ., did have sexual intercourse with a person to whom he is related by lineal consanguinity, to wit: K[redacted] S[redacted] his natural daughter, contrary to Section 826.04, Florida Statutes.

(R 43).

amended information also charged one count of sexual battery by oral penetration of K[redacted] S[redacted] by use of physical force not likely to cause serious personal injury (Count IV), and one count of sexual battery by oral penetration by use of familial or custodial authority (Count VI)(R 42-43).

Because the information charged petitioner with two counts of oral sexual battery where only one act occurred, and because the information failed to allege two separate and discrete acts of vaginal penetration, it must be assumed that Counts II and V also refer to a single act of penile/vaginal penetration. Any other construction would violate due process. Despite evidence that two separate acts, one with Slaughter on top, and another with K[redacted] on top, were committed, appellant was not charged with two discrete acts of vaginal penetration, nor did the jury find him guilty of two discrete acts.

In an analogous situation in Adjmi V. State, 154 So.2d 812 (Fla.1963), this Court held that where the state charges a single act (offense) in one count on the information, but adduces proof of several acts, the state must elect which single act it would rely upon for a conviction; when the state fails to elect between multiple offenses and the jury verdict is general, "it is impossible to ascertain and determine upon which single act that verdict rests." 154 So,2d at 817. See also, Hamilton V. State, 129 Fla. 219, 176 So. 89 (1937). The state, below, did not elect which act of vaginal intercourse it was relying upon

in either Counts 11, V, or VIII. As in Adjmi, the jury below returned a general verdict of guilty on each count: thus, it is unclear whether the jury found petitioner guilty of one or two separate acts of sexual battery by vaginal penetration. If the state was indeed relying upon both acts of vaginal penetration, the information was unconstitutionally vague in failing to give sufficient notice of the nature of the offenses charged, such

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[4] In her closing arguments to the jury, the prosecutor never clarified which act the state was relying upon in each count:

> He got on top of her and he put his penis inside of her. And she told you he moved up and down. Then he untied her and he made her straddle him; put his penis inside her again.
>
> He forced her to perform oral sex on him. He performed oral sex on her.

(T 277).

> The State has proved its case to you beyond a reasonable doubt. And that's why we're going to ask you to bring back verdicts -- verdicts, plural -- of guilty.
>
> Counts 1, 2, and 3 are sexual battery with use of slight force.
>
> Counts 4 and 5 are sexual battery by a person who is in familial or custodial authority.
>
> Count 6 is aggravated battery.
>
> And Count 7 is incest.
>
> The State asks you to bring back verdicts of guilty on all counts. Thank you.

(T 294).

that petitioner was misled or embarrassed in the preparation of his defense and subject to subsequent prosecution for the very same offenses. If the jury found petitioner guilty of a sexual battery by slight force when he was on top (Act A), and guilty of a sexual battery by familial authority when K[redacted] was on top (Act B), and guilty of incest for Act B, petitioner could conceivably be tried again for sexual battery by slight force for Act B, sexual battery by familial authority for Act A, and incest for Act A. As recognized in Adjmi, supra at 816, no one can delve into the minds of the jurors and know with certainty that it was not one or both acts upon which the jury returned its guilty verdicts. Neither an appellate court nor the state can surmise upon which act the verdicts rest, and the holding of the lower court must be reversed on this ground. Bashans v. State, supra, at 1305.

On the other hand, since the information alleged only one count of incest, based upon sexual intercourse, and two counts of oral sexual battery, based upon a single act, it is logical to infer that Counts II and V were likewise based upon a single act of vaginal intercourse, notwithstanding the evidence of two acts of intercourse. Consequently, the principles of Carawan v. State, supra, would apply to Counts II and V, as well as to the charges of oral sexual battery in Counts IV and VI. See George v. State, 488 So.2d 489 (Fla. 2d DCA 1986)(improper to convict for both sexual battery by force likely to cause serious injury and sexual battery not likely to cause serious personal injury, where only one battery occurred); *see* also, Rivera v. State, 14

FLW 1021 (Fla. 4th DCA April 26, 1989)(multiple convictions and sentences for attempted first degree murder, aggravated battery and child abuse improper where offenses are based on the single act of choking the victim).

Respondent also argues that the multiple convictions for a single act of vaginal sexual battery and one act of oral sexual battery are permissible under Blockburger v. United States, 284 U.S. 299 (1932), and under Section 775.021(4), Florida Statutes (1988). This contention was recently rejected by this Court in State v. Smith, 14 FLW 308 (Fla.June 22, 1989), where the Court held that retroactive application of Chapter 88-131, section 7, Laws of Florida, to crimes committed before its effective date would violate the ex post facto clauses of the state and United States Constitutions. Since the instant offenses were committed in August 1985, Chapter 88-131 cannot be applied retroactively.

Consequently, Carawan v. State applies to the instant case and mandates that petitioner's convictions under Counts 11, IV, and VIII be vacated. Alternatively, because it is impossible to determine which act of vaginal penetration the jury relied upon in returning its guilty verdicts in Counts 11, V and VIII, the convictions cannot stand and the cause must be remanded for a new trial.[5]

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[5]The defects in the information and general verdicts of guilt constitute fundamental error, which may be raised for the first time on appeal. Brown v. State, 42 Fla. 184, 27 So. 869 (1900); Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1980).

ISSUE III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE INTRODUCTION OF COLLATERAL CRIME EVIDENCE, WHEN THE EVIDENCE WAS NOT RELEVANT TO ANY MATERIAL FACT OR TO CORROBORATE THE VICTIM'S TESTIMONY, AND COULD SERVE NO PURPOSE OTHER THAN TO PREJUDICE THE JURY BY SHOWING PETITIONER'S CRIMINAL PROPENSITIES.

Respondent initially contends that this issue has not been preserved for review because petitioner failed to timely object when the collateral crime testimony was introduced at trial (RB 11). Respondent made this same argument on direct appeal to no avail. Although the lower court summarily rejected petitioner's claim ["On the Williams Rule issue, we affirm on the authority of Heuring v. State, 513 So.2d 122 (Fla.1988)"], this ruling on the merits implicitly rejected respondent's procedural default argument.

It is clear, however, that this issue was preserved. It is noteworthy that this was the third trial of this cause. At the first trial, the lewd and lascivious assaults were the primary offense charged. After petitioner's motion to dismiss the lewd and lascivious count was granted (R 47-52, 57), the state filed its notice of intent to rely on the now dismissed charges under Section 90.404(2), Florida Statutes, as similar fact evidence, in petitioner's second trial (R 58). That trial resulted in a mistrial, and the transcript of those proceedings are not part of the instant record. However, it is clear from the transcript of the last trial that the issue was raised at the second trial and renewed prior to the third trial of this cause:

> MS. BLOUNT [defense counsel]: Your Honor, at this time, however, I would like to renew a motion in limine that was made previously.
>
> * * *
>
> THE COURT: Okay. The Court, having ruled on this before, did want to give you a chance to place these matters of record: but the ruling would be the same as before that these matters would be admissible.

(T 6, 9). The trial court was fully cognizant of petitioner's objections to the collateral crime evidence and had an opportunity to rule on them. Petitioner submits it would have been an exercise in futility for petitioner to repeatedly object to the evidence each time it was presented in arguments and testimony. See Anderson v. State, 14 FLW 1622, 1624 (Fla. 5th DCA July 6, 1989)(Cobb, J., concurring): Donaldson v. State, 369 So.2d 691 (Fla. 1st DCA 1979). The issue was thus properly preserved.

On the merits, respondent relies upon this Court's holding in Heuring v. State, 515 So.2d 122 (Fla.1987), that collateral crime evidence is relevant to corroborate a victim's testimony, and the district court's recent opinion in Smith v. State, 538 So.2d 66 (Fla. 1st DCA 1989), wherein the Court stated:

> Appellant here argues that the rule [section 90.404(2)] 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.

538 So.2d at 67 [Emphasis in original].

Petitioner has no qualms with the holding in Heuring, but contends that it was misapplied by the district court in Smith

and in the opinion now under review. Petitioner also contends that the statement quoted above is misguided and contrary to established case law.

Evidence of a similar sex act against the victim, without any corroboration, is far more objectionable than evidence of similar acts against other victims for the reason that it does not aid the jury in deciding the credibility of the victim, or whether the accused committed the offense charged. Anderson v. State, supra. It merely bolsters the victim's testimony in the same manner as a prior consistent statement without a showing of recent fabrication. Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980). The rational of the rule prohibiting the witness' prior consistent statement is to prevent "putting a cloak of credibility" on the his or her testimony. Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979). Permitting a victim to testify about similar sex offenses likewise tends to cloak her testimony about the crime charged with vicarious integrity, but it has limited probative value. Either the jury here believed K[redacted] with respect to the offenses charged or they did not; her testimony about other sexual abuses, without corroboration, simply could not aid the jury in determining her credibility. See Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974).

The victim's own testimony about similar crimes committed by petitioner simply does not provide the kind of corroboration contemplated under Heuring. As recognized in Anderson v. State, the victim's testimony about a similar act committed on her by

the defendant was not relevant to any issue at trial because it did not tend to prove the act charged or that the defendant was the perpetrator of the act charged, and not material because it did not relate to the act charged. The Anderson court reasoned that the victim's testimony about the collateral crimes did not "corroborate [her] testimony that [the defendant] committed the act charged for the simple reason that she cannot corroborate herself.'' 14 FLW at 1622. In discussing this Court's opinion in Heuring, the district court stated, at page 1623:

> Heuring v. State, 513 So.2d 122 (Fla.1987) and Beasley v. State, 513 So.2d 1347 (Fla. 5th DCA 1987), approved, 518 So.2d 917 (Fla.1988), surely do not mean that case law has effectively, and unconstitutionally, amended section 90.404(2)(a), Florida Statutes (1985), to make admissible all similar fact evidence that corroborates the testimony of a child victim in every case charging a child sex crime in a familial setting without regard to (1) the strong policy reasons for the general rule of evidence excluding similar fact evidence or (2) all of the other factors limiting the Williams Rule exception, i.e. (a) the necessity that the evidence admissible under the Williams Rule exception relate to a material fact in issue in the particular case, (b) the similarities of the events involved, (c) the remoteness in time of the two events, (d) that the similar fact evidence not become the 'feature' of the trial of the charged fact. . . .
>
> * * *
>
> While Heuring, supra, appears to substantially liberalize the use of similar fact evidence under the Williams Rule, surely that opinion should not be read to hold that the general rule excluding similar fact evidence does not apply in any case where the defendant is charged with a child sex crime in a familial setting and that in that situation all evidence of

> other alleged similar crimes, wrongs, or bad acts are always admissible to 'corroborate' the victim's testimony.

The introduction of the collateral evidence sub judice was error as it was not relevant or material and could not be used to corroborate the victim's own testimony.

Respondent mistakenly assumes that the quantity of similar fact evidence, and not its quality, is determinative of whether the evidence is a feature of the trial. While the courts, in discussing feature arguments, have frequently noted the number of transcript pages devoted to the collateral crime testimony, see Davis V. State, 276 So.2d 847 (Fla. 2d DCA 1973); Reyes V. State, 253 So.2d 907 (Fla. 1st DCA 1971), case law recognizes that Williams Rule evidence does not become a featured aspect of the trial based merely on the volume of the testimony. See Johnson V. State, 432 So.2d 583 (Fla. 4th DCA 1983).

The collateral crime evidence here became a feature of the trial because the lewd and lascivious assaults were emphasized by the prosecutor in proving the charged offenses and in urging the jury to find petitioner guilty. In fact, the prosecutor's closing arguments repeatedly merged the collateral and charged offenses and exhorted the jury to convict petitioner for "this lifetime of sexual molestation" (T 18), and not just for the offenses being tried. State V. Lee, 531 So.2d 133 (Fla.1988). Even if the collateral crimes were somehow relevant to corroborate K[redacted]s testimony, the prejudice clearly outweighed its limited probative value. Section 90.403, Florida Statutes: Knox V. State, 361 So.2d 799 (Fla. 1st DCA 1978).

Here, unlike in Snowden v. State, 537 So.2d 1383 (Fla. 3rd DCA 1989), the jury was never instructed on the proper use of the similar fact evidence, nor was the evidence adduced by the defense, or emphasized by defense counsel in cross-examination or closing arguments. The Williams Rule evidence was a feature of petitioner's trial, and its introduction unfairly prejudiced petitioner and constituted reversible error.

III CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, as well as that in the initial brief, petitioner requests in Issue I that this Court vacate his convictions in Counts 11, IV and VIII and remand for resentencing, or alternatively, that this Court vacate the convictions in Counts 11, V and VIII for a new trial. Petitioner requests in Issue II that the Court remand the cause for resentencing. Petitioner requests in Issue III that this Court reverse his convictions and sentences and remand the cause for a new trial.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders

PAULA S. SAUNDERS
Fla. Bar No. 308846
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
Tallahassee, Florida 32301
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief on the Merits has been furnished by hand delivery to Robert Butterworth, Attorney General, The Capitol, Tallahassee, Florida **32399-1050** and a copy has been mailed to Mr. Thomas Wayne Slaughter, #110359, P.O. Box **1100**, Avon Park, Florida **33825** this 25th day of July, **1989**.

Paula S. Saunders

PAULA S. SAUNDERS