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IN THE SUPREME COURT OF FLORIDA

TOMMY SAAVEDRA,

Petitioner,

vs. CASE NO.: 77,886

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Tommy Saavedra, defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "Respondent," References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitiones's statement of the case and facts is impermissibly argumentative and at times factually incorrect.

For example, at page 2 of Petitioner's brief, Petitioner states that the victim was "allegedly sexually battered." Medical testimony demonstrated that she had in fact been sexually battered (T 740-748). On page 5, Petitioner states that his son was given no other option but to open the door for the police. There is nothing in the record to show that Petitioner's son was forced to open the door. On page 6 Petitioner states that the police "had intended all along" to enter Petitioner's bedroom and arrest him. This opinion is not supported by the record. On page 8 Petitioner incorrectly states that the victim testi ied that "she and her assailants had entered the park through an opening underneath the fence." The victim actually testified that they entered underneath shrubbery (T 582). On page 11, Petitioner states that the appellate court "disregarded" a fact. This is impermissibly argumentative. Petitioner places as much emphasis on what did **not** happen as on what actually did happen.

Respondent thus supplements the statement of the case and facts with the following:

At the end of *May* 1987, K[redacted] A[redacted], a 12-year-old black girl, moved to [redacted] Avenue in Jacksonville, Florida, with her mother, her 14-ysar-old brother, S[redacted], and her 4-year-old sister, B[redacted]. (T 359, 630). When K[redacted] moved

in, a white family lived next door, Tommy Saavedra Sr. (Petitioner) and his 15-year-old son, Tommy, Jr. (T 1088). Sometime in early June, another white man, Donald Teater, moved in with the Saavedras. (T 1135).

On June 24, 1987, K 's mother left for work at the post office sometime around 10:00 p.m. (T 360). On that evening, A J a young male friend of the family, was spending the night at che A 's residence, and Tommy Jr.'s young male cousin, R M , was spending the night at the Saavedra's residence, (T 361).

Shortly after K mother left for work, there was a power failure in the neighborhood, and the lights went out. (T 275). All the children in the A residence went outside. (T 276). Her next-door neighbors were also outside. (T 276). Except for Tommy Jr., K had never seen her neighbors before. (T 382).

While K and E remained on the porch, S and A left their house to talk to the neighbors. (T 377). K observed Tommy Sr. and Donald Teater leaning up against a car which was parked in between the two houses less than twenty feet away. They were standing on the side of the car closest to her house. Both men were dressed in white shorts and were drinking beer. (T 380). Petitioner had a flashlight in his hand which he was shining on the side of her house. (T 377). K stared at these two men for about 15 seconds for no particular reason. (T 379).

K remained on the porch until the lights came back on about 15-20 minutes later. (T 381). By that time, everyone else had moved to the Saavedra's patio. (T 385).

When the electricity came back on, the area between the two houses was lit by a street light. (T 384). Also lighting up the area were lights from K house coming from the porch, her bedroom, the bathroom, and the living room. (T 384). There was also a light on the patio of the Saavedra's residence where everyone was sitting. (T 385). K went over there and told her brother to come home because the lights were on. K again looked at Petitioner and Donald Teater. (T 385).

The A children all returned home and shortly thereafter went to bed. S slept in a room by himself, and A , K , and B all slept on aeparate pallets in her mother's bedroom. (T 387).

K went to bed about 11:00 p.m. About 2:00 a.m., she was awakened by the feeling of something hard in her side. (T 387). From the light shining through the curtains and the digital clock light on the air conditioner, she saw Petitioner, who had a mustache and was dressed in karate pants kneeling beside her bed. (T 387-390). He told her to get up and keep quiet or he would kill her. (T 388). Another man was standing in the room with a hood over his head and seemed to be dressed like Petitioner. (T 389). They each took one of her arms and forced her out of the house. (T 394-395). When they got to the back porch, the man with the hood reached up to knock out the

porch light and in doing so his hood fell off. (T 401-402). K . saw that it was Donald Teater, who had a mustache and a beard (goatee). (T 402-403).

Ke was taken outside, dressed only in a T-shirt and underwear. (T 403-404). She was taken through some bushes to a park behind her home (T 415). By the park fence Petitioner and Teater pushed K to the ground on her back and both of them tore off her underwear (T 419-420). They then took her T-shirt off and Petitioner put it over her head (T 420-421). Teater held her arms above her head, Petitioner took down his pants and placed his penis in her vagina. It hurt. (T 421-422). Petitioner sexually battered her for about three minutes.

Petitioner then got up and pulled up his pants. Teater then came around by Ke feet and Petitioner held her wrists down. Teater took down his pants and placed his penis in her vagina (T 423). After about two or three minutes he finished and pulled up his pants. The assailants then took her into the park. Petitioner said that if she screamed he would kill her. She did not scream (T 424). K was taken to the park slide, which has a ladder, a platform, and a sliding board. Petitioner climbed the ladder and told her to follow. When she wouldn't go, Teater pushed her up the ladder (T 425). When she got to the top, Petitioner punched her in the face and told her to lay down. Petitioner placed her feet on the rail, pulled his pants down, and again placed his penis in her vagina for about two minutes. After Petitioner finished, he made her slide down the sliding board to Teater, who was waiting at the bottom (T 426-428).

Teater then pulled down his pants and placed his penis in her vagina for about two minutes. Teater then turned her over on her stomach and she felt something "going in (her) behind" (T 428-430). She couldn't tell who was doing it. Petitioner then pulled her up by her hair and took her to a concrete circle that used to be a water fountain. Petitioner told her to lay down and she laid down. Petitioner pulled down his pants and placed his penis in her vagina again for about three minutes (T 431).

When Petitioner finished, he pulled his pants up, then Teater pulled his pants down and placed his penis in her vagina. When Teater finished, Petitioner said "the next door neighbors can't help you now." He told her to stay there for ten minutes "until they got to their car." K saw Petitioner and Teater running out the gate through which they had entered. (T 432).

K got up, saw her T-shirt by the slide, and went to get it. She put it on and ran home. She banged on her back door and her brother let her in. The police were called and they arrived four or five minutes later (T 451-453). She soon thereafter identified the rapists and was then taken to the hospita1 (T 453-455).

Officer Benfield of the Jacksonville Sheriff's Office arrived at K home at approximately 3:30 a.m. The victim indicated that her assailants were next door, and she described them (T 745-746). The officer went to the house where the victim said the suspects were. He shined a light into a back bedroom

window to see if anybody was in, but didn't see anything. All the lights in the house were off. The officer requested additional units (T 746).

About twenty minutes later the officer went back to the windaw and there was somebody nude in bed at that time. Another officer had arrived by then. Benfield knocked on the back door and a young white male answered the door (T 746-747). The officer testified:

> I asked him when I went to the door if there was any adults in the house, and he told me that there was. And I asked him if 1 could speak to one and he told me to come in.

(T 750).

He then went straig t to the bedroom where he saw he individual through the window earlier and took the subject into custody. The other suspect was taken out of the other bedroom (T 747).

Officer McLean testified that he **also** shined a flashlight into some of the windows until he saw someone laying in bed. He started knocking on the side of the house trying to get the person **up** to answer the door (T 759-760).

Sergeant Pease of the Jacksonville Sheriff's Office testified at the hearing on Petitioner's motion to suppress that he was the next officer through the door after officers Benfield and McLean. He testified that when he got to the door there was a young man standing there holding the door open. The officer testified that

> I spoke to him briefly, asked him if I could come in and I think I said good morning, how are you doing. He said fine. I said do you mind if I come in. He said sure, come on in. At that point he and I walked into the house where Officer McLean and Benfield were.

(T 91).

The suspects were placed in a police car (T 762). The victim walked out of her house toward the police car to make a "show up" identification. Officer McLean testified that

> When she got what I estimated to be about halfway between the steps and the police car, she went hysterical, she -- she went to pieces and when she did, ~ o uknow, I just turned my head away from her. It kind of upset me when she broke down like she did.

(T 763). K said that the two men in the police car (Petitioner and Teater) were the ones that assaulted her **(T 324).**

At the hospital, she was examined by a physician. He found a scratch on her right thigh about 15 centimeters in length and an additional scratch on her right anterior mid abdomen five centimeters in length. (T 840). Her hymen was swollen, torn in several places, and bleeding (T 844), and there was evidence of recent bleeding into the tissue of the hymen, like a bruise. (T **844).** The doctor also found a 2.5 centimeter long by 3 millimeters deep laceration to the anal sphincter, indicating trauma to the anus. (T 845). These lacerations were recent. (T 844-845). The doctor further found sperm in K vagina. **(T 846-847).** The doctor was of the opinion that K had suffered recent trauma to bath the vaginal and hymen area as well as her anal area consistent with the history she had given. (T **848).**

A rape kit was prepared by the examinkng physician consisting of vaginal and rectal smear slides and vaginal and rectal swabs. (T 875). This evidence, the panties, and blood and saliva samples from the victim and the two defendants were examined by an expert forensic serologist. (T 865-893).

Petitioner and Donald Teater are Blood Type A secretors. (T 878, 880). About 32% of the population are Type A secretors. (T 892). K A is a Type B non-secretor which means that, unlike the defendants, her blood type cannot be determined from her secreted body fluids, such as saliva and vaginal secretions. (T 870-871). The blood type of both defendants is consistent with the blood type found in the semen on K underwear and vaginal swab, which was Type A. (T 874, 876, 879, 880-881).

K A and Petitioner are PGM-type one. (T 871, 878-879). Donald Teater is PGM-type two-one. (T 880-881). The PGM type of Petitioner is consistent with that found in the semen in K panties which was PGM-type one. (T 874, 879). Although Donald Teater's PGM is two-one, he cannot be ruled out as a donor of the sperm because he is a Type A secretor, and the presence of a very large amount of blood staining and probably vaginal secretions coming from K contributed to a high level of PGM type one which could have masked other PGM types. (T 881-882, 926, 930).

With Petitioner's consent (T 794-797, on the morning of the rape, Detective Gilbreath returned to Petition's house and

searched it. He found and took into custody a black hood and a pair af black pants lying next to each other on the floor or the screened-in back porch and a pair of black karate pants from inside the clothes hamper located directly outside Petitioner's bedroom. (T 798, 801-802, 804). These karate pants appeared to be soiled, and the pants and hood from the back porch were wet and had sand on them. (T 799). The hood is the type worn by people performing karate and martial arts. (R 802). The black karate pants were the only item of clothing found inside the clothes hamper. (T 805).

Petitioner was convicted of one count of burglary of a structure, one count of armed kidnapping, and three counts of sexual battery upon a person 12 years of age or older (R 121-125).

On appeal, the First District Court of Appeal upheld Petitioner's convictions. The written opinion is reported at 576 So.2d 953 (Fla. 1st DCA 1991), attached hereto.

SUMMARY OF ARGUMENT

I. The trial court properly denied Petitioner's motion to suppress evidence where, under the totality of the circumstances, valid consent to enter Petitioner's house was given by Petitioner's teenage son, who was an occupant af the premises and who was aware of his right to refuse entry. The son's action of inviting the police officer inside after he had knocked and announced his purpose supports the finding that consent was freely and voluntarily given. Even so, the need to enter and arrest the suspects in a speedy fashion was motivated by exigent circumstances, namely to prevent the destruction of evidence.

11. Petitioner's three convictions for sexual battery stemming from separate acts within. one ongoing criminal episode are proper where the sexual batteries occurred at different times and locations and were further separated by the co-defendant's intervening acts of sexual battery. Such a result is mandated by §775.021(4)(b), Florida Statutes.

REQUEST TO THE COURT

Respondent respectfully requests that in any written opinion resulting from this case, that the Court refrain from publishing the juvenile rape victim's full name, in order to save her from further shame and embarrassment, and in compliance with the spirit of 8794.03, Florida Statutes.

ARGUMENT

ISSUE I

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRONEOUSLY HELD THAT THE WARRANTLESS ENTRY INTO PETITIONER'S HOME AND HIS SUBSEQUENT DETENTION WERE LAWFUL. (Restated)

Minutes after the twelve year old rape victim returned home, the police were called. The police arrived four or five minutes later. Upon ascertaining that the assailants were in the house next door, the police tried to get the occupants' attention by knocking on the door. Petitioner's fifteen year old son finally came to the door. An officer asked him if there were any adults in the house, to which the young man responded yes. The officer asked if he could speak to one, and the young man invited the officer in. The police entered and arrested Petitioner and his codefendant.[1]

Petitioner contends that the district court below erroneously concluded that the trial court properly found valid consent to enter in denying Petitioner's motions to suppress evidence and out-of-court identification. Respondent disagrees.

The court below stated:

> we find that a preponderance of the evidence supports finding that appellant's son voluntatily allowed the police to enter the premises. The narrow issue is whether a

[1] In denying Petitioner's motions to suppress, it is clear that the trial court accepted this version of the facts as true.

> minor may consent to the entry of his father's residence by police for purposes of arresting the father and, if so, whether the consent was given freely and voluntarily.

576 So.2d at 958.

Initially, warrantless arrests are lawful when police have probable cause to believe that the person to be arrested has committed a felony. Carroll v. U. S., 267 US 132 (1925); U. S. v. Watson, 423 US 411 (1976). The police in this case clearly had ample probable cause to believe that Petitioner and his co-defendant had a short time before raped the victim, who told the police that the neighbors raped her.

The entry into Petitioner's home to arrest him was proper pursuant to his son's valid consent, and was also proper as based on exigent circumstances. The issue of whether valid consent to search has been given is a question of fact which will be upheld on review unless the lower court's finding is clearly erroneous. U. S. v. Massell, 823 F.2d 1503 (11th Cir. 1987).

Consent, which may be express or implied, is the free and voluntary waiver of fourth amendment rights. Schneckloth v. Bustarnonte, 412 US 854 (1973); Bumper v. North Carolina, 391 US 543 (1968). The waiver does not necessarily have to be knowing and intelligent. Bustamonte, supra. To determine whether the consent was free and voluntarily given, courts look at the totality of the circumstances surrounding the consent. Bustamonte, supra; Preston v. State, 444 So.2d 939 (Fla. 1984).

The factors used to determine whether express consent is free and voluntary include the individual's knowledge of his right to refuse consent (Bustamonte, supra, U. S. v. Mendenhall, 446 US 544 [1980]); his age, intelligence, and education (Bustamonte, Mendenhall, supra); his knowledge of his constitutional rights (Bustamonte, supra); his cooperation (U.S. v. Gonzalez-Basulto, 898 F.2d 1011 (5th Cir. 1990); and the use of punishment or other coercive police behavior (U. S. v. Edmondson, 791 F.2d 1512 [11th Cir. 1986]). Although each af these factors is relevant to the issue of voluntariness, na single factor is dispositive. U. S. v. Castillo, 866 F.2d 1071 (9th Cir. 1988) (en banc). Consent can also be implied by the person's failure to object to the search. Johnson v. Smith County, 843 F.2d 479 (5th Cir. 1987) (valid implied consent when police knacked on plaintiff's door, asked if anyone minded if they searched house for suspected felon, either plaintiff or friend said "no" and neither plaintiff nor friend objected when police entered house with guns drawn).

Anyone who has a reasonable expectation of privacy in the place being searched can consent to a warrantless search. Any person with common authority over, or other sufficient relationship to, the place being searched can give valid consent. U. S. v. Matlock, 415 US 164 (1974). Courts extend authority to consent to each person who has such mutual use of and access to the property that it is reasonable to infer that the person has the right to permit inspection and that the other users have assumed the risk that areas under common control may be searched.

Matlock, supra. There is no fourth amendment violation if the police reasonably believe at the time of their entry that the person possesses the authority to consent. Illinois v. Rodriquez, **497** US ___, **111** L.Ed.2d **148** (1990).

In the instant case, officer Benfield knocked on the door and Petitioner's **15** year old son answered. The officer asked him if there were any adults in the house, and Petitioner's son said there **were.** The officer asked to speak to one and Petitioner's son told the officer to come in (T 750). The record reveals that no threats or force were used. Qfficer Pease testified that he arrived at the door after Benfield and spoke to Petitioner's son. Officer Pease testified:

> I spoke to him briefly, asked him if I could come in and I think I said good morning, how are you doing. He said fine. I said do your mind if I come in. He said sure, come on in. At that point he and I walked into the house where Officer McLean and Benfield were.

(T 91).

The record thus supports the finding that Petitioner's son consented to the entry by inviting the officers in. The consent was voluntary and freely given.

The court below stated:

> Appellant argues that his son "did not possess the level of maturity, experience, or independent will to exercise the judgment required to refuse the "aura of officialdom' surrounding the officers." Therefore, the entry and arrest were illegal under Payton v.

> New York.[2] However, the record before us indicates that the son was 15 years old, five feet tall, weighed 108 pounds and was in the tenth grade. He and his father had lived at the house for the past one and a half years. He testified that, although he was tired and scared, he knew what was going on when he opened the door for the police. Officer Benfield testified that he identified himself to the boy and asked permission to enter, which was granted. There is evidence in the record that Tommy Saavedra, Jr. was aware of his right to refuse entry. In fact, he testified that he knew Officer Benfield had no right to enter the house without a warrant. Under the totality of the circumstances test, we conclude that the trial court did not abuse its discretion in finding valid consent in denying appellant's motion to suppress.

576 So.2d at 959.

Given Petitioner's son's age and maturity, it was reasonable for the police to believe at the time of the entry that the son possessed the authority to consent, even if he did not possess the authority, which he in fact did as a mutual user of the property. Illinois v. Rodriquez; Matlock, supra.

Petitioner relies on Payton v. New York, supra, but Payton and the campanion case of Riddick v. New York (sub nom Payton v. New York) are factually distinguishable from the instant case. In Payton, the Court stated

> ...in bath cases we are dealing with entries into homes made without the consent of any occupant. In Payton, the police used crowbars to break down the door and in Riddick, although his 3-year-ald son answered the door, the police entered before Riddick

[2] Payton v. New York, 445 US 573 (1980).

had an opportunity either to object or to consent.

Id. at 649.

First, Payton and **Riddick** are cases involving routine arrests in which there was ample time to obtain a warrant. Id. at 648. Days (Payton) and years, (Riddick) separated the arrest from the offense. Here, the entry to arrest was motivated by exigent circumstances to prevent the destruction of evidence of the offenses which occurred only shortly before.

Second, neither Payton nor Riddick involved consent. Payton was not even home when the police broke down his door and entered. Riddick was arrested when his 3 year old son opened the door and the police **saw** him. This is a far cry from asking a mature 15 year old for permission to enter and then being invited in.

Petitioner also relies on **Padron** v. State, 328 So.2d 216 (Fla. 4th DCA 1976), which stands for the proposition that police coercion cannot convert nonconsent into consent.

In Padron, the Fourth District Court of Appeal recagnized that the determination of voluntariness of a consent to search is to be made from the totality of the circumstances. The defendant in Padron denied consent to the police to search his home. His sixteen **year** old son similarly denied consent. After being forced out of the house to "protect evidence," late at night with extremely cold temperatures, and with a sick younger brother, the sixteen year old finally consented to the search.

The court held that:

> In the instant case, under the totality of the circumstances mentioned above, we most respectfully disagree with the trial court's conclusion that the consent did "not constitute a yielding to the majesty of the law by the defendant's son, but rather a yielding by the officer to the desires of the defendant's son not to leave the premises." If the deputy's true motive was the protection of the evidence, there were available to him alternatives other than ordering all of the occupants out of the house on an extremely cold night. Requiring the son to make a choice between permitting the search or the unreasonable alternative (under these circumstances) of evacuating the house effectively stripped his "consent" of any voluntary character.

Padron, supra at 218.

It is important to note that, contrary to Petitioner's assertion, the police only entered Petitioner's home to arrest him and his co-defendant, not to seasch the premises. A written consent to search the premises was obtained from Petitioner after he was placed in custody and a search was conducted thereafter (T **796-797).**

It is clear that the police could have secured the house and eventually obtained arrest and search warrants, but it was imperative to remove the suspects from the residence to preserve evidence, as argued below. The police arrived at the victim's house approximately five minutes after they were called and psoceeded immediately next door when the victim identified the neighbors as the rapists. Officer Benfield testified as to the difficulty in speedily obtaining a warrant at 3:00 a.m. **(T 41).**

Exigent circumstances exist when there is probable cause for the search or seizure and evidence is in imminent danger of destruction. cupp v. Murphy, 412 US 291 (1973) (evanescent evidence under fingernails); Schmerber v. California, 384 US 757 (1966) (blood sample for alcohol level); Ker v. California, 374 US 23 (1963); Warden v. Hayden, 387 US 294 (1967). Here, unfortunately, Petitioner's co-defendant had already washed off evidence in the shower immediately prior to the police arriving (T 1096), which serves to highlight the need for speedy apprehension.

Petitioner's argument that the "knock and announce" statute, §901.19(1), Florida Statutes, was violated in this case is without merit. See Byrd v. State, 481 So.2d 468 (Fla. 1985); Sloan v. State, 429 So.2d 354 (Fla. 1st DCA), review den., 438 So.2d 834 (Fla. 1983); Lewis v. State, 320 So.2d 435 (Fla. 3d DCA 1975).

Even though the police entry into Petitioner's home to arrest him was proper for the aforementioned reasons, the application of a "harmless error" analysis further demonstrates that reversal af the district court's opinion is unwarranted. Petitioner sought to suppress the victim's identification of him at the "show up" after his arrest (R 27), and the physical evidence found in the house (R 25).

First, no harm resulted from the ''showup" identification procedure because the victim had already identified her neighbors as the rapists. She had seen them clearly earlier in the evening

and during the attack. Second, the physical evidence collected from the house was collected pursuant to Petitioner's valídly executed written consent to search given after his arrest. Again, the police entered for the sole purpose of arresting the suspects based on probable cause, and not to conduct a wholesale search of the premises.

In sum, under the totality of circumstances, the trial court properly denied Petitioner's motion to suppress evidence where valid consent to enter was given by Petitioner's teenage son, who was an occupant on the premises and who was aware of his right to refuse entry. The son's action of inviting the police officer inside after he knocked and announced himself and his purpose supports the finding that consent was given freely and voluntarily. Even so, the need to enter and arrest the suspects was motivated by exigent circumstances: to prevent the destruction of evidence.

Petitioner's conviction must consequently be affirmed.

ISSUE II

WHETHER THE DISTRICT COURT'S HOLDING THAT THE PETITIONER WAS CORRECTLP CONVICTED AND SENTENCED FOR THREE COUNTS OF SEXUAL BATTERY WAS ERROR. (Restated)

Petitioner contends that he was erroneously convicted of three counts of sexual battery for separate acts of sexual intercourse which occurred during one criminal episode. He argues that this violates double jeopardy, relying on Carawan v. State, 515 So.2d 161 (Fla. 1987). Respondent disagrees.

In Carawan, this Court addressed the issue of whether a defendant may be convicted of multiple criminal offenses based on **a single act. Id. at 162.** Carawan was convicted of three criminal offenses based on one shooting. The victim **was** struck by either one shotgun blast or two shotgun blasts "fired in such a rapid succession that the two shots were indistinguishable, occurring in the same temporal and spatial relationship with each other." **Id** at **163.** This Court held that multiple punishments for a single act violates double jeopardy. This Court **also** noted, however, that

> **We** emphasize that our holding applies only to separate punishments arising from one act, not one transaction. An act is a discrete event arising from a single criminal intent, whereas **a** transaction is a related series of acts.

Id at 170, n.8.

Soon after this Court issued its opinion in Carawan, the **Florida** Legislature amended §775.021, Florida Statutes, in

response thereto to reiterate what its intent has been. §775.021 4)(b), Florida Statutes states that

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.

Multiple punishments in the instant case are thus authorized both under §775.021, Florida Statutes, and under Carawan, as Petitioner's three acts af rape were separate acts occurring during one transaction. The rape victim testified that Petitioner committed three separate acts of nonconsensual vaginal intercourse upon her.

The first occurred in a field behind the victim's house beside a park (T 418). Petitioner and his codefendant tore off the victim's underwear and, while the codefendant held her arms, Petitioner raped her on the ground (T 420-423). Then the codefendant raped her (T 423).

The two men then took the victim to the park. On top of a playground slide Petitioner raped her again (T 425-427). Thereafter she was made to slide down the slide and the codefendant raped her at the bottom (T 428-429).

Petitioner then pulled the victim by her hair to a concrete circle in the park where a water fountain used to be and raped her again (T 430-431). The rapes thus occurred at different times and places and were separated by the codefendant's intervening acts.

The district court below stated:

> While finding no Florida case directly on point, the state nonetheless asserts that each assault occurred at a different time and location and that in between each, Saavedra had time to pause and reflect before again penetrating the victim. Thus, the state concludes, three separate offenses occurred and double jeopardy principles are not implicated. We agree with the state and hold that the crimina1 acts complained of in this case, although of the same type and character, are sufficiently separated by time and location so that double jeopardy is not involved.

576 So.2d at 956.

Petitioner's reliance on State v. Smith, 547 So.2d 613 (Fla. 1989), is misplaced, as Smith expressly dealt with the issue of whether one act could be punished under two separate statutes.

In Bass v. State, 380 So.2d 1181 (Fla. 5th DCA 1980), the defendant forced the victim into his car, drove to an isolated spot, and forced to her to perform oral sex. After reaching his destination, he then raped her. The court stated:

> In the Williams and Orange cases, supra, the acts were committed together, there was na separation in time. Each crime was part and parcel of the other. In the case before this court, defendant forced the victim to commit one act upon him while driving his car. He then forced her to commit another act after reaching his destination which, while sexual battery and falling within the same statute, was of a separate character and type. Had defendant released his victim after commission of the first episode there is no doubt that he could be charged and convicted of sexual battery. The same result would be obtained as to the second episode had it occurred on the follawing day. In the case before us, the time interval between one

> act and the other was minimal, but nevertheless was sufficient to separate one episode or criminal transaction from the other.

Id. at 1183. See also Duke v. State, 444 So.2d 492 (Fla. 2d DCA 1984) (attempted anal and vaginal penetration: notwithstanding short interval of time between acts, each act is a separate criminal offense); Grunzel v. State, **484** So.2d 97 (Fla. 1st **DCA 1986).**

In further support of the multiple convictions in this case, the district court below stated:

> A case which to us seems more on point with the facts of the instant case is Lillard v. State, 528 S.W.2d 207 (Tenn.Ct.App. 1975), where the defendant forcibly abducted two women, drove them to a rural spot and forced one af the women to have sexual intercourse. He then drove to another location and had sexual intercourse with the other woman. Leaving the first woman in the road, he then drove to yet another **place** with the second woman and again had aexual intercourse with her. He was subsequently convicted of two separate rapes of the second woman and given consecutive 20 year sentences. On appeal, he argued that he should have been sentenced concurrently for the two rapes because they constituted one crime. The Tennessee Court of Appeals upheld the cansecutive sentences, finding that the acts of rape were separate in that the defendant formed a new intent to rape the woman at a different place in time. Similarly, here it can be found that Saavedra had time to pause and reflect and form a new criminal intent between acts of penetration. We so find and, therefore, hold that the acts for which appellant was convicted and sentenced constituted separate offenses. We find further that Carawan, supra, does not apply because its holding is limited to "separate punishments arising from one act, not one transaction." 515 So.2d at 170. See Slaughter v. State, 538 So.2d *509,* **14 F.L.W.** 311 (Fla. 1st DCA 1989). Since Saavedra

committed three separate and distinct acts, multiple punishments were proper.

576 So.2d at 958. See also State v. Garcia, 288 Or. 413, 605 P.2d 671 (1980) (separate convictions and sentences for more than one count of the same act asising in the same transaction is proper if the defendant, after one act, starts anew after a time for reflection).

Petitioner relies on Wade v. State, 368 So.2d 76 (Fla. 4th DCA 1979), and Roberson v. State, 517 So.2d 99 (Fla. 1st DCA 1987), both of which are one paragraph opinions which state, without more, that the defendants' conduct constituted a single violation af the sexual battery statute. As recognized by the district court below, neither opinion sets forth the factual basis and therefare Wade and Roberson offer no guidance vis a vis the instant case, where the sexual batteries occurred at different times and places and were separated by the codefendant's intervening acts.

In sum, Petitioner's three convictions for sexual battery stemming from one ongoing criminal transaction are proper where the sexual batteries occurred at different times and locations and were further separated by the codefendants's intervening acts of sexual battery. Such a result is mandated by §775.021(4)(b), Florida Statutes.

CONCLUSION

Based on the above arguments and citations of legal authority, Respondent urges this Honorable Court to affirm the judgment rendered in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to William J. Sheppard, Elizabeth L. White, and Michael R. Yokan, SHEPPARD AND WHITE, P.A., 215 Washington Street, Jacksonville, Florida 32202, this 5th **day** of November, 1991.

BRADLEY R. BISCHOFF
Assistant Attorney General

Tommy SAAVEDRA, Appellant,

v.

STATE of Florfda, Appellee.

No. 88–561.

District Court of Appeal of Florida, First District.

April 4, 1991.

Defendant was convicted of burglary, armed kidnapping, and three counts of sexual battery following trial in Duval County Circuit Court, R. Hudson Olliff, J., and he appealed. The District Court of Appeal, Miner, J., held that: (1)double jeopardy did not preclude convictions and sentences for multiple acts of sexual battery of the same type and character cornmitted against the same victim; (2) defendant's son validly consented to entry of hia father's residence by the police for purposes of arresting defendant; (3) there was no abuee of discretion in denying severance of defendants despite antagoniatic defenses; (4) there was no error in excluding testimony of defendant's sister relating to alleged involvement of third person; and (5) trial court properly applied sentencing guidelines rule in effect at the time of the offenses.

Affirmed.

Barfield, J., filed a dissenting opinion,

1. Double Jeopardy ⇐148

Double jeopardy principles did not preclude convictions and sentences for multiple acta of sexual battery of the same type and chsracter committed against the same victim, where victim was moved to different locations and defendant had time to pause and reflect and form a new crimina1 intent between acts of penetration. **U.S.C.A.** Const.Amend. 5; West's F.S.A. § 794.011(1)(g), (4)(a).

2. Criminal Law ⇐984(2, 3)

Sexual batteries of a separate character and type requiring different elements of proof warrant multiple punishments, but fact that same victim is sexually battered in the same manner more than once in a criminal episode by the same defendant does not conclusively prohibit multiple punishments; spatial and tempora1 aspects are equally as important as distinctions in character and type in determining whether multiple punishments are appropriate. **U.S.C.A.** Const.Amend. 5; West's F.S.A. § 794.011(1)(g), (4)(a).

3. Arrest ⇐68.5(7)

Minor, who was 16 years old and had lived in house with father for one **and** one-half years, could consent to entry of his father's residence by police for purposes of arresting the father. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐68.5(7)

Record supported finding that consent to entry of residence for purposes of arresting defendant, given by defendant's 15-year-old aon, was given freely and voluntarily, in light of son's testimony that, although he was tired and scared, he knew what was going on, evidence that he was aware of his right to refuse entry, and testimony of officer that he identified himself to the boy and asked permission to enter, which was granted.

5. Searches and Seizures ⇐173, 177

In general, the test for determining third-party coneent to search is whether that person possesses common authority over the area to be searched, but joint dominion or control provides valid consent only when the other person is absent. **U.S.C.A.** Const.Amend. 4.

6. Arrest ⇐68.5(5, 7)

"Knock and announce" statute was not activated in connection with entry into house to arrest defendant, where officers were voluntarily admitted. West's **F.S.A.** § 901.19(1).

7. Criminal Law ⇐622.2(6)

There was no abuse of discretion in **denying** motion for severance of defendants even though defenses of defendant and codefendant were antagonistic in that codefendant's theory of defense **was** that sexual battery and related offenses did not

Digest

occur, while defendant's defense was that the rapes were committed by codefendant and a third person, especially where defendant was given full opportunity to confront nnd cross-examine *the* witnesses, competent substantial evidence implicated defendant, codefendant did not make any accusations implicating defendant, and evidence **was** not particularly complexed. West's F.S.A. RCrP Rule 3.152(b)(1).

8. **Criminal Law** ⇐622.2(6, 7)

Strategic advantage, hostility among defendants, or attempts to escape punishment by throwing blame on other defendants are insufficient reasons, standing alone, to justify **a** severance of defendants. West's F.S.A. RCrP Rule 3.152(b)(1).

9. **Criminal Law** ⇐419(4)

In prosecution for sexual battery and related offenses, there was no error in excluding hearsay, curnulative testimony of defendant's sister concerning statements of third person allegedly indicating that he, rather than defendant, committed offenses, despite contention that statements were statements against interest, where the third person **was** available for trial and did in fact testify. West's F.S.A. § 90.804(2)(c).

10. **Criminal Law** ⇐422(1)

Where codefendant denied making statements to police when he was arrested, there was no abuse of discretion in stopping defendant's attorney from further inquiry into codefendant's silence.

11. **Criminal Law** ⇐1233

Sentencing guidelines rule in effect at time of offenses was properly applied even though subcequent amendment to guidelines would have reduced scoresheet total. West's F.S.A. RCrP Rule 3.701, subd. d, par. 7.

12. **Criminal Law** ⇐1246

Under amended sentencing guidelines rule, injury to the same victim is not to be scored more than once for a single criminal episode. West's **F.S.A. RCrP** Rule 3.701, subd. d, par. **7.**

13. **Criminal Law** ⇐14

It is impermissible to apply amendment of a criminal statute to offenses committed prior to the effective date of the amendrnent. West's F.S.A. Const. **Art.** 10, § 9.

Elizabeth L. White and William J. Sheppard of Sheppard and White, **P.A.,** Jacksonville, for appellant.

Robert **A.** Butterworth, Atty. Gen. and Bradley R. Bischoff, Asst. Atty. Gen., Tallahassee, for appellee.

ON MOTION FOR **REHEARING AND** MOTION FOR **REHEARING** EN BANC

[Original opinion at 15 F.L.W. D2732]

The motions are denied except that the original opinion dated November 8, 1990 is withdrawn and the following opinion is substituted therefor:

MXNER, Judge.

In this appeal, Tommy Saavedra challenges his convictions and sentences for burglary, armed kidnapping and three counts of sexual battery. With respect to the sexual battery convictions and sentences, he urges that his multiple punishments for offenses of the same character and type committed against the same per. son violated double jeopardy principles. Be also argues that the trial court erred in denying his motions to suppress and **for** severance of defendants, in impermissibly restricting his ability to defend against the crimes charged and in applying sentencing guidelines in effect at the time the offenses were committed. Finding no merit in any of appellant's arguments, we affirm the convictions and sentences appealed from.

By amended information, Saavedra and a co-defendant, Donald Teater,[1] were charged with burglary, armed kidnapping and three counts of

1. Like appellant, *Teater* was convicted as charged. On appeal to this court he advanced many of the same arguments for reversal as does appellant. *His* convictions and sentences wcrc affirmed without comment.

and three counts of sexual battery which offenses occurred when they broke into their next door neighbor's home, forcibly removed a 12 year old girl from the home and repeatedly assaulted her in a nearby park. Prior to trial, appellant filed a motion to sever defendants and a motion to suppress physical evidence, certain statements made by him at the time of his arrest and the pre-trial and any in-court identification of him by the prosecuting witness. These motions were denied without elaboration.

At the suppression hearing, the following facts were established.

During the early morning hours of June 25, 1987, Jacksonville police officer Robert Benfield received a report that a sexual battery had occurred at 366 Tallulah Avenue. When he arrived at the scene, the victim, K.A., informed him that her assailants lived next door at 360 Tallulah Avenue. Benfield went to the home described and knocked on the door, but no one answered. The lights were out and the house was dark. Officers McLean and Pease arrived and, upon looking in the windows of the house with a flashlight, saw two persons lying on a bed. The officers then began to knock on the side of the house to arouse the occupants.

Officer Benfield went to the rear of the house and knocked on the back door. A boy (later identified as appellant's son, Tommy Saavedra, Jr.) appeared at the door. Officer Benfield testified that he identified himself and told the boy that he needed to speak to an adult; that he asked permission to enter; and, that the boy responded "yes" and opened the door. Officer Benfield entered the house and walked into a nearby bedroom, where he found an adult male (later identified as the co-defendant Teater) and a small boy (later identified as Robbie Methvin) in bed. Officer Benfield asked Teater to get out of the bed and arrested him. Officer Benfield testified that he did not hurry into the house, and did not feel that his life was threatened when he was outside the house. By the time Officer Benfield had arrested Teater, Officers Pease and McLean had entered the house and had arrested appellant whom they found in an adjacent bedroom. Officer McLean also testified that he did not feel that his life was in danger when he secured the outside of the house. Officer Pease testified that when he entered the home after Officer Benfield, the boy at the back door told him he could enter.

Tommy Saavedra, Jr. testified that he was 15 years old and had lived with his father for the past year and a half. On the night in question, he was awakened by the officer's knocking on the side of the house. He woke his cousin, Methvin, and together they ran into the living room and looked out the window and saw the police cars. They then ran into the bedroom and jumped into the bed with Teater who told them to lay down on both sides af him. When the police began shining their flashlight in the bedroom, Tommy Saavedra, Jr. and his cousin went to the backdoor and opened it half-way. The police immediately pushed past them without getting consent to enter. Prior to answering the door, young Saavedra did not see or have any conversation with his father. Methvin testified that he was standing behind Tommy, Jr. when he opened the back door. The police did not say anything to either of them and just pushed thern aside when they entered. He knew that the police needed a warrant to enter but he was too scared to stop them.

Appellant testified that he had rented the premises at 360 Tallulah Avenue for the past year and a half; that Teater had been temporarily staying with him for the past two and a half weeks because he had no other place to live; and, that Teater never paid Saavedra any rent.

The prosecuting witness testified that at approximately 10:30 p.m., there was a power failure in the neighborhood and that she sat on her front porch with her sister. Next door she saw appellant and Teater talking to her brother, her cousin, Tommy Saavedra, Jr., and Robbie Methvin. When the power failure ended, she went next door, got her brother and her cousin, returned home and thereafter went to bed. At 2:00 a.m., she was awakened by appel-

lant who was kneeling beside her on her bed and shoving something sharp in her side. Appellant and Teater led her from her home to a nearby park. She recognized both defendants throughout the attack which took approximately one hour and 15 minutes. After the attack, she saw the defendants again in the backseat of the police car; the car light was lit, she was on her front porch, and got a clear look at their faces and identified them as her attackers.

On cross-examination, K.A. testified that she had never seen either defendant prior to that night, nor did she know their names (she had moved inta her home one month earlier). She first saw them during the power failure when she was sitting inside her screened porch. When the lights went back on, she walked over to their house to get her brother and saw the defendants again for about 30 seconds. On redirect examination, she stated that during the blackout, Saavedra was shining a flashlight on the side of her house and leaning against a parked car between the houses, which are approximately 15–20 feet apart.

In support of his motion to suppress and on appeal, Saavedra argues that his arrest was illegal in that the police entered the house without a warrant, consent or exigent circumstances. Therefore, the subsequent search and seizure were unlawful. The trial court, apparently accepting the state's argument that the entry was consensual, denied the motion. The court also denied the motion to suppress the identifications, finding that the victim had seen the defendants earlier in the evening, in the light and could identify them then; that she had seen them again when she was abducted and attacked; and, that she had positively identified them in the police car. The court concluded that the identifications were not impermissibly suggestive.

The state filed a motion *in limine* to prohibit testimony regarding an alleged confession made by one John Baldwin (who was not charged with any crimes) to appellant's sister, Vickie Saavedra, that Baldwin, not appellant, committed the crimes. Prior to trial, the trial court granted the motion, admonishing the attorneys not to make any reference to Baldwin's statements in their opening statements.

At trial, K.A. testified that her attackers were dressed in black karate suits. They took her to some bushes in the rear of her house, tore off her clothes, pushed her to the ground and performed vaginal intercourse with her. They then took her to a slide in a park located behind her home and again performed vaginal intercourse. Teater then unsuccessfully atternpted anal intercourse. The men led her to a concrete circle in the middle of the park and again performed vaginal intercourse. They told her to remain on the ground for ten minutes while they escaped. She waited three or four minutes and then ran home.

Appellant was convicted as charged and upon denial of his amended motion for a new trial, he took this appeal. In disposing of the issues raised, we shall address the substance of each.

[1] Saavedra first argues that double jeopardy principles preclude convictions and sentences for multiple acts of sexual battery of the same type and character committed against the same victim. Otherwise stated, relying primarily on such cases as *Carawan u. State*, 515 So.2d 161 (Fla. 1987), *Wade v. State*, *368* So.2d 76 (Fla. 4th DCA 1979) and *Roberson v. State*, 517 So.2d 99 (Fla. 1st DCA 1987), he contends that he was convicted three times for one continuous act.

While finding no Florida case directly on point, the state nonetheless asserts that each assault occurred at a different time and location and that in between each, Saavedra had time to pause and reflect before again penetrating the victim. Thus, the state concludes, three separate offenses occurred and double jeopardy principles are not implicated. We agree with the state and hold that the criminal acts complained of in this case, although of the same type and character, are sufficiently separated by time and location so that double jeopardy is not involved.

[2] The sexual battery statute may be violated in multiple, alternative ways, i.e., "oral, anal, or vagin[a] union with, the sexu[al] the anal or vaginal [p] by any other object." Stat. (1987).[2] Sexual character and type [re] ments of proof warr ments. *See Duke* v. (Fla. 2nd DCA) (v[ag] lowed a moment late[r] *aff'd*, 456 So.2d 893 (*State*, 484 So.2d 97 (cunnilingus followed by vaginal intercours 483 So.2d 70 (Fla. 4th ed vaginal intercours gus, fellatio, commit[t] riod); *Bass v. State*, 5th DCA 1980) (oral However, the fact th sexually battered in t than once in a crimina defendant does not multiple punishments ral aspects are equ distinctions in chara mining whether mul appropriate. *See B* So.2d 890 (Fla. 5th

In *Bartee*, the F "whether multiple fa repeated blows or k tute separate offens in the aggregate, m they are different in ciently separated by different factual ev rate and distinct of So.2d at 892, fn. 4. stated that "the tim act, and the other w theless sufficient to or crirninal transac 380 So.2d at 1183. the Second District's court stated that, short interval of tim the acts involved he is a separate crimina at 494.

2. Appellant was con ual battery on a per without consent, whe

"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." § 794.011(1)(g) Fla. Stat. (1987).[2] Sexual battery of a separate character and type requiring different elements of proof warrant multiple punishments. *See Duke v. State*, 444 So.2d 492 (Fla. 2nd DCA) (vaginal penetration followed a moment later by anal penetration), *affd*, 456 So.2d 893 (Fla.1984); *Grunzel v. State*, 484 So.2d 97 (Fla. 1st DCA 1986), (cunnilingus followed a few seconds later by vaginal intercourse); *Begley v. State*, 483 So.2d 70 (Fla. 4th DCA 1986) (attempted vaginal intercourse, atternpted cunnilingus, fellatio, committed over two week period); *Bass v. State*, 380 So.2d 1181 (Fla. 5th DCA 1980) (oral sex followed by rape). However, the fact that the same victim is sexually battered in the same manner more than once in a criminal episode by the same defendant does not conclusively prohibit multiple punishments. Spatial and temporal aspects are equally as important as distinctions in character and type in determining whether multiple punishments are appropriate. *See Bartee v. State*, 401 So.2d 890 (Fla. 5th DCA 1981).

In ***Bartee,*** the Fifth DCA noted that "whether multiple factual events, such as repeated blows or knife stabbings, constitute separate offenses or but **one** offense in the aggregate, may depend on whether they are different in quality or are sufficiently separated by time or place to be different factual events and therefore separate and distinct offenses in fact." 401 So.2d at 892, fn. 4. In *Bass*, the court stated that "the time interval between one act, and the other was minimal, but nevertheless sufficient to separate one episode or criminal transaction from the other." 380 So.2d at 1183. In *Grunzel*, relying on the Second District's decision in *Duke*, this court stated that, "notwithstanding the short interval of time that evolved between the acts involved here, we believe each act is a separate criminal offense." 444 So.2d at 494.

Appellant's reliance on *Wade u. State, supra,* appears to us misplaced. In that case, the defendant was convicted of two separate violations of the sexual battery statute for a single attack on the victim. The Fourth DCA held that the attack constituted only a single violation of the statute, and vacated both convictions and remanded with instructions for the trial court to re-sentence for only one violation. However, the *Wade* court did not articulate the underlying facts which it relied upon in making its determination that the attack constituted only a single sexual battery. Therefore, we do not find *Wade* particularly helpful in analyzing the facts at hand.

Appellant's further reliance on ***Roberson u. State, supra,*** is likewise of little assistance in resolving the issue. There, this court held that it was improper to convict and sentence Roberson for sexual battery. The *Roberson* court distinguished *Grunzel* on the basis that that case involved two separate acts that violated the sexual battery statute. Since the *Roberson* opinion does not relate the undcrlying facts, we are unable to say that *Roberson* contains facts similar to the case under consideration.

Appellant also cites *James u. Cupp*, 65 Or.App. 377, 671 P.2d 750 (1983), in support of his contention in this regard. There, the defendant was convicted of two counts of rape, two counts of sodomy and one count of sexual abuse, all arising in the same transaction against the same victirn. The Oregon Appeals Court reversed one rape and one sodomy conviction, stating that Oregan law precluded separate convictions and sentences for more than one count of the same act arising in the same transaction unless "the defendant, after one act, starts anew after a time for reflection," citing *State v. Garcia,* 288 Or. 413, 605 P.2d 671 (1980). 671 P.2d at 751. The record in *James* did not support a finding that the defendant paused for reflection between acts.

2. Appellant was convicted for committing a sexual battery on a person 12 years of age or older, without consent, when the victim was physically helpless to resist, in violation of section 794.011(4)(a), Florida Statutes (1987).

A case which to us seems more on point with the facts of the instant case is *Lillard v. State*, 528 S.W.2d **207** (Tenn.Ct.App. 1975), where the defendant forcibly abducted two women, drove them to a rural spot and forced one of the women to have sexual intercourse. He then drove to another location and had sexual intercourse with the other woman. Leaving the first woman in the road, he then drove to yet another place with the second woman and again had sexual intercourse with her. He was subsequently convicted of two separate rapes of the second woman and given consecutive 20 year sentences. On appeal, he argued that he should have been sentenced concurrently for the two rapes because they constituted one crime. The Tennessee Court of Appeals upheld the consecutive sentences, finding that the acts of rape were separate in that the defendant formed a new intent to rape the woman at a different place in time. Similarly, here it can be found that Saavedra had time to pause and reflect and form a new crimina1 intent between acts of penetration. We so find and, therefore, hold that the acts for which appellant was convicted and sentenced constituted separate offenses. We find further that *Carawan*, ***supra***, does not apply because its holding is limited to "separate punishments arising from one act, not one transaction." 515 So.2d at **170.** *See Slaughter v. State*, *538* So.2d **509, 14** FLW 311 (Fla. 1st DCA 1989).[3] Since Saavedra committed three separate and distinct acts, multiple punishments were proper.

Appellant next complains that the warrantless entry into his home, absent exigent circumstances or consent, violated his fourth amendment rights. *Payton v.* ***New*** *York*, **445** U.S. **573, 100** S.Ct. 1371, **63** L.Ed.2d **639** (1980). He maintains that the state failed to carry its burden of showing that his son possessed the ability to consent to the entry of the officers into his home. He claims that his son merely acquiesced to the physical presence of official authority and that his subsequent illegal arrest tainted the fruits of his illegal detention. Therefore, he argues, the "tainted" evidence seized at his home and the victims "show-up" identification of him immediately after his arrest should have been suppressed since they were the product of the officers illegal entry and arrest. For its part, the state argues that under the "totality of the circumstances," the trial court properly denied appellant's motion to suppress the evidence. The state reminds us that the consentor's age is merely one of the circumstances to be examined. It argues that the officers did not take any coercive action against appellant's son when asking for permission to enter and that the 15 year old boy responded in an appropriate fashion and **did** not appear threatened in any way. The state finds no evidence of acquiescense to authority but rather maintains there was evidence of knowing consent to enter the dwelling. Moreover, the state asserts that the officers were motivated by the necessity to speedily apprehend thc suspects and prevent destruction of evidence.

[3–5] At the outset, we find that a preponderance of the evidence supports a finding that appellant's son voluntarily allowed the police to enter the premises. The narrow issue is whether a minor may consent to the entry of his father's residence by police for purposes of arresting the father and, if **so,** whether the consent was given freely and voluntarily. In general, the test for determining third party consent is whether that person possesses common authority over the area to be searched. *United States v. Matlock,* **415 U.S. 164, 94** S.Ct. **988,** 39 L.Ed.2nd 242 (1974); *Preston v. State*, 444 So.2d 939 (Fla.1984); *Silva v. State*, 344 So.2d 559 **(Fla.1977);** *Pinyan v. State*, **523** So.2d 718 (Fla. 1st DCA 1988). Joint dominion or control provides valid consent only when the other person is absent. *Pinyan*, 523 So.2d at 721. "Unless consent is given by the owner or rightful possessor of the property, a warrant must be obtained. The only exception to this consent is where consent by a joint owner has been obtained in
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search." *Silva*, **344**

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3. Initially. the supreme court accepted review in Slaughter based on apparent conflict with Carawan. Later. however, the court determined that jurisdiction was granted improvidently, and dismissed the case. *Slaughter v. State,* **557 So.2d 34 (Fla.1990).**

has been obtained in the absence of the person whose property is the object of the search." *Silva*, 344 So.2d at 563.

In *Padron v. State*, **328** So.2d 216 (Fla. 4th **DCA**), *cert. denied*, 339 **So.2d 1172** (Fla.1976), the defendant denied the police permission to search his home for a murder weapon after being arrested at his home, handcuffed and placed in the back seat of a patrol car. An officer then asked defendant's 16 year old son for permission, but the boy also denied entry. When the officer ordered all persons removed from the premises, including defendant's nine year old son who was ill, the 16 year old boy acquiesced and allowed the police to enter and conduct the search. The Fourth **DCA** held that the 16 year old child did not share common authority with his father over their dwelling place. The court premised its holding on the notion that the parent's interest in the premises is superior to that of the child, therefore, it cannot be said that a child has authority equal to his parent to permit a search **by** a police of the premises. 328 So.2d at 218, fn. 1. The court additionally held that even if the son could give valid consent in his father's absence, "where the father was present and asserted his rights, the son had no authority to override that assertion." *Id.* at 218. The court also found that under the circumstances of that case the son's consent was not freely given.

Other jurisdictions have rejected a *per se* rule as set forth in *Padron*, and held that a consentor's age is only one factor to consider in determining the validity of this consent. *See Atkins v. State*, **254** Ga. 641,331 S.E.2nd 597 (1985); *State v. Scott*, **82** Or. App. **645, 729** P.2d 585 (1986) (expressly declining to follow *Padron*); ***Doyle*** *v. State*, **633** P.2d 306 (Alaska App.1981). In his work, *Search and Seizure: **A** Treatise On The Fourth Amendment*, § 8.4(c) (1987), Professor LaFave states that two important factors to consider in determining valid consent by a child are the age of the child and the scope of the consent given. Consent must be given freely and voluntarily in order to be valid; such a determination is a question of fact to be gleaned from the totality **of** the circumstances. *Schneckloth v. Bustamonte*, **412 U.S.**218, **93** S.Ct. 2041, **36** L.Ed.2d 854 (1973); ***Preston v. State, supra*** at 943. Youth, lack of education and low intelligence are factors to consider in determining whether a persen's will was overborn by police officers in a consent situation. *Mack v. State*, 298 So.2d 509 (Fla. **2d** DCA 1974).

Appellant argues that his son "did not possess the level of maturity, experience, **OP** independent will to exercise the judgment required to refuse the 'aura of officialdom' surrounding the officers." Therefore, the entry and arrest were illegal under *Payton v. New York*. However, the record before us indicates that the son was 15 years old, five feet tall, weighed 108 pounds and was in the tenth grade. He and his father had lived at the house for the past one and a half years. **He** testified that, although he was tired and scared, he knew what was going on when he opened the door for the police. Officer Benfield testified that he identified himself to the boy and asked permission to enter, which was granted. There is evidence in the record that Tommy Saavedra, Jr. was aware of his right to refuse entry. In fact, **he** testified that he knew Officer Benfield had no right to enter the house without a warrant. Under the totality of the circumstances test, we conclude that the trial court did not abuse its discretion in finding valid consent in denying appellant's motion to suppress.

[6] In the third issue raised, appellant maintains that the trial court erred in admitting evidence obtained after the police failed to knock and announce before entering his home, pursuant to section 901.19(1), Florida Statutes, 1987. He argues that the failure of Officer Benfield to announce the purpose of his entry makes his arrest illegal and the subsequent search conducted of the premises invalid under section 901.19(1). *Urquhart v. State*, 211 So.2d 79 (Fla. 2nd **DCA** 1968). We find this argument unavailing.

Under section 901.19(1), police may break into a residence to make a valid warrantless felony arrest only when they have

been denied access after announcing their authority and purpose. Failure to "knock and announce" will vitiate the lawfulness of the arrest, unless exigent circumstances are present. *Benefield u. State, 160* So.2d **706** (Fla.1964); *Urquhart v. State, **supra.*** However, section 901.19(1) is not violated when officers are voluntarily admitted. *See Byrd v. State,* 481 So.2d 468 (Fla.1985); *Sloan v. State,* 429 So.2d **354** (Fla. 1st **DCA),** *review **denied,*** **438** So.2d **834** (Fla. 1983). In the instant case, the officers had lawfully entered the premises through consent of appellant's son. Therefore, the "knock and announce" statute was not activated.

[7] Appellant next contends that the trial court abused its discretion in denying his motion for severance of defendants, pursuant to Rule 3.152(b), Florida Rules of Criminal Procedure. The defenses of appellant and his co-defendant were clearly and completely antagonistic in that the co-defendant's theory of defense was that the offenses did not occur, and appellant's defense was that the rapes were committed by co-defendant and by one John Baldwin. Where evidence directed solely against a co-defendant is prejudicial against a defendant, Saavedra maintains that severance is necessary to protect his rights and the failure to grant such severance constitutes reversible error. *Suarez v. State,* 95 Fla. **42, 115** So. 519 (1928); *Cason v. State,* 211 So.2d **604** (Fla. 2nd DCA 1968). The state responds that the trial court did not abuse its discretion in denying u motion for severance because, despite Saavedra's claim of possible antagonistic defenses, no direct evidence implicating appellant was offered by his co-defendant's theory of defense. *Crofton v. State,* 491 So.2d **317** (Fla. 1st DCA 1986). Additionally, the state argues, where the evidence against the defendant is overwhelrning, it is not an ahuse of discretion to deny a motion for severance. *Id.* at 319.

[8] On this issue we conclude that the trial court did not abuse its discretion. Rule 3.152(b)(1) authorizes the trial court to order separate trials either before or during trial if the movant shows severance is appropriate to protect a speedy trial right or promote the fair determination of guilt or innocence. The trial court denied appellant's initia1 written motion for severance without explanation. However, during trial and before cross-examination of the complaining witness, appellant moved again for severance, which the trial court denied, relying generally on *McCray u. State,* 416 So.2d 804 (Fla.1982). In that case, the defendant moved for severance of defendants on the basis of a co-defendant's inculpatory statements that the defendant shot: the victim. In affirming the denial of the motion, the Florida Supreme Court stated that:

> The object of the Rule [3.152(b)(1)] is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime. Rather, the Rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a man. ner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The Rule allows the trial court, in its discretion, to grant a severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants.

416 So.2d at 806. Strategic advantage, hostility among defendants, or attempts to escape punishment by throwing blame on other defendants, are insufficient reasons, standing alone, to justify a severance of defendants. Similarly, appellant argues that Teater's defense was completely antagonistic toward his defense and that Teater theorized that the rapes did not occur and relied on a fullscale attack on the complaining witness and her testimony, while appellant asserted that Teater and John Baldwin committed the attacks. Saavedra also contends that there was substantial evidence presented against Teater which prejudiced him, i.e., that the state emphasized the fact that Teater had taken

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a shower in the early morning hours after the crime was committed; that Teater testified that John Baldwin was in the appellant's house in the early morning hours; that appellant's son testified that he saw a man he did not know present in the house at the time of the crimes telling Teater to "hurry up"; and, that appellant's son testified that Teater "appeared to be scared" when he jumped in bed with him. Appellant also asserts that the trial court improperly limited his cross-examination of Teater regarding Teater's silence to police when he was arrested." Finally, appellant contends that the style and arguments of Teater's counsel during closing argument manifested the conflicts which were apparent throughout the entire trial.

The facts here do not rise to a level warranting severance, especially when appellant was given full opportunity to confront and cross-examine the above witnesses and where competent substantial evidence implicated appellant, i.e., the victim's clear identification of appellant as one of her attackers. *O'Callaghan v. State*, 429 So.2d 691 (Fla.1983). In this regard, neither *Suarez* nor *Cason*, cited by appellant in his brief, appear to be dispositive. Both cases stand for the proposition that where there is direct evidence against a co-defendant which is prejudicial against the defendant, severance is proper. In *Cason*, no such evidence was presented and the court denied the motion for severance. In *Suarez*, the court granted the motion for severance based on evidence of past similar offenses committed by one defendant and admitted only against that defendant. The court found that the evidence was prejudicial to the other defendants. In the instant case, Teater did not make any accusations implicating appellant, nor was the evidence particularly complex for the jury to distinguish each defendant's case. Therefore, we affirm the order *denying the motion* for severance of the defendants.

[9, 10] Appellant's next argument is that the trial court erred in restricting his right to present a defense to the crimes charged. Specifically, he finds fault in the trial court's granting of the state's motion *in limine* excluding Saavedra's sister's testimony regarding facts relevant to the alleged involvement of one John Baldwin in the sexual battery of **K.A.** He maintains that his sister's testirnony went to the very heart of his theory of defense, namely that John Baldwin committed the crimes with which he is charged. He also urges error in the trial court's restriction of his right to cross-examine Teater on Teater's communications with the police following his arrest.

The state maintains the trial court did not abuse its discretion in granting the state's motion *in limine* to prevent hearsay statements made by appellant's sister. In any event, John Baldwin admitted, at trial, that he stopped by appellant's house the night of the crimes. The state finds no error in the trial court's refusal to admit the statements as statements against interest, pursuant to section 90.804(2)(c), because Baldwin was available for trial and did in fact testify. As to the appellant's inability to cross-examine Teater concerning statements allegedly made to police after his arrest, the state finds no abuse of discretion in the trial court's limiting the cross-examination in light of Teater's constitutional right against self-incrimination.

During the trial, appellant's attorney proferred Vickie Saavedra's testirnony that two days after the attack she talked with Baldwin; that Baldwin admitted that he was at appellant's house on the night of the attacks sometime after 9:30 p.m.; that he did not confess to the crimes, but repeatedly stated that he did not want to go to jail, and that if "you think I did it so I did it". Appellant's attorney offered the statements as declarations against interest. The trial court sustained the state's objection to the statements until it was ascertained whether Baldwin would be present to testify. Baldwin testified at trial that he stopped by appellant's house the night of the attack at approximately 10:00 p.m., and that after appellant was arrested, Baldwin

4. During appellant's cross-examination of Teater, Teater denied talking with the police when he was arrested. The court refused to allow appellant's attorney to inquire further into the reason for Teater's silence. Appellant moved for a mistrial which the trial court dcnied.

remembered telling Vickie Saavedra "if ya'll think I did it, you know, call the police".

We find no error or abuse of discretion committed by the trial court in this regard. The court did not preclude appellant from presenting Baldwin's testimony. We agree with the state that further testimony by Vickie Saavedra in this respect would have been cumulative. As for appellant's assertion that he was precluded from fully cross-examining Teater, we likewise conclude that the trial court did not err. Teater denied making statements to the police when he was arrested. Thus, the trial court did not abuse its discretion in stopping appellant's attorney from further inquiry into Teater's silence to police after his arrest,

[11, 12] Lastly, Saavedra complains that the trial court improperly applied the Sentencing Guidelines Rule in effect at the time of the offenses. His sentencing guidelines scoresheet totaled 508 points, including 120 points assessed for three penetrations/slight victim injuries. At the sentencing hearing, appellant objected to the 100 points scored for this factor, arguing that only 40 points for one penetration should be assessed which would have the effect of reducing the recommended sentence from the 22–27 cell to the 17–22 cell. The court overruled this objection and sentenced him to five concurrent 27 year prison terms.

At the time Saavedra's offenses were committed, Florida Rule of Criminal Procedure 3.701(d)(7), provided that: "[v]ictim injury shall be scored if it is an element of any offenses at conviction." The committee notes to the rule stated that "[v]ictim injuries shall be scored for each count where victim injury is an element of each offense, whether there are one or more victims." In adopting the above rule in April, 1985, the supreme court stated in a footnote that, "[t]he committee note to Rule 3.710(d)(7) is revised to include language 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." *The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988—Sentencing Guidelines)*, 468 So.2d 220, 221 (Fla.1985).

On June 29, 1987, Rule 3.701(d)(7) and was amended as follows:

> *"Victim injury shall be scored for each victim physically injured during a criminal episode or transaction." The committee note* was *altered accordingly:*
>
> This provision implements the intention of the commission that points for victim injury be added for each victim injured during a criminal transaction or episode. The injury need not be an element of the crime for which the defendant is convicted, but is limited to physical trauma. However, if the victim's injury is the result of a crime for which the defendant has been acquitted, it shall not be scored.

The legislature adopted the amendment in Chapter 87–110, Laws of Florida, effective July 1, 1987. *See The Florida Rules of Criminal Procedure Re Sentencing Guidelines (3.701 and 3.988)*, 509 So.2d 1088 (Fla.1987). In amending the rule, the supreme court intended to have physical injury scored whether or not it was an element of the offense, and to have it scored for each victim injured during a criminal episode. 509 So.2d at 1089. The court did not expressly address whether victim injury could still be scored for each count involving the same victim, as it did in the 1985 opinion. However, by deleting such language from the rule and comrnittee notes, it is apparent that the court and the legislature did not intend the injury to the same victim be scored more than once for a single criminal episode.

[13] Saavedra argues that the 1985 version of Rule 3.701(d)(7), in effect at the time that the offenses were committed, should be applied only when application of the 1987 amendment would subject him to greater punishment and violation of the constitutional prohibition against *ex post facto* laws. Because application of the 1987 amendment would have the effect of lessening his punishment, he asserts that he is entitled to the benefit of the change in

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the law. While we agree with him that the *ex post facto* clauses of the state and federal constitutions are not implicated in this case, we hold that the trial court properly applied the guideline rule in effect at the time of the offenses. As the state correctly argues in its answer brief, it is impermissible to apply the amendment of a criminal statute to offenses committed prior to the effective date of the amendment. Article X, section 9, Florida Constitution; *Castle v. State*, 305 So.2d 794 (Fla. 4th DCA 1974), (defendant had no right to benefit from an ameliorative change in the law) *aff'd*, 330 So.2d 10 (Fla.1976).

In summary, we affirm as to each point raised on appeal and the sentences imposed on appellant.

NIMMONS, J., concurs.

BARFIELD, J., dissents with opinion.

BARFIELD, Judge, dissenting.

The officers' warrantless entry into Saavedra's home was illegal under *Payton v. New York* and *Riddick v. New York*, both reported in 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

In *Payton*, the police, acting on probable cause, broke into Payton's home without a warrant in order to arrest him for a crime. Payton was not at home, but the police seized certain evidence which was later admitted into evidence at Payton's trial. In *Riddick*, the police went to Riddick's home to arrest him based on probable cause that he committed two armed robberies. When his three-year-old son opened the door, the officers observed Riddick sitting in bed covered by a sheet. The officers entered without giving Riddick an opportunity to object and arrested him. In a search incident to the arrest, the officers seized narcotics and related paraphernalia, which were later used to indict Riddick on narcotic charges. The Supreme Court of the United States held that a warrantless, nonconsensual entry into a suspect's home to make a routine, felony arrest violates the Fourth Amendment. 445 U.S. at 576, 100 S.Ct. at 1373, 63 L.Ed.2d at 644. In finding the entries in *Payton* and *Riddick* illegal, the Court stated:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home-a zone that finds its roots in clear and specific constitutional terms: "The right of people to be secure in their ... houses ... shall not be violated." That language unequivocally establishes the proposition that "[alt the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 5 L.Ed.2d 734, 81 S.Ct. 679, [683] 97 A.L.R.2d 1277. In terms that apply equally to seixures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

445 U.S. at 589–590, 100 S.Ct. at 1381, 63 L.Ed.2d at 653.

In the instant case, the State asserts that exigent circumstances justified the officers' entry into Saavedra's home. The State suggests that the officers were motivated by the necessity to speedily apprehend the suspects and prevent the destruction of evidence. At the suppression hearing, the arresting officers testified that they did not feel that their lives were in danger when they were securing the outside of the house prior to entry; nor was there an indication that lives were being threatened or any evidence being destroyed within the house. Under the "exigency" exception to the warrant requirement, the critica1 inquiry is the reasonableness of the officer's belief that an emergency exists and not the actual existence of an emergency. *Randolph v. State*, 463 So.2d 186, 191 (Fla.1984), *cert. den.*, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985). The record in the instant case simply does not support a finding that the arresting officers believed that an emergency situation

existed which justified their warrantless entry into Saavedra's home.

The legality of the arrest and subsequent search, thus, turns on whether the officers entered Saavedra's home with the valid consent of Saavedra's son. In a third party consent situation, the state must show that the consentor possessed common authority or some other **sufficient** relationship over the area to be searched, in the absence of the nonconsenting person with whom that authority is shared. *United States v. Matlock*, 415 **U.S.** 164, 94 S.Ct. 988, **39** L.Ed.2d 242 (1974); *Silva v. State*, **344** So.2d 559 (Fla.1977); *Pinyan v. State*, **523** So.2d 718 (Fla. 1st DCA 1988). The State must show by *clear and convincing* evidence that the consent was freely and voluntarily given, *Bumper v. North Carolina*, 391 U.S. **543**, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), which is to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, **412** U.S. 218, **93** S.Ct. **2041**, 36 L.Ed.2d **854** (1973); *Preston v. State*, 444 So.2d 939 (Fla.1984). The majority's assertion that competent, substantial evidence was present to support the trial judge fails to address the evidentiary **test** to be applied.

At the onset, it **is** not apparent from the record that Saavedra's son shared comrnon authority with his father over their home to permit a full-scale entry and **search.** *See Padron v. State, 328* So.2d 216 (Fla. 4th **DCA** 1976), *cert. den.*, **339** So.2d 1172 (Fla. 1976).[1] Even if Saavedra's son possessed the requisite authority to consent to entry by the police of his father's residence, I **would** find that such authority extended only to crossing the threshold into that portion of the home where any caller might be admitted under norrnal circurnstances. Officer Benfield, in tectimony that conflicted with that of the children, testified that he needed to speak to an adult and asked permission to enter. The police exceeded the scope of any initial, valid consent given by Saavedra's son, when they entered the other rooms of the home without any further permission from the boy or from an adult with superior authority over the premises. *See State v. Wells*, **539** So.2d **464, 467** (Fla.1989), *cert. granted, Florida v. Wells*, 491 **U.S. 903,** 109 S.Ct. 3183, **105** L.Ed.2d 692 (1989) (if the police are to rely on consent to conduct a warrantless search, thcy are confined to the terms reasonably conferred by that consent). **A** young boy, awakened at 3:00 a.m. *to* the presence of police officers banging on the side of his home and seeking entry at the back door, does not reflect a situation where free and voluntary consent can be provided. Based on the totality of the circurnstances, the arrest of Saavedra in his home was the result of a nonconsensual entry

As a consequence of the illegal entry, I would hold that the arrest, show-up identification and physical evidence seieed pursu-

1. In *Padron,* the defendant denied the police permission to search his home for a murder weapon after he had been arrested, handcuffed and placed him in the backseat of the patrol car. The police approached the defendant's sixteen-year-old son, who acquiesced to thc officers' entry. The Fourth District Court of Appeal stated that the teenager did not share common authority with his father over their dwelling place, reasoning that a parent's interest in the premises is superior to that of his child. 328 So.2d at 218, En. 1. The court held that, even if the teenager did share authority. he could not providc valid consent where his fathcr was present and had already asserted his rights. 328 So.2d at **218.** The court also held that, under the circumstances of the case, the son's consent was not freely or voluntarily given. *id.*

Some states have rejected a per se rule that a minor does not possess sufficient authority to consent to the entry or search of his parent's residence. (or that of someone in a superior relationship). and held that age of the consentor is but one factor to consider in determining valid consent. See *Atkins v.* State, 254 Ga. **641, 331** S.E.2d **597 (1985);** State ***v. Scott,*** 82 Or.App. 645, 729 P.2d **585 (1986)** (expressly declining to follow Padron); Doyle ***v. State,*** **633 P.2d** à06 (Alaska App.1981); *People v. Swansey,* 62 Ill. App.3d **1015,** 20 Ill.Dec. **211,** 379 N.E.2d **1279 (1978);** ***State v. Folkens,*** 281 N.W.2d 1 (Iowa 1979); ***Commonwealth v. Maxwell,*** 505 Pa. **152,** 477 A.2d **1309,** cert. den., 469 **U.S.** 971, **105 S.Ct. 370, 83** L.Ed.2d **306 (1984):** ***State v. Jones,*** 22 Wash.App. **447,** 591 P.2d **796 (1979);** see ***also,*** 3 W. LaFave *Search* ***and Seizure: A Treatise on the Fourth Amendment,*** **§ 8.4(c) (1987).** I agree with Professor LaFave that. under sorne circumstances, a child of sufficient age and maturity displaying to an officer the discretion and authority over certain areas **of** a home may provide valid consent to entry or search of those areas in the absence of a person with a superior authority.

ant to the written consent form were tainted and should have been suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Norman v. State*, 379 So.2d 643 (Fla.1980).

BRITAMCO UNDERWRITER'S, INC., Appellant,

v.

ZUMA CORPORATION, etc., et al., Appellees.

No. 90-1161.

District Court of Appeal of Florida, Fifth District.

April 4, 1991.

Coverage suit was filed. The Circuit Court, Orange County, B.C. Muszynski, J., found insurance coverage in favor of bar against whom patron had obtained judgment based on theory that bar failed to provide adequate security resulting in patron being beaten by other patrons. Insurer appealed. The District Court of Appeal, Griffin, J., held that assault and batterylnegligent hiring exclusion applied to claim alleging negligence in failure to provide adequate security.

Reversed and remanded with instructions.

Insurance ⇐435.22(5)

Assault and battery/negligent hiring exclusion in liability policy of bar excluded coverage for claim by patron alleging that bar was negligent in failing to provide adequate security resulting in assault on patron.

Neil Rose of Conroy, Simberg & Lewis, P.A., Hollywood, for appellant.

Edward R. Gay, Orlando, for appellees.

GRIFFIN, Judge.

Appellant seeks review of a summary final judgment finding insurance coverage in favor of appellee, Zuma Corporation. Appellee owns and operates a bar in which a patron was injured as a result of a beating inflicted by other patrons. The patron previously had obtained a judgment against the appellee based on the theory that, by failing to provide adequate security, appellee had negligently created a dangerous condition which resulted in the injuries to the patron.

The appellant, Britamco, which issued a policy of insurance to appellee, asserts that its policy contained no coverage for this incident because of the "assault and batterylnegligent hiring" exclusion. This exclusion provided in pertinent part:

> [I]t is understood and agreed that this policy excludes claims arising out of:
>
> 1. Assault & Battery, whether caused by or at the instructions of, or at the direction of, the insured, his employees, patrons or any causes whatsoever ...

Appellee concedes that the patron was injured by an assault and battery but contends that coverage is nevertheless available because the legal theory upon which the patron obtained a judgment was negligence in failing to provide adequate security. We agree with the appellant that the policy excludes coverage for this claim, which clearly arises out of an assault and battery. Our conclusion is consistent with the overwhelming weight of authority in jurisdictions that have considered this issue. *E.g.*, *Terra Nova Ins. Co., Ltd. v. North Carolina Ted, Znc.*, 715 F.Supp. 688 (E.D.Pa.1989); *Garrison v. Fielding Reinsurance, Inc.*, 765 S.W.2d 536 (Tex.App. 1989); *Ross v. City of Minneapolis*, 408 N.W.2d 910 (Minn.App.1987).

Accordingly, we reverse and remand to the trial court with instructions that a summary final judgment be entered in favor of appellant.

REVERSED and REMANDED.

COWART and DIAMANTIS, JJ., concur.