AA 4-7-93 GK

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,487

CHARLES HENRY WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The Respondent, the State of Florida, was the psosecution in the trial court and the Appellee in the Appellate Court. In this brief, the parties will be referred to as the defendant and the State. The symbol "R" wil1 be used to designate the record on appeal and the symbol "T" will be used to designate the transcript of proceedings. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The State accepts defendant's Statement of the Case as being substantially correct with the following addition:

The only argument raised by defendant in his brief to invoke this Court's jurisdiction is that the decision in Williams ~~v.~~ State, 592 So.2d *350* (Fla. 3d DCA 1992), is in conflict with other decisions on the question of whether other crime evidence can be admitted in a sexual battery case when the defense is consent.

STATEMENT OF THE FACTS

The State rejects the defendant's Statement of the Facts as inaccurate and incomplete and pursuant to Fla.R.App.P. 9.210(c) makes the following additions and/or corrections.

In his opening statement, defense counsel asserted that C.[1] engaged in consensual sex with the defendant because she wanted crack cocaine, and falsely accused him of sexual battery when he did not give her enough crack. (T. 640, 641.) Defense counsel attempted to advance this defense in his cross-examination of C. and in closing argument. (T. 704, 705, 1043-1045.)

C testified that on March 17, 1989, (T. 64), the defendant engaged her in a conversation about crack cocaine, and then choked her from behind by putting his arm around her neck. (T. 667, 668.) When she tried to scream, the defendant tightened his choke-hold which prevented her from making any noise. (T. 669.) In choking C the defendant pulled her up off the ground. (T. 669, 670.) He then dragged her to a secluded area. (T. 670.)

Maintaining his choke-hold, the defendant forced C to the ground. (T. 674.) He took her cocaine and then got on top of her and pulled down her pants and panties while unbuttoning his pants. (T. 675-678.) The defendant tried to penetrate C vagina but did not have an erection so he started masturbating. (T. 678.) While the defendant pulled on

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[1] C. last name, as well as the last names of the two other crime vkctims, will be omitted.

his penis with one hand, he tightened his grip around C neck with the other. (T. 678, 679.) The defendant eventually got an erection and penetrated C vagina and ejaculated. (T. 679, 680.) The defendant stopped choking C when he penetrated her. (T. 680.) After he ejaculated, the defendant got up and tossed C pants one way and her panties the other way. (T. 680.) He told hes not to move or he would kill her. (T. 680.) The defendant then walked calmly away. (T. 681.)

After the crimes, C immediately ran into the street and waved down a police car. (T. 682-685.) While still at the scene, C asked people she knew to bring her mother to her. (T. 695.) She wanted her mother there because she felt that she was in danger and wanted her rnother close by. (T. 695.) C mother, a licensed practica1 nurse for 23 years, came to the scene, but C had already left with a detective, in search of her mother; so she returned to the house where she met C (T. 737-740.)

C testified on cross-examination that she felt that when the police arrived at the scene and she told them what happened, it was as if they did not believe her, (T. 701.) Defendant's attempt to mislead this Court by alleging in his statement of the facts that, based upon this testimony, the police did not believe C initially, must be corrected. No police officer testified that he did not believe C at any time.

Officer Frank Motto was flagged down by C who was yelling and screaming. (T. 747.) C was very upset and hysterica1 and pointed to the defendant and said that he had just raped her. (T. 747, 748.) Officer Motto called the defendant over and advised him of his Miranda rights, which he waived. (T. 749, 750.) C clothes were dirty and it appeared that she had been in a scuffle. (T. 752.) The defendant denied the rape charge and claimed that they were going to have a good time with cocaine he had. (T. 753.) Officer Motto went to the area where C said the rape had occurred and found a pair of panties, which C identified as hers. (T. 755, 756.)

Sexual Battery Detective Larry Jackson responded to the scene where he made contact with C and Officer Motto. (T. 903.)[2] C , who was still crying and very upset, told Detective Jackson that after she had purchased crack cocaine, the defendant initially talked to her about crack, and then choked her and dragged her to a secluded area where he raped her. (T. 905-907.) Detective Jackson took C home to her mother and then to the Rape Treatment Center. (T. 910, 911.) The defendant waived his rights and voluntarily told Detective

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[2] Detective Jackson testified on the morning of April 26, 1990. The transcript of this morning session starts at page 891 of the trial transcript and continues thru page 1032. The transcript of the April 26th afternoon session begins at page 776 and continues thru page 890. Thus the morning and afternoon sessions are transposed in the transcript of proceedings filed in this case.

Jackson that he had helped C buy cocaine and that they had consensual sex. (T. 914-919.)

Also in March of 1989, (T. 1003, 1004), the defendant engaged other crime victim L in a conversation about crack cocaine, and then choked her from behind by putting his arm around her neck. (T. 1011-1013.) In so doing, the defendant pulled L up off the ground and dragged her to a secluded area. (T. 1012.) He tightened his chock-hold and thereby prevented L from making any noise. (T. 1013.)

Maintaining his choke-hold, the defendant put L on the ground and got on top of her. (T. 1014-1016.) He then unbuttoned his pants and started masturbating, because he did not have an erection. (T. 1016.) He kept his chock-hold on L with one hand while masturbating with the other. (T. 1016, 1017.) Eventually, the defendant ripped L panties and penetrated her vagina and ejaculated. (T. 1017.) After he ejaculated, the defendant took L cocaine and told her that he would kill her if she said anything. (T. 1018, 1019.) The defendant then walked away from the scene. (T. 1019.)

L testified that she had initially consented to have sex with the defendant in exchange for drugs and money, but the defendant sexually assaulted her against her will and did not give her drugs or money. (T. 1021, 1022.)

In October of 1988, (T. 845), the defendant engaged other crime victim B in a conversation about crack cocaine

and choked her by putting his arm around her neck. (T. 819, 820.) In so doing, the defendant lrfted B off the ground. (T. 820, 821.) The defendant's choke-hold was so tight that B could not make any noise and she passed out. (T. 820,) When B regained consciousness, she was in a secluded area and her pants and panties had been pulled down. (T. 821-823.) The defendant walked away from B when confronted by Lester Haney. (T. 841, 842.) Prior to the attack, B had introduced the defendant to a friend who was willing to engage in consensual sex in exchange for money or drugs. (T. 815, 816.)

C testified that she does not know the other victims, who likewise testified that they did not know her or each other. (T. 699, 700, 784, 828.)

SUMMARY OF ARGUMENT

The other crime evidence in this case established that the defendant engaged in a common scheme or plan, by which he committed sexual batteries against victims, who would be particularly susceptible to a consent defense should they accuse him of the crime. When C , the victim in this case, did accuse him of sexual battery, the defendant raised the consent defense, which his actions prior to the crime had made possible. The other crime evidence supported the argument that the defendant committed the crimes charged only after he had orchestrated events to support a defense, if needed. Therefore, it had great probative value in determining whether there was consent, and was properly admitted.

The admissibility of the other crime evidence is supported by this Court's decision in Williams v. State, 110 So.2d 654 (Fla. 1959), and other cases in Florida and throughout the country. The cases relied on by the defendant are not on point because they do nol involve situations where the similaritíes between the charged and uncharged crimes show a common scheme or plan to sexually batter a particular type of victim under circumstances supporting a consent defense.

Furthermore, the similarities and other circumstancés of the other crimes committed by the defendant, in addition to showing a common scheme or plan, are also relevant and admissible to rebut the consent defense because they show an intent to commit nonconsensual sex and corroborate the testimony of C .

The issues raised by the defendant, which were not the basis for this Court's grant of jurisdiction, should not be reviewed. In any event, they are clearly without merit.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF OTHER CRIMES COMMITTED BY THE DEFENDANT BECAUSE THAT EVIDENCE, (1) ESTABLISHED A COMMON SCHEME OR PLAN TO SET UP IN ADVANCE OF THE CRIMES HIS CONSENT DEFENSE, WHICH THEREFORE REFUTED SUCH DEFENSE, (2) SHOWED DEFENDANT'S INTENT TO ENGAGE IN NONCONSENSUAL SEX, AND (3) PROVIDED CRUCIAL CORROBORATION OF THE TESTIMONY OF THE PROSECUTRIX.

In affirming the defendant's convictions, the Third District Court of Appeal relied upon this Court's landmark case of Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). In that case, the Court upheld the admission of a similar crime victim's testimony to show plan, or common scheme, even though Williams claimed that sex with the prosecutrix had been consensual. The State submits that the Third District correctly held that Williams is directly on point; and its holding, allowing evidence of a similar crime chowing a plan or common scheme in a sexual battery case where consent is the defense, should not be overruled.[3] This significant precedent has provided guidance to Florida courts for the application of the "Williams Rule" since 1959, and is consistent with the majority of other state courts that have addressed this issue

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[3] Recognizing that this Court would obviously, be most reluctant to overrule such a significant holding, the defendant attempts to distinguish Williams from this case. As demonstrated, infra, this attempt is unsuccessful.

In Williams, this Court undertook a detailed and comprehensive analysis of its prior case law on the admissibility of similar other crime evidence "...for the future guidance of the bar and trial courts ... so that in the future the correct rule of evidence may be applied in its proper setting." Id. at 658. The Court began its analysis by strecsing that the rule is one of admissibility as contrasted to a rule of exclusion. After analyzing many of its precedents, the Court concluded that the rule, which has evolved, is that other crime evidence is admissible if relevant to any fact in issue, but is inadmissible if it only shows bad character or propensity.[4] In applying this rule, the Williams Court provided yuidance for determining the admissibility of other crime evidence in all cases by its holding that the evidence was properly admitted to show a common scheme or plan.

In Williams, the 17-year-old prosecutrix testified that she was stabbed and sexually assaulted by the defendant, who haà hid in the back seat of her car while she had been shopping in the vicinity of Webb's City. A 16-year-old other crime victim testified that six weeks earlier, the defendant had been found hiding in the back of her car at the same parking lot at

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This Court has often times reiterated that the test for the admissibility of other crime evidence under the "Williams Rule" is relevancy. State v. Savino, 567 So.2d 892 (Fla. 1990); Bryan v. State, 533 So.2d 744 (Fla. 1988); Swafford v. State, 533 So.2d 270 (Fla. 1988). To be relevant, the evidence must have a logical tendency to prove or disprove a material fact, i.e., one which is of consequence to the outcome of the action. Amoros v. State, 531 So.2d 1256 (Fla. 1988); Section 90.401, Fla. Stat. (1992).

approximately the same hour. The defendant testified that he and the prosecutrix had consensual sex and had known each other for six months. The Williams court upheld the admissibility of the other crime evidence since it established a plan scheme ar design and was relevant to meet the anticipated defense of consent.

Thus, Williams mandates the rejection of defendant's argument that evidence of a similar other crime can never be admitted in a sexual battery case if consent is raised as a defense. As Williams held, evidence of the other crime was admissible since it was sufficiently similar to the charged crime to establish a scheme or plan and to rebut a consent defense. A comparison of this case with Williams establishes that the other crime evidence from L and Beverly was properly admitted for both these reasons.

In Williarns, the collateral crime evidence demonstrated that the defendant engaged in a scheme or plan in which he would hide in the back seat of a car in a particular parking lot and then attack his teenager female victim when she entered the car. In this case, the other crime evidence demonstrated that the defendant followed a scheme or plan, in which he wore a uniform-type shirt, and while in the same part of town sought out female victims of the same approximate age and height, who were by themselves at night. He then engaged them in a conversation about crack cocaine to determine if they were "safe" victims, i.e., victims against whom he could build a viable, believable

consent defense. After ascertaining that they were, he choked and dragged them to a secluded area where he committed vaginal sexual battery. (T. 653-661, 664-682, 1003-1007, 1011-1017, 808-810, 813-815, 819-8231.)

By preying upon women who were alone at night and who knew where to buy or smoke crack cocaine, the defendant engaged in a common scheme or plan in which he hoped to commit a sexual battery upon a victim who would be unwilling to come forward or would be disbelieved if she did. There clearly is more evidence of a common scheme or plan in this case than in Williams. Furthermore, the evidence in this case more directly refuted the consent defense than in Williams, since the defendant's plan included as a crucial part, the setting up of the consent defense. In accordance with the "Williams Rule," the other crime evidence was properly admitted.

The defendant attempts to distinguish ~~Williams~~ from this case by arguing that there was a factual dispute as to the events preceding the sexual acts, but fails to explain why or how these factual disputes played any part in the Court's upholding the admissibility of the other crime evidence to show a common scheme or plan. The Court's conclusion that the other crime evidence was relevant and admissible because "[i]t definitely had probative value to establish a plan, scheme or design...," Id. at 663, is based solely upon the aforementioned facts showing such a plan. While the other crime evidence in Williams was relevant to other issues, there is no suggestion in

the Court's opinion that the evidence would not have been properly admitted if relevant only to show a common scheme or plan. Indeed, the lengthy analysis of the prior case law, conclusively establishes that under the "Williams Rule," the evidence would have been properly admitted since it was relevant to a fact in issue.

The defendant's primary argument for rejecting the admissibility of the other crime evidence in this case is that when identity is not in issue, a common scheme or plan cannot be a material fact in issue. This argument is contrary to Williams, which holds that the other crime evidence was admissible for the independent reason of establishing a plan, scheme, or design, which thus was a material fact in issue, even if identity was not. Section 90.403(2), ~~Fla.~~ Stat. (1992), also recognizes that plan can be a material fact independent of identity.

The materiality of the defendant's common scheme or plan in this case is clear. The defense was that C consented to have sex with the defendant in exchange for drugs and falsely accused him of sexual battery when he did not give her the crack cocaine she wanted. (T. 640, 641, 704, 705, 1043-1045.) If the jury concluded that the defendant planned this defense by making sure before he committed the crimes that C was a crack cocaine user, they obviously would be inclined to reject the defense. Since the evidence of the crimes committed against L and B showed that the

defendant did indeed engage in such a plan, the evidence was relevant to a material fact, C s lack of consent.

In addition to Williams, there are several other Florida cases that support the admissibility of the other crime evidence in this case to show a common scheme or plan. Foremost among these is Jackson v. State, 538 So.2d 533 (Fla. 5th DCA 1989), which postdates the two cases relied on by the defendant to invoke this Court's conflict jurisdiction.

In Jackson, the charged and other crime occurred thirteen months apart. Both victims knew the defendant and had agreed to let him drive them to a desired location. The defendant drove to Hernando County where he threatened to kill the victims then beat them up and raped them. The defendant claimed that he had consensual sex with both victims. Despite significant differences in the actual sexual battery, the Court held that the other crime evidence was admissible and relevant to show modus operandi, plan or scheme, and to rebut the defendant's claim of sex for pay.

In so holding, the Jackson Court reasoned that plan or scheme was a relevant fact in issue. The defendant picked out victims with whom he was acquainted because he knew that they would be likely to accept his offer to drive them to a desired location. He then drove them to a location where there would be no witnesses and raped them. Since the victims had voluntarily accompanied him, and there were no witnesses, the defendant could easily claim consensual sex. However, the similar crime

evidence, which demonstrated that the defendant followed a specific plan or scheme so that he could raise just such a defense, made the defense much less credible. Plan or scheme was therefore, as the Jackson Court faund, a material factual issue.

Jackson and this case are identical in that in both cases, other crime evidence, showing a plan to commit sexual battery on victims against whom a consent defense could be supported, was properly admitted. The defendant attempts to distinguish Jackson by arguing that in that **case** the defense conceded tnat the other crime evidence was relevant to show plan or scheme. Jackson cannot be distinguished from this case on this basis because the relevance of the other crime evidence to show plan or scheme in this case, is clearly not in dispute. The issue in this case, as it was in Jackson, is whether a plan or scheme was a relevant fact in issue, i.e., was it material. In both Jackson and this case, an affirmative **answer** is appropriate.[5]

Although decided by the same Court that later **decided** Jackson, the decision in Hodges v. State, 403 So.2d **1375** (Fla. 5th **DCA** 1981), rev. denied, 413 So.2d **877** (1982), is the case

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5 As **he** does with Williams, the defendant unsuccessfully attempts to distinguish Jackson from this case by arguing that there was a disputed issue other than whether there was consensual sex. However, the fact that the other crime evidence in Jackson also rebutted the defendant's claim as to where the sex occurred in no way lessens the significance of the Court's primary holding that the evidence was admissible to **show** a plan or scheme.

most heavily relied upon by the defendant.[6] However, as correctly limited by the Jackson majority, Hodges does not apply to cases such as Jackson and this case in which the other crime evidence shows a common scheme or plan.

In Hodges, the prosecutrix testified that the defendant, a stranger, dialed her telephane by mistake *and* after a conversation she gave him directions to her apartment. He came with a bottle of wine and after some wine and television he committed a sexual battery. The defendant testified that the sex was consensual. The improperly admitted other crime evidence was that three years earlier the defendant and a **different** victim were kissing in his house, and when the victim refused his further advances, he raped her. There was no similarity between the two crimes and no showing of a common scheme or plan. The other crime evidence showed solely propensity to commit sexual battery and would not have been admissible under the "Williams Rule" even if identity had been the defense. Thus, Judge Sharp's concurrence in the result only is **correct.**

The Hodges Court correctly held that the other crime evidence should not have been admitted because it only showed bad character or propensity. Indeed, Judge Cowart devotes considerable time explaining why when other crime evidence has only such limited relevance it should not be admitted. The

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[6] Judges Cowart and Sharp were on both cases. Judge Cowart authored the opinion in Hodges and dissented in Jackson. Judge Sharp authored the majority opinion in Jackson and concurred in result only **in** Hodges.

Court, however, also appears to conclude that other crime evidence can never be admitted in a sexual battery case, in which consent is the defense, and reasons that other crime evidence cannot have relevance to whether or not the prosecutrix consented. The Court's reasoning and conclusion derived therefrom are faulty and incorrect.

Contrary to Williams, the Hodges Court takes the view that the concept of common scheme or plan relates solely to identity and thus cannot be a material fact in issue if identity is not in issue.[7] The error in this reasoning can be demonstrated by altering the facts of Hodges. The facts of the charged crime remain the same. The defendant telephones a stranger and claims that he made a mistake. He engages her in a pleasant convessation, and she invites him to come over to her apartment. He brings over a bottle of wine and after she drinks some he, according to the prosecutrix, commits a sexual battery. At trial he claims consent and argues in support that the prosecutrix had invited him over and had some of his wine. Suppose that the State also introduced evidence that the defendant had done the same thing with another woman, thus establishing a common scheme or plan to select women, who would invite a stranger over to their apartment and drink his wine, and therefore allow him to argue that his claim of consent was supported by the women's actions. Surely, such evidence would

[7] The Court's correct definition of a material fact in issue as a fact having "rational probative value," Id. at 1376, is helpful in demonstrating its faulty reasoning.

have had "rational probative value" in determining whether the sex between the defendant and the prosecutrix was consensual.

The key question posed by the Hodges Court is what particular proposition was the other crime evidence offered to prove. Under the hypothet, which parallels the fact of this case, the answer is a common scheme or plan to commit sexual battery upon women, who the defendant had ascertained would be susceptible to a consent defense. Since proof of such a plan would seriously undermine a consent defense, the evidence is relevant to *a* material fact and would be admissible.

In addition to Hodges, the other Florida case primarily relied upon by the defendant is Helton v. State, 365 So.2d 1101 (Fla. 1st DCA 1979), rev. denied, 373 So.2d 461 (1979). Helton, like Hodges, is completely distinguishable from this case because there is no similarity between the charged and other crime and no evidence of a common scheme or plan. The other crime evidence thus did not **prove** lack of consent in the charged crime. The Court's statement that "the **lack** of consent of one person is not proof of the **lack** of consent of another," 365 So.2d at 1102, has no bearing upon this case. The State has never argued that the other crime evidence in this case was relevant because the lack of consent by L and B is proof that C also did not consent. Unlike in Helton, other crime evidence was not admitted merely because they were non-consensual sexual batteries; but rather because they established a common scheme or plan probative on the question of whether C and the defendant had consensual **sex.**

As the aforecited cases make clear, the issue to be resolved in this case is whether evidence showing a common scheme or plan is admissibie as relevant to a material issue when a defendant's defense to a sexual battery charge is consent. The Court in Williams and Jackson held that such evidence is admissible, and the Courts in Hodges and Helton did not have before them the facts from which the issue could be raised. In reconciling these cases, Professor Charles W. Ehrhardt, stated that other crime evidence is apparently admissible to rebut a consent defense if the surrounding facts demonstïate that the acts are probative of the victim's consent. Ehrhardt, Florida Evidence § 404.19 (1992 Edition). Additional Florida cases, while not expressly addressing the issue, lend support to the State's position that the evidence would be admissible. Cf. Duckett v. State, 568 So.2d 891 (Fla. 1990); Dean v. State, 277 So.2d 13 (Fla. 1973); Coney v. State, 193 So.2d 57 (Fla. 3d DCA 1966).

In accordance with the "Williams Rule," evidence of a common scheme or plan followed by the defendant in this case was properly admitted because it was highly probative on the question of whether he committed the crimes charged or rather had consensual sex as he claimed. The probative value of this evidence is great even though identity was not in issue since without it the jury would have been left with a one-on-one credibility battle between the defendant and C . The jury would be left to evaluate the credibility of the defendant's

claim that C . consented to have sex with him but falsely accused him of sexual battery when she did not get the crack cocaine she wanted, without critical evidence showing that the defendant followed a plan whereby he selected her as a victim only after ascertaining that he would be able to raise such a defense. Since the defendant obviously did not **concede** that he selected C . for this reason, his common scheme or plan was a material fact in issue, which was properly shown by the other crime evidence.

Any time a defendant raises a defense of consent in a sexua battery case, evidence of othsr sexual crimes committed by the defendant has some probative value on the issue of consent, since a jury would obviously be more inclined to believe that a defendant, who on another occasion committed a sexual battery, did so in the **case** before it. However, because of the potentially unfairly prejudicial effect that such evidence could have, evidence merely showing a defendant's propensity to commit sexual battery is properly excluded. The determination of admissibility in a case such as this, therefore, requires a balancing of the probative value and its potential for unfair prejudice.

The potential for unfair prejudice, **whenever** evidence of an uncharged crime is admitted, remains constant; **the** jury may choose to punish the defendant for the other crime rather than the charged crime or the jury may infer that the **defendant** is **an** evil person inclined to violate the law. Snowden v.

State, 537 So.2d 1383 (Fla. 3d DCA *1989).* Thus, the focus of the balancing test must be on the relative probative value of the evidence. In making this determination an appellate court chould defer to the trial court's exercise of its discretion unless it was abused. Amoros v. State, 531 So.2d 1256 (Fla. 1988); State v. McClain, 525 So.2d 420 (Fla. 1988). Moreover, as stated in Amoros, at 1260: "...[o]nly where the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded."

The probative value of evidence of an uncharged sexual battery on the issue of consent is the least when, as in Hodqes and Helton, there is no similarity between the charged and uncharged crime. On the other hand, the probative value is the greatest on the issue of consent when the other crime evidence shows a common scheme or plan designed to set up a consent defense, which therefore strongly tends to show that a claim of consent had been fabricated. The probative value of such evidence in a case such as this, in which C 's testimony would otherwise be uncorroborated, cannot be substantially outweighed by the danger of unfair prejudice. Cases from other jurisdictions, in which a plan to set up a consent defence in advance can be shown by other crime evidence, allow for such evidence.

The defendant claims that there is a fairly even split of authority in other states as to the admissibility of similar face evidence to establish lack of consent in a sexual battery

case, and cites several cases that hold such evidence to be inadmissible. (Brief of Appellant, pp. 26, 27.) The cases cited by the defendant, however, do not involve facts which support an argument that other crime evidence demonstratec that the defendant followed a common scheme or plan to facilitate a consent defense.

When such a common scheme or plan can be shown, the great majority of courts hold that the evidence is admissible. Tndeed, the A.L.R. Annotation, Admissibility in Rape Case, of Evidence that Accused Raped or Attempted to Rape Person Other than Prosecutrix, 2 A.L.R. 4th 330, Sec. 6(a) (1980 and Supp. 1992), which is cited by defendant, states the general rule, derived from the case law, to be as follows:

> With regard to the question of the admissibility of evidence that the accused raped or attempted to rape another woman for the purpose of demonstrating the complainant's laek of consent or the accused's use of force, the rule appears to be that while such evidence is inadmissible where the only issue involved in the case is whether the act of intercourse was voluntary, such evidence is admissible for the purpose of showing lack of consent or the use of force if it also falls within one of the other exceptions to the general rule of inadmissibility, such as where the evidence also establishes a common scheme or plan on the part of the accused.

Consistent with this rule, numerous cases have held that when consent is raised as the defense in a rape case, other crime evidence is admissible to show a common scheme or plan followed

by the defendant to rape victims against whom a consent defense could be easily asserted. See Jones v. State, 580 So.2d 97 (Ala. Cr. App. 1991); People v. Vilt, 139 111. App. 3d 868, 94 Ill. Dec. 581, 488 N.E.2d 580 (1986); State v. Willis, 370 N.W.2d 193 (S.D. 1985); State v. Esposito, 192 Conn. 166, 471 A.2d 949 (1984); State v. Morrison, 310 N.W.2d 135 (Minn. 1981); Commonwealth v. Kjersgaard, 276 Pa. Super. 368, 419 A.2d 502 (1980); People v. Oliphant, 399 Mich. 472, 250 N.W.2d 443 (1976; Hunt v. State, 233 Ga. 329, 211 S.E.2d 288 (1974); State v. Arnold, 284 N.C. 41, 199 S.E.2d 423 (1973); State v. Hill, 104 Ariz. 238, 450 P.2d 696 (1969).

People v. Oliphant, closely parallels this case. The complainant met Oliphant while window shopping and agreed to accompany him to a bar where they talked about various topics, including marijuana. They left the bar, voluntarily in Oliphant's car, ostensihly to drive to another bar. At this point the testimony of the complainant and Oliphant diverge.

The complainant testified that Oliphant drove her to an unfamiliar area and became threatening and demanding. Oliphant parked the car in a secluded area, and by means of further threats he forced her to engage in various sexual acts.

Oliphant testified that he and the complainant had engaged in consensual sex. He had then dropped her off at her dormitory and gone to the police where he told them that he and the complainant haa consensual sex, but then he was apprehensive as to what she might do because she had become angry when he told her that she had an unpleasant body odor.

To rebut the consent defense, the prosecution introduced the testimony of three women who testified that they were raped by Oliphant under similar circumstances. The Michigan Supreme Court upheld the admissibility of this evidence based upon well-reasoned analysis directly applicable to this case.

The Court first addressed the question of whether the victims' testimony "...reveal a plan or scheme to arrange the circumstances surrounding the episodes in such a way as to make it appear that the victim consented." 250 N.W.2d at 447. The Court found that the charged crime and the three other crimes all shared the following characteristics: (1) the incidents all began with a public meeting with friendly conversation, (2) marijuana was discussed with all the victims, (3) the victims voluntarily entered Oliphant's car expecting to be driven to a particular place, and (4) they were driven to an area unfamiliar to them, where they were raped. Based upon these similarities, the Court found a plan or scheme, to wit:

> The many similarities in all four cases tend to show a plan or scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent and the defendant could thereby escape punishment. Defendant's plan made it appear that an ordinary social encounter which culminated in voluntary sex had simply gone cour at the denouement due to his reference to complainant's unpleasant body odor; a vain and bitter woman seeking revenge against an innocent man.
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> 250 N.W.2d at 443

The Court next addressed the issue of whether this plan or scheme was material, i.e., probative of a matter in issue. The Court concluded that "...[e]vidence of a plan or scheme on the part of defendant to orchestrate events to make proof of nonconsent difficult is, of course, probative of the contested issue of nonconsent." Id. at 443.

The third issue addressed by the Court is whether the probative value of the other crime evidence is substantially outweighed by its unfairly prejodicial effect. The Court noted that there was a dearth of evidence on the key issue of consent, aside from the contradictory testimony of complainant and defendant, and the trial court had therefore properly exercised his discretion in finding that the probative value of the other crime evidence was not substantially outweighed by the danger of unfair prejudice.

The analysis and holding in **Oliphant** are directly applicable in this case. Like Oliphant, the defendant orchestrated events with C so he could claim that she consented to have sex with him and only accused him of sexual battery because he had angereà her. Other crime evidence establishing a common scheme or plan by the defendant to make proof of nonconsent difficult is probative of the contested issue of nonconsent. The evidence is of greater probative value in this case since the most significant act supporting the consent defense, the crack cocaine conversation, was present in

all cases, while in Oliphant, the most significant act, the preemptive report to the police, did not reoccur.

In State v. Hill, 104 Ariz. 238, 450 P.2d 696 (1969) the Arizona Supreme Court upheld the admissibility of other crime evidence under circumstances analogous to this case. In Hill, the complaining witness testified that the defendant broke into her home, threatened her with a pair of scissors and committed various sexual crimes. After the crimes, the defendant fell asleep in the victim's bed. The defendant testified that the sex had been consensual and pointed to his falling asleep in the victim's bed as indicative of consent. The Court held that an uncharged sexual crime committed by the defendant after which he also fell asleep in the victim's bed was properly admitted to show a common plan or scheme. The Court reasoned that "...evidence of the prior rape, where defendant fell asleep in his victim's bed, was extremely relevant and indeed vital proof of the fact that a forcible rape had been committed in the instant case." 450 P.2d at 697. So too, in this case, the defendant's inquiries of L and B about crack cocaine, which was the primary basis for his claim of consensual sex with C was vitally important in negating such a claim.

The clear significance of other crime evidence to disprove consent was recognized by the Minnesota Supreme Court in State v. Morrison, 310 N.W.2d 135 (Minn. 1981). In that case, the Court held that the other crime evidence was relevant

to the issue of consent because it showed that the defendant "...figuring that he could explain it away later, forced women he knew to have vaginal sexual intercourse with him." 310 N.W.2d at 137.

Among the *cases* cited by the defendant to support his argument that other crime evidence is inadmissible when consent is the defense in a sexual battery case is People v. Barbour, 106 Ill. App. 3d 993, 62 111. Dec. **641**, 436 N.E.2d 667 (1982). However, the defendant does not cite the subsequent Illinois case of People v. Vilt, 139 111. App. **3d** 868, 94 Ill. Dec. 581, 488 N.E.2d 580 (1986), which holds that other crime evidence is admissible in such cases to show a common scheme or plan.

In Barbour, there was no evidence that the defendant engaged in a common scheme or plan when he raped the complainant and the other crime victims since the crimes were completely dissimilar. The other crime evidence was therefore irrelevant to the issue of whether tne complainant consented. However, as Vilt made clear, the evidence would have been relevant and admissible if it had shown a common scheme or plan.[8]

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[8] In People v. Brown, 214 Ill. App. **3d** 836, 158 Ill. Dec. 396, 574 N.E.2d 190 (1991), the Court noted that Illinois **cases** subsequent to Basbour have upheld the admissibility of similar ether crime evidence to show modus operandi in rape cases where consent is the defense, and identity is not in issue. The courts reasoned that "... modus operandi evidence is not limited to the identity of the accused but is also relevant and admissible on the distinct issue of whether a crime was committed at all." 574 N.E.2d at 995.

In Vilt, the complainant testified that when she went to a Job Service Office, she was approached by the defendant, who advised her of a job opportunity at the local Holiday Inn. She accepted the defendant's offer of a ride to the Inn and entered his truck. The defendant drove her to a rural area where he saped her. The defendant testified that he and the complainant had engaged in consensual sex. The victim of another crime testified that she too was approached by the defendant at the Job Service Center, and voluntarily entered his truck when he told her of a job opportunity. As did the cornplainant, the other crime victim testified that the defendant drove her to a rural area, where he raped her. The Court held that the defendant's actions with the other crime victim "are strikingly similar with his actions with the victim in the instant case and hence such evidence was admissible to prove modus operandi, intent and lack of consent to the defendant's sexual acts." Id. at 586.

Thus, the Illinois courts recognize the distinction between cases where there is no similarity between the charged and uncharged sexual crimes and when there is a similarity which shows a common scheme or plan or modus operandi. This distinction has been recognized in Florida, hence the different results in Williams and Jackson, from Hodges and Helton.

The significance of the distinction between cases in which there is no evidence of a common scheme or plan and cases where there is, was recognized by the Court in State v.

Esposito, 192 Conn. 166, 471 N.W.2d 949 (1984). In that case, the Connecticut Supreme Court, when presented with the issue before this Court phrased the issue thusly: "[W]hether the prior offense was sufficiently similar to the offense charged to show a pattern of common design or plan and if so whether, on balance, the evidence should have been excluded." 471 A.2d at 952. In Esposito, the defendant in the charged and uncharged cases, while accompanied by others, encountered the victims, who he had met on one previous occasion. The other people left the defendant alone with the victims, who agreed to accompany him on a walk. Eventually the defendant got the victims to his apartment, where he sexually assaulted them. The defendant asserted that he had consensual sex with the victim in the charged case but denied that he had sex at all with the other crime victim.

Citing, inter alia, to this Court's decision in Williams, the Court began its analysis by stating that "...evidence of a common plan or scheme to engage in compelled sexual intercourse would tend to negate a defense of consent." Id. at 953. Referring to its prior decision in State v. Williams, 190 Conn. 104, 459 A.2d 510 (1983), the Court noted, however, that when the two crimes are very dissimilar, the probative value of the other crime evidence is minimal, at best, and substantially outweighed by its prejudicial effect. The Court distinguished its prior Williams decision because the similarities in the case before it established a modus operandi

or common plan or scheme to commit sexual assaults under circumstances, which were such as to make it easier for the defendant to claim later that there had been consent. Id. at 953. As such, the potential unfair prejudice from the evidence was more than outweighed by its probative force.

The issue before this Court was also extensively analyzed in Jones v. State, 580 So.2d 97 (Ala. Cr. App. 1991), in which the Alabama Appellate Court quoted the passage from the A.L.R. annotation previously quoted herein. Consistent with the annotation, the Court reasoned that "...the evidence of the collateral offense was admissible for the purpose of showing lack of consent or the use of force because it also falls within one of the other exceptions to the general rule of inadmissibility, in that this evidence also establishes a common scheme or plan on the part of the accused." 580 So.2d at 101.

In Jones, thc common scheme oF plan, as found by the Court, was to lure a "friend" to an isolated and wooded area of the county by the guise of telling her that they were going to his sister's house. The evidence that the defendant went about "abtaining sexual favors in a particular manner," Id. at 103, and pursuant to a specific plan, logically connected the two crimes and made the other crime evkdence admissible to show a lack of consent.

A case ***most*** similar to the instant case is State v. Willis, 370 N.W.2d 193 (S.D. 1985). In that case, the South Dakota Supreme Court held that the defendant's sexual assault of

two retarded women over whom he had control established a common plan or scheme, which was relevant to negate his consent defense.[9] As in this case, the jury was properly allowed to hear evidence tending to show that the defendant selected his victim, at least in part because *he* knew that he could easily raise a consent defense. This evidence has significant probative value in evaluating the consent defense and should not be kept from the jury's consideration.

The State has so far limited its discussion of other jurisdiction cases to cases such as this, in which the other crime evidence shows that the defendant followed a common scheme or plan whereby he would select his victim and arrange the circumstances so that he could most convincingly claim that he had engaged in consensual sex should the victim come forward. Since in these cases the probative value of the evidence of the common scheme or plan to the issue *of* consent *is* the greatest, the Courts have uniformly upheld its admissibility. The defendant has not cited any case and the State has not found any in which a court had held that other crime evidence establishing such a common scheme or plan should not be admitted. Indeed, the rnajority of cases have upheld the admissibility of other crime evidence to establish a common scheme or plan in a consent

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The three cases cited in support of the argument, which resulted in this holding are ~~Ell~~phant, Esposito, and this Court's decision in Williams.

case even when the plan is not designed to **set up** a consent defense.

This Court's decision in Williams is a prime example of such a case. In that *case,* the other crime evidence was found to be relevant to meet the anticipated defense of consent even though the common scheme or plan shown by such evidence did not **set** up a consent defense. The defendant's plan of hiding in his potential victim's car and thereby creating his opportunity to **commit** a sexual assault was relevant to the issue of consent because it had probative value tending to show that the charged crime, in which he followed such a plan, was not consensual. See also Jackson v. State, 538 So.2d **533** (Fla. 5th **DCA** 1989), and Hodge v. *State,* 419 So.2d **346** (Fla. 2d **DCA** 1982). Consistent with the Florida case law, the courts in other states have generally upheld the admissibility of other crime evidence as relevant to the issue of consent if it has psobative value beyond showing propensity or bad character.

Many courts have **held** that a sufficient similarity between the charged and uncharged crime makes the latter of sufficient probative value to warrant its admission in a sexual battery prosecution, in which consent is the issue. Taylor v. State, *195* Ga. **App. 634, 394** S.E.2d *597* ***(1990*** ; ***State*** v. DeBaere, 356 N.W.2d 301 (Minn. 1984); Evans v. State, 655 P.2d 1214 (Wyo. 1982); Rubio v. State, 607 S.W.2d 498 **(Tex.** Crim. App. 1980) (en banc); Wiggins v. State, 778 S.W.2d 877 (Tex. **App.** Dallas 1989); People v. Burgin, 74 Ill. **App. 3d 58,** *29* Ill.

Dec. 694, 392 N.E.2d 251 (1979); Williams v. State, 603 P.2d 694 (Nev. 1979). As these cases recognize, the similarities between a charged and uncharged sexual crime do not have to be great to support a conclusion that the evidence of the uncharged crime has significant psobative value making it admissible on the issue of consent in the charged crime. See, e.g., Hunt, (crimes several years apart, victim, who lived with her small daughter, raped at knifepoint in her home); DeBaere, (five other crimes committed by the defendant over a two-year period showing a pattern of similar aggressive sexual behavior against women in the community); Evans, (victims known by defendants and were threatened with death, and crimes occurred in private home when other people present and in the same town); Williams, (victims met defendant at a job interview and coerced to submit to intercourse by his demonstration of karate).

The similarities in this case are much greater than in any of these cases. The most telling are: (1) The victims, black women in their late twenties of similar body-types, were alone when approached by the defendant. (T. 653, 805, 1003.) (2) The crimes occurred in the late evening or very early morning within five months of each other in the same general part of town. (T. 654-656, 818, 845, 1003, 1004.) (3) When the defendant approached al1 three victims, he was wearing a uniform-type shirt. (T. 661, 809, 1005.) (4) The defendant began the encounter with the victims by talking to them about smoking crack cocaine. (T. 664, 810, 813, 1006.) (5) The

defendant attacked each victim by choking them by wrapping his arm around their neck. (T. 667, 668, **819,** 820, 1011, 1012.) (6) The defendant tightened his choke-hold so the victims could not scream and he lifted them off the ground. (T. 669, 670, 820, 821, 1012, 1013.) (7) The defendant then pulled and dragged each victim to the most secluded area possible. (T. 673, 674, 821, 1012, 1013.) (8) **The** defendant put the victims on the ground and pulled down their clothing from below the waist. (T. 674-678, 823, 1015, 1019.) (9) With C and L ,[10] the defendant did not have an erection so he mascurbated while tightening his grip around their necks. (T. 678, 679, 1016, 1017.) (10 The defendant got an erection, penetrated **the vagina of** C and L and ejaculated. (T. 679, 680, 1017.) (11) From the moment he initially choked them until he was able to penetrate, the defendant continuously choked C and L (T. 671, 672, 674, 678-680, 1013-1017.) (12) The defendant stole cocaine from C and L . (T. 676, 1018.) (13) The defendant told C and L that he would kill them if they told what happened, and in all three criminal episodes he walked away from the crime scene. (T. 680, 681, 841, 842, 1018, 1019.)

As previously discussed, the similarities in the defendant's conduct even before the actual sexual battery are sufficient to establish a common scheme or plan. The overall

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[10] E lost conciousness when the defendant choked her and does not know what happened to her until **she** was **rescued** and the defendant had waiked away. (T. 821, 822.)

similarities establish a pattern of conduct which is surely relevant to rebut the defendant's claim of consensual sex.

Of the cases previously cited, the one with the most sirnilarities is People v. Burqin, 74 Ill. App. 3d 58, 29 Ill. Dec. 694, 392 N.E.2d 251 (1979), but even in that case there were less than in this case. In Burqin, the Court summarized the pertinent similarities thusly:

> Both victims were students at Northwestern University. Both were allegedly raped on campus while walking in an area south of the library. The attacks occurred within a few blocks of each other and within 2 weeks; both on Saturday evenings when there were few students in the vicinity. In both incidents the defendant approached the victims while riding a bicycle. He initiated both conversations with a vulgar remark. In neither instance was a weapon used, but in both cases the victim was told if she cooperated she would not get hurt. Each of the women was dragged by the arm to a place which was dark and below grade. The length of the attack was similar and in neither case was the victim subjected to any violent or sexual abuse, other than the rape. After the act was performed the defendant left immediately on his bicycle.
>
> 392 N.E.2d at 259

The Court held that this evidence "...is extremely probative and strongly relevant to prove guilt." Id. at 259.

Many of the cases allowing for similar other crime evidence in a consent case do so because the evidence shows that the defendant intended to engage in nonconsensual sex. Rubio v. State, 607 S.W.2d 498 (Tex. App. Dallas 1989), is such a case.

In Rubio, the prosecutrix testified that while she was driving her car, the defendant drove up and started honking so she pulled off the road. The defendant approached her and told her she had a flat tire. When the prosecutrix exited her car, the defendant seized her and placed her in his truck. He then drove to a field and raped her. The defendant testified that he had consensual sexual intercourse with the prosecutrix.

The victim of an uncharged crime testified that she too pulled off the road when the defendant drove into the lane next to her; and that he approached hes and told her that she had a flat tire. When she rolled down the window, the defendant grabbed her and attempted to place her in his truck. A struggle ensued, in which the victim was beaten severely, shot three times, and a rape was attempted.

The Texas Court of Criminal Appeals supported its holding that the other crime evidence was properly admitted with the following reasoning:

> In order to be convicted of rape appellant must have engaged in the conduct intentionally and knowingly without the prosecutrix's consent. It is the lack of consent on the part of the prosecutrix that is the essence of the offense of rape. When the defensive theory of consent is raised, a defendant necessarily disputes his intent to do the act without the consent of prosecutrix. His intent is thereby placed in issue. Such intent cannot be inferred from the mere act of intercourse with the prosecutrix. The indictment herein alleges a lack of consent by means of force and threats.

> In the instant case, appellant admitted having sexual intercourse with the prosecutrix. He maintained that she consented to the act, thus rendering his actions noncriminal. His testimony raised a defensive theory of no force or threats. This evidence directly contradicted the testimony previously given by the prosecutrix, The testimony of D___ H___ concerning an attempted sexual offense committed upon her by appellant in the same manner, geographical location and within the approximate time frame as the offense charged was relevant to whether appellant intended to have sexual intercourse with the prosecutrix in the instant case without her consent by means of force and threats.
>
> 607 S.W.2d at 501

In this case, evidence of the similar crimes committed by the defendant on L and Beverly shows that when he approached women such as C . in the manner that he did he acted with the intent to have nonconsensual sex. Indeed, the evidence of such intent is most clearly shown by the testimony of L and B that the defendant committed a forcible sex crime on them even though he had been given the opportunity to have consensual *sex.* (T. 815, **816,** 1021, 1022.) Since a finding that the defendant intended to engage in nonconsensual sex when he approached C , would obviously have great probative value in evaluating C testimony that he attacked her consistent with such an intent, the other crime evidence was properly admitted.

As at least implicitly recognized in many of the aforecited cases, other crime evidence, under these

circumstances, has substantial probative value in corroborating the testimony of the prosecutrix. When two women, who are unknown to each other or the prosecutrix, testify that they were initially approached, attacked, and sexually assaulted in a manner virtually identical to what the prosecutrix said happened to her, the credibility of the prosecutrix is greatly strengthened. Consistent with its decision in Heuring v. State, 513 So.2d 122 (Fla. 1987), this Court should hold that the probative value of this evidence to corroborate the testimony of the prosecutrix makes it admissible.

In Heuring, the Court held that in a case involving the sexual battery of a child in the family context, evidence of a similar crime committed by the defendant on another child in the family is admissible to corroborate the victim's testimony. The Court reasoned that this rule was appropriate because identity is not in issue, and since the victim is typically the sole eyewitness, the credibility of the victim becomes the focal issue. Hence, the great psobative value of other similar crime evidence.

The State submits that in cases such as this, where idsntity is not in issue, and the focal issue is the victim's credibility, the probative value of corroborative other crime evidence is likewise great. Since the rationale for the Heuring holding exists equally in this case, the rule adopted therein for admitting such corroborative evidence should be applied in this case. Indeed, the one authority cited by the Heuring Court

to support its holding, Comment, Defining Standards for Determining the Admissibility of Evidence of Other *Sex* Offenses, 25 U.C.L.A. L.Rev. 261 (1977), supports such an application of the Heuring rule.

The Comment at pages 285-290 argues for the admissibiiity of similar other crime evidence in sex crime procecutions, where identity is not in issue, to corroborate the testimony of the victim, without any suggection or indication that such a rule of admissibility should be limited to cases where a child is the victim. Rather, the author of the Comment consistently refers to sex offenses where the victim is acquainted with the accused[11] and identity is therefore not in issue, leaving the victim's credibility as the paramount concern for the jury. Under such circumstances the author argues that the probative value of corroborative evidence of other crimes against similar victims justifies its admission.

This Court in Heuring agreed with the argument advanced in the Comment, with regard to child sexual abuse cases in the family context. The State submits that the probative value of other crime evidence is even greater in cases such as this when the three victims do not know each other. Thus, the possibility that the victims might have collaborated on their accusations or been similarly motivated to falsely accuse a defendant, which

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[11] Cynthia's encounter with the defendant before he attacked her was certainly long enough for her to be "acquainted" with him so that identity was not contested.

could occur when victims are members of the same family, does not arise in this case.

In his treatise on Florida Evidence, Professor Charles W. Ehrhardt writes: "The rationale [of Heuring] would also seem to be applicable whenever the defense in a sexual battery prosecution is that the victim fabricated the incident, rather than that the wrong person has been charged." Ehrhardt, Florida Evidence § 404.18 (1992 Edition). See also Pendleton v. State, 348 So.2d 1206 (Fla. 4th DCA 1977), holding that the trial court properly admitted similar other crime evidence in an adult sexual battery case to corrobarate the testimony given by the victim. Other state courts have upheld the admissibility of other crime evidence to corroborate the testimony of an adult woman, whose credibility had been put in issue by the defense of consent. State v. Plaster, 424 N.W.2d 226 (Iowa, 1988); State v. Fears, 69 Or. App. 606, 688 P.2d 88 (1984).

In this case, where the critical question was whether C had consented to have sex with the defendant, the evidence of othes similar crimes he committed on L and B was admissible because it (1) established a common scheme or plan to set up in advance the consent defense he raised at trial, which thus negated that defense, (2) showed that the defendant had the intent to commit nonconsensual sexual battery when he approached C , and (3) corroborated the testimony of C . In affirming the decisions of the trial court and Third District in this case, this Court should

eliminate the confusion in the law created by the decisions in Hodges and Helton and hold that those cases, while correctly finding that other crime evidence showing only propensity and bad character was improperly admitted, contain language which improperly suggests that other crime evidence can never be admitted in a sexual battery prosecution when consent is the defense.

In his brief on the merits, the defendant goes beyond the issue upon which this Court granted jurisdiction and raises other issues, which are not encompassed in the conflict questinn. These issues should not be addressed. Gould v. State, 577 So.2d 1302 (Fla. 1991); State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). Should the Court determine that these issues do warrant consideration they should be found to be without merit.

The defendant's feature argument is obviously untenable and should be rejected for the following reasons: (1) there was no contemporaneous feature objection when the other crime evidence was admitted. See Phillips v. State, 476 So.2d 194 (Fla. 1985); German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980); (2) the defendant has never specified what other crime evidence violated the feature rule; (3) the defendant challenged the credibility of L and B (T. 786-791, 828-834), thus inviting corroborative evidence in response, Medina v. State, 466 So.2d 1046 (Fla. 1985); Sias v. State, 416 So.2d 1213 (Fla. 3d DCA 1982); (4) the jury was appropriately

and repeatedly instructed on the proper use of the evidence. (T. 794, 804, 1103, 1104), Snowden v. State, 537 So.2d 1383 (Fla. 3d DCA 1989); and (5) the relatively small amount of collateral crime evidence was all relevant to the reasons why the other crime evidence was admissible, and did not constitute an attack on defendant's character. Williams v. State, 143 So.2d 484 (Fla. 1962); Ashley v. State, 265 So.2d 685 (Fla. 1972); Snowden v. State, supra.

The argument that the convictions should be reversed because of an alleged inadequate notice of the State's intent to rely on evidence of crimes committed against B is also without merit. On December 22, 1989, the State filed a Notice of Intent to Rely on Evidence of Crimes committed against B . (R. 92, 93.)[12] This notice was filed as soon as it became apparent that B could offer relevant similar crime evidence. (R. 179.) The defendant filed a Motion to Strike the notice claiming that it had been furnished to him on December 26, 1989, only seven days before the then scheduled trial date. At argument on the Motion to Strike, the trial court, after ascertaining that there had been several defense continuances, continued the trial, which eventually commenced on April 23, 1990. (T. 51, 1141-1144.)

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[12] A prior notice regarding the crimes committed against L was filed on August 11, 1989. (R. 36.) The sufficiency of the notice regarding L has never been challenged.

On April 2, 1990, the defendant argued against the admissibility of the collateral crime evidence including that which would come from B . (T. 1-37.) At no point during this argument or the trial did the defendant claim that he was not prepared. Since the defendant was obviously not prejudiced by the notice which he received almost four months before trial actually commenced, the notice was timely. See Garcia v. State, 521 So.2d 191 (Fla. 1st DCA 1988).

Contrary to the defendant's claim that the limiting of the defendant's cross-examinaticn of C , L and B constituted reversible error, the State submits that the irrelevant evidence of their sexual activities and drug use was properly excluded.

In accordance with Section 794.022, evidence of a victim's consensual sexual activity with a person other than the defendant is not admissible to support a consent defense unless "...such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to conduct or behavior in the case that it is relevant to the issue of consent." In Hodges v. State, 386 So.2d 888, 889 (Fla. 1st DCA 1980), the Court stated that under this provision, the test for admissibility of evidence of a victim's prior consensual sexual activity "...is much Like that for admission of other crime evidence under Williams v. State, 110 So.2d 654 (Fla. 1959), and its progeny."

In Kaplan v. State, 451 So.2d 1386 (Fla. 4th DCA 1984), the Court held that for evidence to be admissible under the pertinent portion of Section 794.022, the "pattern" must consist of repetitive or frequent conduct or behavior extremely similar to the defendant's version of the encounter. Although, one of the proffered incidents remotely resembled the defendant's account, the Kaplan court held that one episode cannot ectablish a pattern of conduct or behavior. See also Winters v. State, 425 So.2d 203, 204 (Fla. 5th DCA 1983). "...few isolated instances presented did not present a pattern of conduct or behavior" and McElveen v. State, 415 So.2d 746, 748 (Fla. 1st DCA 1982) "...three specific instances of sexual activity...is not so repetitive or frequent as to establish a pattern of behavior." See also Young v. State, 562 So.2d 370 (Fla. 3d DCA 1990).

In accordance with Section 794,022 and the aforecited case laws, the evidence that C had exchanged sex for drugs or money was properly excluded. The proffered evidence did not establish a frequent or repetitive pattern of extremely similar behavior. There is no indication from the proffer that these other incidents were at all like the defendant's version of what happened between him and C . For example, there is no suggestion that on these other occasions C had sex with someone she had just met, or that she had done so outside, or that she had only unprotected vaginal intercourse, or that she had not initiated the encounter, or that the direct exchanges of

sex for drugs occurred anytime close to the crimes, or that the exchange was for crack cocaine, or that the male partner in anyway resembled the defendant or was associated with him. Clearly, the trial court properly excluded evidence of unrelated, nonspecific dissimilar sexual activities of C with other persons.

At trial, evidence was admitted that C , I and B had smoked crack cocaine on the night they were attacked by the defendant. (T. 654-657, 817 1004.) The trial court, relying on Edwards v. State, 548 So.2d 656 (Fla. 1989), ruled that drug use by the victims at other times would be inadmissible unless there was other relevant evidence that the drug use affected the witness's ability to observe, remember and recount. Defense counsel proffered that C , L and A were drug users immediately before and after their encounters with the defendant, but did not claim that there was other relevant evidence to show that such use affected their ability to observe, remember and recount. (T. 771, 990-993.) The trial court correctly excluded such evidence based upon Edwards and its progeny. See Johnson v. State, 565 So.2d 879 (Fla. 5th DCA 1990), evidence that it was not uncommon for the sexual battery victim to use cocaine during the period of the sexual battery properly excluded; and Richardson v. State, 561 So.2d 18 (Fla. 5th DCA 1990).

The defendant's argument that he should have been allowed to introduce evidence that L was a prostitute is

clearly wrong. L testified that she initially agreed to have sex with the defendant in exchange for drugs and money, (T. 1021), and her alleged prostitution would thus have been irrelevant to any issue at trial even if the required pattern of similar behavior had been proffered. The claim that evidence of Lynette's prostitution was admissible to impeach her testimony that she was unemployed is untenable since there was no inconcistency, and, at any rate, whether or not L was employed is a collateral matter. *See* Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981).

In sum, the State submits that evidence that C or L had on unspecified times exchanged sex for drugs oF money was properly excluded since it did not establish a pattern of similar conduct or behavior from which it could be concluded that the defendant's claim as to what happened was probable. Evidence of drug use by C , L and B unrelated to this case was properly excluded since in the absence of other evidence, there is no basis for concluding that such drug use affected their testimony.

At any rate, even if the excluded evidence was relevant, its exclusion would have been harmless given the overwhelming weight of the avideiice against the defendant, which would not have Geen diminished. See Youna v. State, 562 So.2d 370 (Fla. 3d DCA 1990). C testimony that she did not engage in consensual sex with the defenàant was strongly corroborated by the testimony of L and B who could

not have collaborated on their accusations with each other or Cynthia, (T. 699, 700, 784, 828), that the defendant before and during his crimes acted in virtually the identical manner as he did with Cynthia. The consent defense, which required that the jury believe that C would have left her panties at the scene, flagged down police officers, and, while hysterical, tell them that she had purchased crack cocaine and falsely accuse the defendant, and call for her mother to come to the scene and comfort her, tell her mother she was raped, and then be examined at the Rape Treatment Center, all because the defendant did not give her the crack cocaine that he had prornised, was certainly completely undermined by the other crime evidence showing his plan to set up this defense and his intent to engage in nonconsensual sex. Any alleged error in the exclusion of alleged impeachment evidence was therefore harmless.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State submits that this Court should approve the decisions of the trial court and Third District Court of Appeal and hold that the other crime evidence was properly admitted and affirm the defendant's convictions and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy *of* the above and foregoing was forwarded to May L. Cain, 16300 N.E. 19th Avenue, Suite 224, North Miami Beach, Florida 33162, on this the 15th day of January, 1993.

Paul Mendelson

PAUL MENDELSON
Assistant State Attorney