IN THE SUPREME COURT OF FLORIDA

THOMAS F. WILSON, JR.,

Petitianer,

vs. Case No. 82,187

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, Thomas Wilson, will be referred to hereinafter as "the Defendant" or by surname. The Respondent will be referred to hereinafter as "the State."

References to the record on appeal will be made by the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's statement of the case and facts.

SUMMARY OF THE ARGUMENT

ISSUE I (Certified Question): This Court should decline to accept jurisdiction to answer the certified question. The question is not one of "great public importance" and the law is settled.

On the merits, however, the certified question should be answered in the negative. The trial court is not required to instruct on any attempt to commit the charged offense unless there is some evidence to support the instruction. The question assumes that there was no evidence of attempt presented by the State and that the defendant simply denied the charged offenses. Under these facts, the rules of crimina1 procedure are clear that no attempt instruction is required.

The defendant would have this Court reevaluate the evidence to determine whether there was any evidence of attempt. This Court should refrain from reevaluating the evidence because the district court is a court of final jurisdiction and carefully evaluated the evidence. However, the defendant's arguments on this issue are frivolous. The district court concluded that there was "absolutely no evidence of attempt," and the defendant has not pointed out any facts which would change that conclusion.

Finally, Rule 3.510, Fla. R. Crim. P., does not abrogate the common law jury pardoning power. The jury can always pardon the defendant by returning a verdict of not guilty. The defendant cites no authority for the proposition that the jury has a "right" to return a verdict for a permissible, lesser included offense.

ISSUE 11: This Court should refrain from addressing this issue because it is ancillary to the certified question and the First District Court of Appeal addressed the issue on the merits. However, the trial court did not abuse its discretion in denying the defendant's motion to sever, as the charges of sexual battery and lewd and lascivious assault were properly joined.

The specific offenses were "connected acts" under Rule 3.150(a), Fla. R. Crim. P. The sexual abuse was part of a continuous episode, was geographically associated, was all of a similar nature, and was committed in a similar manner. The trial court made detailed findings with respect to each of the abave

considerations. Hence, the defendant has not shown an abuse of the trial court's sound discretion.

ISSUE 111: This Court should refrain from addressing this issue because it is ancillary to the certified question and the First District Court of Appeal addressed the issue on the merits. The trial court did not abuse its discretion by declining to inform the jury that the prosecutor had nol prossed count seven prior to trial. The nol pros was not relevant to any material fact at issue in the remaining seven counts, nor was it "reverse Williams rule evidence."

ISSUE IV: This Court should refrain from addressing this issue because it is ancillary to the certified question and the First District Court of Appeal addressed the issue on the merits. The defendant asserts that the trial court erred by denying his motions for directed verdict. Defendant failed to preserve most of these issues for appellate review, and waived another. The trial court did not err in denying defendant's motion for judgment of acquittal because the State introduced competent evidence of the crime of sexual battery upon L

ARGUMENT

ISSUE I

WHERE THE VICTIMS TESTIFY THAT THE DEFENDANT COMMITTED THE CHARGED OFFENSES OF CAPITAL SEXUAL BATTERY OF A VICTIM UNDER 12 AND LEWD AND LASCIVIOUS ASSAULT, AND THE DEFENDANT TOTALLY DENIES COMMISSION OF *ANY* OFFENSE, IS A TRIAL COURT REQUIRED TO INSTRUCT A JURY ON ATTEMPT IF REQUESTED TO DO SO BY THE DEFENDANT? (Certified Question).

This Court should decline to exercise its discretion to answer the certified question. The case law, rules of criminal procedure, applicable statutes, and standard jury instructions all clearly provide that where there is no evidence of an attempt, the instruction should not be given. This being the case, and the First District Court of Appeal having made a thorough analysis of the law in its opinion, this Court could have little to add in a written opinion. The question is not of sufficient public importance to have been certified. See, e.g., Everard v. State, 559 So. 2d 427 (Fla. 4th DCA 1990)("Nothing in the record indicates that the interpretation of the applicable statute involves such complex or difficult issues, or that the case has such widespread ramifications, so as to make the case of "great public importance."). Therefore, this Court should decline to exercise its jurisdiction.

A. A Trial Court is Not Required to Instruct on the Attempt to Commit a Crime, Even When Requested to do so by the Defendant, Unless There is Some Evidence To Support the Charge.

At the charge conference, defense counsel requested a jury instruction on attempted sexual battery and attempted lewd and lascivious assault. (R 474-6). The trial court refused to give an attempt instruction based on its understanding (1) that "attempt" is listed in the Standard Jury Instructions in Criminal Cases as a Category 2 lesser included offense for both charged offenses, and (2) that the decision whether to give an "attempt" instruction is discretionary unless the evidence supports attempt. (R 474-476). The First District Court of Appeal held, after a thorough analysis of the applicable law and the record, that there was "absolutely no evidence of the lesser offense of attempt," and that the trial court did not err in refusing to instruct on attempt. Wilson v. State, 18 Fla. L. Weekly D1573 (Fla. 1st DCA July 7, 1993).

The defendant argues that the certified question should be answered in the affirmative because: (1) attempted sexual battery is a necessarily lesser included offense of sexual battery; (2) that there was evidence of an attempt, which the trial court and the First District Court of Appeal "ignored"; and (3) even if there was no evidence to support an attempt instruction, not to give the instruction violated the defendant's "right" to a jury pardon. (Petitioner's Brief at 13, 19). The defendant's arguments lack merit and the certified question should be answered in the negative.

First, attempted sexual battery is **not** a necessarily lesser included offense of sexual battery. The defendant relies on the case of Firkey v. State, 557 So. 2d 582 (Fla. 4th DCA 1989), rev. denied, 574 So. 2d 140 (Fla. 1990), for the proposition that attempted sexual battery is a necessarily lesser included offense of sexual battery. On the contrary, Firkey considered lesser included offenses in the context of the sufficiency of the evidence to support a conviction, not in the context of jury instructions. Id. at 586. Under the facts of Firkey, the district court concluded that the evidence adduced was not legally sufficient to support the defendant's conviction for sexual battery, but that the same evidence did support a conviction for attempted sexual battery. Id. Therefore, the district court directed the trial court to enter judgment for the lesser included offense of attempted sexual battery pursuant to section 924.34, Florida Statutes. Id. The district court did not cite any authority for its conclusion that "[a]ttempted sexual battery on a child under the age of eleven is a lesser necessarily included offense of sexual battery on a child under the age of eleven." Id. Subsequently, this Court held that section 924.34, Florida Statutes, authorizing an appellate court to direct entry of a conviction of lesser offense necessarily included in the offense charged, when the evidence was legally insufficient to support the charged offense, did not apply to permit conviction of permissive (category 2), rather than necessarily (category 1), included lesser offenses. Gould v. State, 577 So. 2d 1302 (Fla. 1991). All attempts are permissive

(category 2) lesser offenses, Thus, Firkey is no longer good law as to the particular holding that the district court could direct judgment of the attempt to commit the charged offense. The defendant's reliance on Firkey for this proposition is misplaced.

This Court amended the standard jury instructions in In Re Standard Jury Instructions in Criminal Cases, 543 So. 2d 1205 (Fla. 1989). Prior to the 1989 amendment, note four of the "Comment on Schedule of Lesser Included Offenses" provided as follows:

> Except as stated above, attempts to commit crimes generally are included even though in many instances it would be very unlikely that the facts would demonstrate an attempt to commit that particular crime.

As amended, note four now reads as follows:

> Except as stated above, attempts to commit crimes generally are included unless the evidence conclusively shows that the charged crime was completed. In such case, attempt should not be instructed.

543 So. 2d at 1233. (emphasis added).

Likewise, Florida Rule of Criminal Procedure 3.510 provides as follows:

> On an indictment or information on which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> (a) An attempt to commit the offense if such attempt is an offense and is supported by the evidence. The judge shall not instruct the jury if there is no evidence to support the attempt and the only evidence proves a completed offense.

The case law in the district courts is also clear that Rule 3.510, Fla. R. Crim. P., precludes an instruction when there is only evidence of the completed offense. See Pride v. State, 511 So. 2d 1068 (Fla. 1st DCA 1987); Bain v. State, 526 So. 2d 170 (Fla. 1st DCA 1988); Henry v. State, 445 So. 2d 707 (Fla. 4th DCA 1984)("[i]t appears the rule [Fla. R. Crim. P. 3.510] prohibits an attempt instsuction on a criminal episode that has reached fruition."), An instruction on a category 2 permissible lesser included offense must be given only where it is alleged and proven at trial. See, e.g., Johnson v. State, 572 So. 2d 957, 959 (Fla. 1st DCA 1990), approved, 601 So. 2d 219 (Fla. 1992)(existence of Category 2 lesser offense is discoverable only on close examination of the allegations and proof connected with the charge).

B. Absolutely No Evidence Was Presented From Which the Jury Could Have Concluded That Either Attempted Sexual Battery or Attempted Lewd and Lascivious Assault Occurred.

The First District Court of Appeal thoroughly reviewed the evidence "to determine whether it conclusively and irrefutably shows the charged crimes were committed completely rather than merely attempted." Wilson, 18 Fla. L. Weekly at D1574-5 (citing Wilcott v. State, 509 So. 2d 261, 262 (Fla. 1987)). As stated, the certified question presumes that the evidence was only of a completed offense and that the defendant totally denied the commission of any offense. Since the First District reviewed the evidence and concluded that "there is absolutely no evidence of the lesser offense of attempt," this Court should refrain from

undertaking the same review of the evidence. In recognition of the district court's function as a court of final jurisdiction, and also that this Court's jurisdiction rests solely upon the certified question posed, this Court must assume that these was only evidence of the completed offenses. The defendant's assertions to the contrary are not supported by the record, especially in light of his complete denial of the offenses in the trial court and the First District's thosough review of the evidence.

The fact that the defendant testified, but totally denied commission of the crimes charged, does not warrant an attempt instruction. This fact is the only fact which distinguishes Pride, 511 So. 2d at 1070, from the present case. As the district court stated, this is a distinction without a difference. Wilson, 18 Fla. L. Weekly at D1576. This case presented just two factual altesnatives for the jury's sesolution: either (1) the defendant committed the completed crimes as charged, or (2) the defendant neither committed nor even attempted any of the crimes charged. The First District's thorough review of the evidence reveals, however, that the trial court did not abuse its discretion in ruling that there was no evidence to support an attempt instruction. The defendant's arguments -- that there was evidence of an attempt, and that the trial court and First District "ignored" this evidence -- are frivolous.

First, as to the child S.K., Count I charged sexual battery by oral, anal or vaginal penetration by, or union with, the defendant's penis. Wilson, 18 Fla. L. Weekly at D1574. Wilson took S.K. to Turner's Landing, a popular swimming place, on his motorcycle. Id. He "forced her back on the motorcycle," id., pulled down S.K.'s shorts, unzipped his own pants, and then "stuck his bad spot" on hers. Id. Wilson "rubbed up and down" for about five minutes. Id. Afterwards, the area down on her "bad spot" was wet. Id. S.K. was subsequently recalled to testify and demonstrated with dolls what Wilson had done to her: the male doll's penis touched the female doll's vaginal area. She referred to the male doll's penis and the female doll's vagina as a "bad spot." Defense counsel asked whether Wilson put his penis inside of her, to which S.K. responded "I don't know." Id.

The defendant argues that:

> [S.K.'s] testimony that [the defendant] placed his 'bad spot' on hers, but not inside hers, was ambiguous as to union, and failed to prove penetration. Notwithstanding the First District's characterization to the contrary, this evidence was evidence of attempt.

(Petitioner'sBrief at 19). In effect, the defendant is arguing that because the defendant "attempted" penetration but achieved only union between his penis and S.K.'s vagina, an attempt instruction should be given. This argument fails to recognize the obvious -- that a union between the defendant's penis and S.K.'s vagina constituted the completed crime of sexual battery

upon a child. §794.011(1)(h), Fla. Stats. For an attempt instruction to be required, there would have to be some evidence that the defendant attempted a union, but either failed in that attempt or was prevented from achieving a union. Section 794.011(1)(h), Florida Statutes, includes "union with" the vagina in order to preclude the specific defense that the defendant only intended a union between his penis and the vagina and, therefore, is guilty of neither sexual battery nor attempted sexual battery.

Count II alleged that the defendant "did unlawfully handle, fondle or make an assault" on S.K. "in a lewd, lascivious or indecent manner." Id. The defendant rubbed himself against S.K.'s hip when she bent over to pick something up. Id. The defendant argues that an attempt instruction should have been given because he rubbed S.K. on top of her clothes on her hip, a place she did not consider a "bad spot." However, section 800.04(1), Florida Statutes, states that the lewd, lascivious or indecent handling, fondling or assault must be committed "without committing the crime of sexual battery," which is a separate crime. S800.04, Fla. Stats. If there had been an unclothed touching in the vagina1 area, the defendant would have committed a second count of sexual battery. However, the clothed touching between the defendant's penis and the child's hip could only constitute either (1) an attempted sexual battery on the child or (2) the completed crime of a lewd and lascivious act upon a child. The defendant was not charged with attempted sexual battery, and there were no indicia of such an intent. Thus, no interpretation of the evidence lends itself to an attempted lewd and lascivious act upon a child.

Finally, as to Count III, the sexual battery upon L.K., the defendant was charged with oral, and or vagina1 penetration, or union with, the defendant's penis, or "by anal or vaginal penetration with an object, to wit: a pen or a spoon, or [the defendant's] finger." Id. at D1575. The defendant argues that when L.K. testified that the defendant placed a plastic fork on her "back part," there was some evidence of an attempt. This argument fails to recognize that Count III charged the defendant with multiple acts of sexual battery in the alternative, which could have been separately charged. The defendant kissed L.K. on her "privates" and stuck an ink pen in her "front privates." These acts constitute the completed crime of sexual battery upon a child. The fact that the victim stated that she was "confused" on cross-examination simply went to the credibility of the witness and the weight of the evidence. Likewise, the fact that there was no physical evidence of penetration went to the weight of the evidence. Id. at D1575. None of this evidence indicated that the defendant attempted a sexual battery, but failed or was prevented. The act of placing a plastic fork on L.K.'s "back part," as opposed to in her "back part," indicates that the defendant committed a lewd assault on a child. This act did not constitute a prima facie case of sexual battery or attempted sexual battery, because there was no evidence of an intent to penetrate the anus, which either failed or was prevented.

Thus, there was absolutely no evidence of an "attempt" to commit the crimes charged under Counts I, II or III.

C. Florida Rule of Criminal Procedure 3.510 Does Not Abrogate the Jury's Pardoning Power.

The jury can always pardon the defendant by returning a verdict of not guilty. The defendant argues, however, that he was entitled to be pardoned down from the charged offense to an attempt, and that the failure to instruct on this lesser offense violated his "right" to jury pardon. (Petitioner's Brief at 19). This argument was rejected by the First District Court of Appeal and is without merit.

In Wimberly v. State, 498 So. 2d 929, 932 (Fla. 1986), this Court stated that "[t]he requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is bottomed upon a recognition of the jury's right to exercise its 'pardon power.'" (citing State v. Baker, 456 So. 2d 419, 422 (Fla. 1984)(emphasis supplied). However, this Court also recognized that Rule 3.510, Fla. R. Crim. P., "broadened the trial judge's authority to determine the appropriateness of instructing on attempts and degrees of offenses." Id. at 931 (emphasis added). Thus, the "pardon power" at most extends to necessarily lesser included offenses (category 1), but not to permissible lesser included offenses (category 2), which are totally unsupported by the evidence. The adoption of Rule 3.510, Fla. R. Crim. P., did not abrogate the common law right of a jury pardon because the old rule, which required instruction on attempt in all cases, was required by statute. Wimberly, 498 So. 2d at 929 (citing Brown v. State, 206 So. 2d 377 (Fla. 1968)). Since the statute which the Bsown decision construed has been

repealed, the only "right" which was abrogated was purely statutary. Cf. Jones v. State, 492 So. 2d 1124, 1126 (Fla. 3d DCA), rev. denied, 501 So. 2d 1282 (Fla. 1986)("No authority is cited or is to be found in the case law, or in the notes to the rule, that the rule [3.510, Fla. R. Crim. P.] was intended to overturn the substantive law of jury pardon."). The First District Court af Appeal's decision in Gillespie v. State, 440 So. 2d 8 (Fla. 1st DCA 1983), rev. denied, 475 So. 2d 222 (Fla. 1985), is consistent with this Court's decision in Wimberly. In Gillespie, the district court stated:

> Juries are finders of fact. They should and do have a wide latitude in finding the facts. Even if the evidence is overwhelming that the defend[a]nt is guilty of the crime with which he is charged, the court must give a charge on a lesser included offense as to which there is any evidence. However, the jury has no right to exercise its "pardon power" if there is no evidence of attempt or of a lesser included offense and no instruction on attempt or lesser included offense should be given in such a situation because it would merely confuse the jury.

440 So. 2d at 10. Hence, Rule 3.510, Fla. R. Crim. P., does not abrogate the jury's "pardon power" because the jury has no right to pardon the defendant down to a permissibly lesser included offense which is not supported by the evidence.

The defendant furthes argues that to answer the certified question in the negative would "deny the defendant the right ta present inconsistent defenses." The defendant cites no authority for this proposition and did not present this argument to the district court. Accordingly, the defendant was not properly

preserved or presented this issue for appellate review. The State notes, however, that a complete denial of the charged offenses and the defense that he merely attempted the charged offenses are mutually exclusive.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR SEVERANCE (Restated).

A. Propriety of Discretionary Review

This issue was presented to the First District Court of Appeal and rejected, By presenting this ancillary issue, the defendant fails to recognize the district court's function as a court of final jurisdiction; only Issue I in the defendant's Brief on the Merits relates to the certified question. Although this Court has the authority to reach the ancillary issues presented by the defendant, see Trushin v. State, 425 So. 2d 1130 (Fla. 1982), this Court should refrain from exercising that authority and address only the certified question. This issue "lies beyond the scope of the certified question." Stephens v. State, 572 So. 2d 1387 (Fla. 1991). The opinion below simply states that "we find no reversible error," without further discussion; it is, in effect, a per curiam affirmance as to this issue. Hence, this issue would not, standing alone, afford the defendant a basis for review by this Court. Consequently, this Court should decline to address this issue on the merits.

B. Response on the Merits

The district court found no reversible error on the issue of whether the trial court abused its discretion in denying the defendant's motion for severance. Wilson, 18 Fla. L. Weekly at D1573. The decision to grant a motion for severance is "largely

a matter of discretion with a trial court, and the burden is on the movant to demonstrate an abuse of discretion." Johnson v. State, 438 So. 2d 774, 778 (Fla. 1983)(citations omitted). The defendant has not met this high burden and this Court should affirm. The abuse of discretion standard of review applies to cases involving the consolidation or severance of charges because "sometimes it is difficult to decide whether two separate crimes are related." Crossley v. State, 596 So. 2d 447 (Fla. 1992). In a close, difficult case, the trial court carefully considered the evidence relevant to the issue in making its ruling. The trial court did not abuse its sound discretion and this Court should affirm.

The evidence presented before the trial court in the instant case established that the defendant moved into the neighborhood where which the victims' family lived in April, 1990. (R 270). He lived in a small camper-trailer parked across the street from the victims' house (R 270, 282). The defendant became quite friendly with the victims' family; he visited them, ate meals with them, played with the children,[1] and bought them numerous gifts for the children (R 270, 272, 282, 292, 444). The children often also visited the defendant in his trailer, and on occasion even spent the night with him (R 270-271, 457-458). The defendant took the children on trips, both in and out of town (R 271, 453, 455, 456-457). The family and defendant often swam

[1] There were six children: four girls under 12 years of age, one boy under 12, and one girl over 12 with her own child (T 268-269, 276).

together at Turner's Landing, a local swimming hole (R 271). The defendant testified that most of the children called him "Uncle Tom." (R 449).

The victims in this case were four of the sisters in the family, all under 12 years of age. The charged offenses were sexual battery upon a child 12 years of age, and lewd and lascivious assault. All but one of the offenses was committed in defendant's trailer while he was alone with the victim. L[redacted] testified that defendant kissed her private part (R 369-370) and placed an ink pen inside the front part of her privates when they were alone in his trailer (R 371-372, 395). At that time, he also placed a fork on (but not in) her back privates (R 374, 395). A[redacted] testified that defendant placed an ink pen inside her back privates when she spent the night in his trailer with him alone (R 359-360). At that time, he also kissed and touched with his finger her private parts (R 341-342). S[redacted] testified that defendant touched her private parts with his hand while they were (apparently alone) in his trailer (R 404-406). S[redacted] testified that defendant rubbed her hip, despite her two requests to stop, while they were alone in his trailer (R 302-304, 323). The only incident which did nat occur in defendant's trailer took place at the swimming hole, after defendant had taken S[redacted] to a store where he purchased a present for her brother; there defendant rubbed his "bad spot" against hers for five minutes, after which she felt wet (R 309-311, 424-425). Additionally, each of the victims testified that defendant told them not tell anyone about the incidents; A[redacted], L[redacted] and S[redacted] each

specifically stated that the defendant threatened to hurt them with a belt, spanking, or whipping, respectively (R 304, 345, 368, 406). The criminal sex acts, which began shortly after defendant moved in across the street, ceased upon his arrest.[2]

The trial court denied defendant's motion for severance, finding that the offenses were properly joined because the acts involved two or more connected acts, and that:

> the acts were connected in an episodic sense because they were committed within two or three month period when the Defendant lived across the street from the victims, who are sisters; that the geographical location of the acts centered around the area of the Defendant's home or at a public swimming place near the home; that all of the acts are of the same nature because all are sex acts and all of the victims are girls under the age of 12; and that the manner of committing the acts was the same because the Defendant established a friendly relationship with the family, gave the children gifts, got a child alone and committed a sex act, and then told the child not to tell. The *acts* ceased when the parents learned from the children, all at the same time, that the sex acts were occurring, and the parents then went to the police.

(R 177-178).

The defendant argues that this ruling was an abuse of the trial court's sound discretion because: (1) the charges against the defendant were not sufficiently "connected" under Rule 3.152, Fla. R. Crim. P.; (2) the joinder of the charges denied the

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[2] The information charged that the offenses occurred between May 1, 1990, and July 9, 1990. (R 12).

defendant a fair trial under Rule 3.152(a)(2)(A), Fla. R. Crim. P. These arguments are without merit.

Rule 3.150(a), Fla. R. Crim. P., which deals with joindes of offenses, provides that:

> [t]wo or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based OR the same act or transaction or on **two** or more connected acts or transactions. (Emphasis added).

Rule 3.152, Fla. R. Crim. P., provides in pertinent part:

> (a) Severance of Offenses
>
> (1) In case two or more offenses are improperly charged in a single indictment or information, the defendant shall have a right to a severance of the charges upon timely motion thereof.

See also Macklin v. State, 395 So. 2d **1219, 1220 n.2 (Fla. 3d DCA** 1981)("[I]f offenses cannot be joined **[under** Rule **3.150],** they cannot **be** consolidated **[under** Rule 3.151]; and if they cannot be consolidated, they cannot be joined.").

In order to be "connected" for **purposes** of **Rule 3.150,** it is well-settled that the acts joined for trial must be considered "in an episodic sense[.] [T]he rules **do** not warrant joinder or consolidation of criminal charges based on similar but separate episodes separated in time, which **are 'connected'** only by similar circumstances and the accused's alleged guilt in both or a11 instances." Garcia v. State, **568 So.** 2d **896 (Fla.** 1990)(quoting Paul v. State, 365 **So. 2d 1063, 1065-55 (Fla. 1st DCA**

1979)(Smith, J., dissenting)). This Court has explained that joinder of "connected acts or transactions" requires consideration of "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." Bundy v. State, 455 So. 2d 330, 344-45 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986).

The trial court's ruling in the present case is consistent with this Court's holding in Garcia, Paul and Bundy. The trial court made specific findings with regard to each of the above considerations relevant to a determination of whether separate offenses can be joined. (R 177-178). The acts in this case were "cannected" as that term has been construed by this Court, for the reasons set forth in the trial court's ruling.

The crimes were connected in an episodic sense as they were committed within a two or three month period (R 12), and the acts were continuous during that time period. When the defendant moved in across the street, the sexual abuse began, and continued until the defendant was arrested. The acts of sexual abuse were geographically located around the defendant's home and at the swimming area near the home. (R 270, 271). All but one of the offenses -- the sexual battery of S.K. at the swimming area -- were committed in the defendant's trailer. The crimes were of the same "nature" -- they were all sex crimes committed on children under twelve yearc of age. Finally, the manner in which the crimes were committed was markedly similar as to each child.

The defendant established a friendly relationship with the family and the trust of the children's parents. He then got the child alone in his trailer and molested or sexually battered the child. He gave the child gifts and threatened them not to tell others. Hence, these offenses were much more closely connected than the crimes in Paul or Crossley.

Even if this Court finds that the denial of the motion for severance was errar, the error should be held harmless beyond a reasonable doubt. See Livingston v. State, 565 So. 2d 1288 (Fla. 1988)(Any error in consolidating of murder and grand theft charges with armed robbery and murder charges was harmless as defendant failed to demonstrate prejudice in light of overwhelming evidence of guilt). Furthermore, in this case, unlike Crossley, the evidence of other crimes would have been admissible under Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959), and Heuring v. State, 513 So. 2d 122 (Fla. 1987), quashed on other grounds, 513 So. 2d 122 (Fla. 1990); see also Bierer v. State, 582 So. 2d 1230 (Fla. 3d DCA 1991), rev. denied, 591 So. 2d 180 (Fla. 1991)(an inappropriate joinder of offenses is harmless error if evidence of the other crimes would be admissible pursuant to Heuring). Accordingly, this Court should affirm.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN NOT INFORMING THE JURY THAT THE PROSECUTOR NOL PROSSED COUNT SEVEN PRIOR TO TRIAL.

This issue was presented to the First District Court of Appeai and rejected. **(Issue** one in Petitioner's brief was issue three in the Appellant's initial brief below, and the remaining issues were numbered one, two and four, respectively.) By presenting these ancillary issues, the Petitioner fails to recognize the district court's function as a court of final jurisdiction. Only issue one in the Petitioner's Brief on the Merits relates to the certified question. Of course, this Court has the authority to reach all of the questions presented. See Tsushin v. State, 425 So. 2d **1130** (Fla. **1982).** However, this Court should refrain from using that authority and entertain only the certified question.

The prosecutor filed **a** notice of nolle prosequi as to Count Seven on June **13, 1991** (R **121);** the defendant's trial on the remaining seven counts was held June 26, **1991.** On appeal, the defendant contended that the trial court erred in refusing to inform the jury that the State had nol prossed Count Seven.[3] Defendant claims that the nol pros actually constituted "reverse

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[3] **In** the heading under this issue, defendant also claims that the trial court erred in not taking judicial notice of the dismissal of Count Seven. Obviously, the court did notice this fact -- the court knew there were originally eight counts charged, but that one had been nol prossed -- the question of whether or not to tell the jury about this fact was discussed on the record **(R 471-472, 481-482, 485).**

Williams rule evidence," and that the trial court's decision not to tell the jury of the existence was harmful error.

The fact that the prosecutor chose to nol psos one of the charges against the defendant prior to trial was not relevant to any material fact at issue in the remaining seven charges.[4] A prosecutor may choose to nol pros a charge for a number of different reasons; therefore, a nolle prosequi entered before the jury is sworn does not operate as an acquittal. 15 Fla. Jur. 2d Crim §846. Thus, the prosecutor's decision to nol pros Count Seven before trial did not prove that the defendant had been found innocent of Count Seven. Nar did the nol pros prove that the prosecutor had erroneously charged him with the other seven crimes, or that the evidence adduced at trial as to those other seven crimes was insufficient. Since the nol pros did not tend to prove or disprove any material fact at issue in the other seven counts, the trial court did not abuse its discretion by declining to tell the jury about something unrelated to the case at bar. See C. Ehrhardt, Florida Evidence, $401.1 at 96 (1992 ed.)("Whether the evidence has probative value is an issue for the discretion of the court."),

It is obvious from the record that defense counsel did not particularly care to argue the fact of the nol pros of Caunt Seven to the jury; rather, he wanted the trial court to explain

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[4] Indeed, informing the jury that defendant had been charged with an additional crime might have been prejudicial to him. The jury easily could have thought that the charge was dropped for a tacktical or other reason, not because defendant did not commit the crime.

to the jury why there were a total of seven counts, yet the verdict form identified Counts One through Six, and Eight.

> [COURT]: Orren [prosecutor], you have nol-prossed prior to beginning of this trial Count 7.
>
> [PROSECUTOR]: That's correct.
>
> [COURT]: I will just make that announcement.
>
> [DEFENSE COUNSEL]: You are going to announce what was nol-prossed?
>
> [PROSECUTOR]: No, sir, I don't believe that's correct. It is just not . . .
>
> [COURT]: 1 think because of the error I made the other day I think it would be appropriate and I think they need to know. What I'm saying is on that jury verdict form you have got verdicts for Counts 1 through 5 and you have a verdict for Count 8.
>
> [PROSECUTOR]: Yes. Tell them there is no Count 7.
>
> [DEFENSE COUNSEL]: That's why I want him to nol-pros publicly.

(R 481-482)(emphasis supplied). Defense counsel did not identify any other relevant reason for informing the jury about the nol prose (R 471-472, 483).[5] Thus, defendant's claim on appeal that the nol pros really was intended to be introduced as "reverse Williams rule evidence" is unfounded.

Even if defense counsel had attempted to introduce the nol pros for this purpose, it clearly did not qualify as "reverse

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[5] Defense counsel did remark that S had "originally said that [defendant] sexually battered her and the State determined that that was not true." However, as the charge was nol prossed prior to trial, that evidence was not part of the instant trial (R 482).

Williams rule evidence." This type of evidence is offered to show that a person othes than the defendant committed the chasged crime, and may be admitted "for exculpatory purposes if relevant." State v. Savino, 567 So. 2d 892, 893 (Fla. 1990). Here, the fact that the prosecutor determined that defendant had not committed sexual battery on S ., and therefore nol prossed that count, did not exculpate defendant in the seven other crimes. Moreover, as argued abave, the nol pros simply was not relevant to prove a material fact in issue in thic case. See, e.g., Brown v. State, 513 So. 2d 213, 214 (Fla. 1st DCA 1987), cause dism., 520 So. 2d 583 (Fla. 1988)(fact that another victim in another case misidentified appellant "has no relevancy to the credibility of the identification testimony of the witnesses in the present case."). Therefore, the trial court did not abuse its discretion in not informing the jury that the prosecutor nol prossed one count prior to trial. The district court held that the trial court did not abuse its discretion. 18 Fla. L. Weekly at D1574.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON ALL COUNTS

This issue was presented to the First District Court of Appeal and rejected. (Issue one in Petitioner's brief was issue three in the Appellant's initial brief below, and the remaining issues were numbered one, two and four, respectively.) By presenting these ancillary issues, the Petitioner fails to recognize the district court's function as a court of final jurisdiction. Only issue one in the Petitioner's Brief on the Merits relates to the certified question. Of course, this Court has the authority to reach all of the questions presented. See Trushin v. State, 425 So. 2d 1130 (Fla. 1982). However, this Court should refrain from using that authority and entertain only the certified question.

At the close of all the evidence, defendant moved for a directed verdict as to L[redacted], stating that "it's alleged vaginal penetration with an ink pen. I think the testimony of the doctor was uncontroverted and completely rebutted that possibility." (R 471). The defendant also moved for a judgment of acquittal as to the other three victims (S[redacted], A[redacted], and S[redacted]) on the ground that the State had "failed to prove a prima facie case" or that the rebuttal testimony of defendant and the doctor "dispel that prima facie case [so] that reasonable minds could not differ." (R 483). The trial court denied both motions (R 471, 483).

With respect to the offenses involving S[redacted], [redacted] and S[redacted], defense counsel's "shotgun" motion below failed to preserve the issue for appellate review. See Cornwell v. State, 425 So. 2d 1189, 1190 (Fla. 1st DCA 1983)(judgment of acquittal motion alleging that the State filed to prove a prima facie case, that the testimony was arnbiguous, vague and indefinite, and the evidence was insufficient, was a deficient motion and did not preserve point for appellate review); G.W.B. v. State, 340 So. 2d 969, 970 (Fla. 1st DCA 1977). Additionally, defense counsel failed to move for a judgment of acquittal with respect to the lewd and lascivious count involving L[redacted], so that issue is not cognizable on appeal. See Showers v. State, 570 So. 2d 377, 378 (Fla. 1st DCA 1990). Therefore, the State respectfully declined to address defendant's arguments as to those counts before the district court.

Although defense counsel made a sufficient motion for judgment of acquittal with respect to the offense of sexual battery upon L[redacted], the evidence was sufficient to support defendant's conviction for this offense. L[redacted], a child under 12, testified that defendant, who was over 18, kissed her privates (R 369-370) and placed an ink pen inside her front privates (R 371-372). Even under vigorous questioning from both the prosecutor and defense counsel, she maintained that the incident had occurred (R 393-396). See e.g. Snodderly v. State, 528 So. 2d 928, 983 (Fla. 1st DCA 1988)(sufficient evidence in victim's testimony to establish penetration). Moreover, defendant's assertion that the medical evidence did not support

penetration is unfounded. The medical doctor admitted that the evidence was inconclusive as to whether sexual battery of any of the victims occurred. (R 468-471). He testified that he had "no evidence that there was vaginal penetration but now I don't have an opinion as to whether there was or not." (R 470).

Because the State introduced competent evidence of the crime of sexual battery upon L[redacted], the trial court did not err by denying defendant's motion for judgment of acquittal. The district court held that the evidence supporting the defendant's convictions was competent and substantial. 18 Fla. L. Weekly at D1574.

CONCLUSION

Based on the foregoing argument and citation of authority, this Court should answer the certified question in the negative and refrain from addressing the ancillary issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS has been furnished by U.S. Mail to MR. DAVID P. GAULDIN, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 12th day of October, 1993.

Joe S. Garwood

JOE S. GARWOOD