IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,793

AUGUSTAS J. RAWLS,

Respondent.

_____/

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The State recognizes that intra-district conflict is not a basis for conflict jurisdiction. However, the court should be aware of Saffor v. State (en banc), Case No. 82,531, now before this court on a certified question, which has some relevance to the instant case. There, the mother's boyfriend was the perpetrator of the sex crime, and he lived in the same house with the victim, who was not related to him by blood or marriage. The Saffor opinion, which was authored by Judge Wolf, was released the day after Rawls was released. Judges Ervin, Zehmer, and Webster decided Rawls. They dissented in Saffor. In his concurring and dissenting opinion in Saffor, Judge Ervin stated, "[M]y disagreement with Judge Wolf's decision is with his assumption that a family-type tie existed between the victim and the defendant...." 18 Fla. L. Weekly at D2049. Judge Allen wrote a dissenting opinion in Saffor, which was joined in by Judges Zehmer and Barfield. Judge Allen did not directly address the issue of the nature of the relationship between the defendant and the child victim. Instead, he focused on the type of collateral crime evidence that was admitted, arguing that it was not unique enough to have been admitted. 18 Fla. L. Weekly at D2049-2051.

JURISDICTIONAL STATEMENT

Article V, section 3(b)(3) of the Florida Constitution states, in pertinent part, the following:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

STATEMENT OF THE CASE AND FACTS[1]

Respondent, Augustas J. Rawls, was charged with and convicted of sexually battering a nine-year-old male child, M.R. Rawls had known M.R.'s mother for six months. He told her that he was having problems where he lived and that he desired to live with a family who had children. Rawls moved into M.R.'s home and paid rent. He slept in M.R.'s bedroom, and M.R. slept on the couch. This arrangement lasted ten days. While there, Rawls fondled M.R.'s penis and also stuck it in his mouth. This conduct occurred in the living room and the kitchen when they were alone. M.R. was afraid to report what had happened.

At trial, the State introduced the testimony of three collateral crime witnesses. In all three instances, Rawls had befriended the families, moved into their homes, paid rent, bought groceries, was generous to all family members, and sexually molested male youths in the family. The jury was instructed that this evidence could be used for corroborative purposes. On appeal, Rawls challenged both the evidentiary ruling and the jury instruction. The First District Court of Appeal approved the evidentiary ruling but not the jury instruction. It stated:

> Because there was no evidence in the case below that the charged offense arose within a familial or custodial setting, the instruction was an incorrect statement of the

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[1] All facts are taken directly from the opinion of the First District Court of Appeal in this case.

> law, because section 90.404(2)(a) does not list victim corroboration as a proper purpose for similar-fact evidence, and Heuring only authorizes use for corroboration in a familial or custodial situation.

18 Fla. L. Weekly at D2028. The court summarily concluded that the error was harmful.

The State moved for rehearing or certification, which was denied, following which it filed a timely notice to invoke the discretionary jurisdiction of this Court to review the decision.

SUMMARY OF ARGUMENT

The decision of the First District Court of Appeal in the instant case directly and expressly conflicts with a decision of the Third District Court of Appeal on the same question of law. The Third District held that the Heuring "familial or custodial" context requirement was satisfied where the child lived in the neighborhood and was a frequent guest in the defendant's home. By contrast, the First District held that the Heuring requirement was not satisfied even though the child lived in the same house with the defendant.

ARGUMENT

ISSUE

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN BIERER V. STATE, 582 SO. 2D 1230 (FLA. 3RD DCA 1991) ON THE SAME QUESTION OF LAW.

The decision in this case expressly and directly conflicts with the decision of the Third District Court of Appeal in Bierer v. State, 582 So. 2d 1230 (Fla. 3rd DCA 1991) on the same question of law. The question of law in both cases was whether the relationship between the defendant and the victim could be classified as familial or custodial. The Third District held that the relationship between the defendant and a visiting neighborhood child fell within this classification, whereas the First District held that the relationship between the defendant and a child, both of whom resided in the same house, did not fall within this classification.

In Bierer, the defendant was charged in a five-count information with committing sex crimes on different dates on three children, S.V. (stepdaughter), J.V. (stepdaughter), and G.S. (neighborhood friend of stepdaughters). The defendant moved to sever the case involving the neighborhood friend from the cases involving the stepdaughters, which was denied. At the close of the State's case, the trial court dismissed one count and reduced three others. The jury returned guilty verdicts of simple battery with respect to S.V. and J.V. and lewd assault and attempted battery with respect to G.S. On appeal, the defendant

argued that the trial court had erred in refusing to sever the cases, and the Third District agreed but held that the error was harmless.

To reach this latter conclusion, the court had to answer the question whether evidence of the sex crimes committed against the stepchildren would have been admissible as collateral crime evidence in the case involving the neighborhood friend. It answered the question affirmatively. In doing so, it further held that the relationship between the defendant and the neighborhood friend fell within the "familial context" described in Heuring v. State, 513 So. 2d 122 (Fla. 1987). It noted that the neighborhood friend "frequented the appellant's home every day." Id., at 1230. It ultimately concluded:

> In this case the defendant exercised parental-type supervision of the neighborhood child on a daily basis at his home. On the authorities cited, we conclude that such an arrangement constitutes care within the broad familial context.

Id., at 1232.

In the instant case, Rawls lived in the same house with the child victim. He paid rent and slept in the child's room, and the child slept in the living room. Rawls had known the child's mother for six months before moving into the house. He explained to her that he was having problems where he was living and that he desired to live with a family who had children. The First District held that the relationship between Rawls and the child did not fall within the familial or custodial context described

in Heuring. Having reached that conclusion, the court went on to hold that the trial court erred in instructing the jury that the collateral crime evidence could be used for corroborative purposes. It stated:

> Because there was no evidence in the case below that the charged offense arose within a familial or custodial setting, the instruction was an incorrect statement of the law, because section 90.404(2)(a) does not list victim corroboration as a proper purpose for similar-fact evidence, and Heuring only authorizes use for corroboration in a familial or custodial situation.

Slip Opinion, 7-8.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. Mail to Josephine L. Holland, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301 this 9th day of December, 1993.

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,793

AUGUSTAS J. RAWLS,

Respondent.

_____/

APPENDIX

12-110636-TAR

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

AUGUSTAS J. RAWLS,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant,	)	DISPOSITION THEREOF IF FILED.
vs.	)	CASE NO. 92-1146
STATE OF FLORIDA,	)	
Appellee.	)	

SEP 15

Opinion filed September 14, 1993.

An Appeal from the Circuit Court for Escambia County.
Kim Skievaski, Judge. 91-3601-F

Nancy A. Daniels, Public Defender and Josephine L. Holland, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Carolyn J. Mosley, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

ERVIN, J.

Appellant, Augustas J. Rawls, seeks review of a conviction for sexual battery on a person less than 12 years of age. He contends that the trial court erred by allowing Williams[1] Rule

[1]Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959).

evidence from three collateral-crime witnesses and by modifying the Williams Rule jury instruction to include corroboration of the victim's testimony as a proper use of collateral-crime evidence. We affirm as to the first issue and reverse and remand as to the latter.

Initially, we conclude that both issues were properly preserved. Appellant filed a written objection to the use of the similar-fact evidence, and the parties argued the objection at the outset of the trial. See Thomas v. State, 599 So. 2d 158, 159-61 n.1 (Fla. 1st DCA) (objection preserved where the defendant objected to the similar-fact evidence during the state's proffer at the outset of the trial), review denied, 604 So. 2d 488 (Fla. 1992). As for the modified jury instruction, defense counsel clearly objected to the modification at the time it was discussed, which was immediately prior to the jury charge. See Buford v. Wainwright, 428 So. 2d 1389, 1390 (Fla.) (objection to erroneous instruction properly preserved where counsel objected during charge conference), cert. denied, 464 U.S. 956, 104 S. Ct. 372, 78 L. Ed. 2d 331 (1983).

Appellant was charged by information with sexual battery on a person less than 12 years of age, to wit: nine-year-old M.R., a male youth, on or about July 25, 1991. Prior to trial, the state filed notices of intent to offer collateral-crime evidence of similar conduct committed by appellant against three other boys. Over appellant's objection, the state was allowed to introduce the same.

In regard to the charged offense, M.R.'s mother recounted that she had met the defendant through a neighbor; that the defendant said he was having problems where he lived; and that he desired to live with a family who had children. Approximately six months thereafter, upon appellant's agreement to pay $200 per month in rent and to provide his own food, the defendant moved in with the victim's family and remained in their home for ten days. He slept in M.R.'s room while M.R. slept on the couch in the living room. The victim testified that the defendant touched his penis and placed it in his mouth. This conduct occurred in both the living room and occasionally in the kitchen when no one else was present. M.R. did not tell anybody, because he was afraid.

The state's collateral-crime evidence consisted of the testimony of 16-year-old J.F., who stated that the defendant had lived with his family. The defendant was good to his family while he lived with them and bought J.F. gifts, gave him money, and took him fishing. J.F. called him "Uncle Gus." J.F. testified that the defendant put his mouth on his penis. He was approximately eight or nine when this first occurred. No one else was present. The defendant told J.F. not to tell anyone what he did to him.

J.K.F., J.F.'s brother who was 20 years old at the time of the trial, testified that the defendant was his mother's friend and had moved in with the family. J.K.F. was approximately eight or nine when the defendant first came to live with them, and he lived with them for several years. The defendant was good to the

family and to him. He bought J.K.F. clothes and toys, paid the bills, and paid rent to his mother. J.K.F. testified that the defendant put his mouth on his penis when no one was around and that he told him not to tell anyone. This usually occurred while J.K.F. was in his bedroom between 2:30 and 3:00 a.m.

Finally, T.S., then 12-1/2 years old, testified that he met the defendant when he was approximately nine years old. The defendant moved in with his family and helped them to pay bills and groceries. The defendant was good to him -- he bought him clothes and drinks. T.S. testified that the defendant first put his mouth on the boy's penis while the two were in the defendant's trailer, and that similar acts occurred after the defendant moved in with T.S.'s family. No one was present during these occurrences, and the defendant told T.S. not to tell anyone. The defendant lived with his family approximately one to one and a-half years.

Turning to the merits of the issue pertaining to the admission of the Williams Rule evidence, the standard for the admission of same was established in Heuring v. State, 513 So. 2d 122 (Fla. 1987), wherein the state was permitted to introduce certain collateral evidence disclosing that the defendant had sexually battered his daughter approximately 20 years before he was charged with sexually battering his stepdaughter. There, the supreme court, recognizing that collateral-crime evidence is inherently prejudicial and that such evidence is inadmissible if solely relevant to bad character or propensity, determined that

in order to minimize the risk of a wrongful conviction, similar-fact evidence must meet a strict standard of relevance. The charged and collateral offenses must not only be strikingly similar, but must also share some unique characteristic or combination of characteristics which set them apart from other offenses. Id. at 124. In addition, the evidence must be relevant to a material fact at issue in the cause at trial, such as identity, intent, motive, opportunity, plan, knowledge, or absence of mistake or accident. Id. (citing § 90.404(2)(a), Fla. Stat.).

Recognizing that special problems inhere in cases involving sexual battery within the familial context, the court continued that in such cases the victim knows the perpetrator and identity is not an issue. Moreover, the victim is usually the sole witness and corroborative evidence is scant. Therefore, the credibility of the victim is the focal issue. The court observed that while some jurisdictions have allowed evidence of a parent's sexual battery on another family member as relevant to modus operandi, scheme, plan, or design, the better approach is to treat such evidence as simply relevant to corroborate the victim's testimony, and to consider that in such cases the similar-crime evidence's probative value outweighs its prejudicial effect. Id. at 124-25.

The collateral-crime evidence in the instant case satisfies the Heuring test. First, the charged offense and the collateral offenses were strikingly similar and shared some unique

characteristic or combination of characteristics which set them apart from other offenses. Appellant befriended the boys' mothers, arranged to move into their homes, paid rent and bought groceries and was generous to all the family members, and then, in the same manner, sexually molested male youths of approximately the same age in their homes while no other person was present while instructing them not to tell anyone what had occurred. Second, the evidence was relevant to prove a material fact in issue, i.e., opportunity, plan, and/or absence of mistake or accident. This is so because the appellant's defense at trial was that he did not commit the charged offense, and that M.R. was mistaken. Therefore, we find no error in the admission of the Williams Rule evidence.

In so saying, we find no merit to appellant's argument that the admission of the collateral-crime evidence was unduly prejudicial, because of the quantum of evidence (the testimony of three witnesses), and because it became the feature of the trial. The fact that three collateral-crime witnesses testified for the state does not necessarily give rise to a finding of prejudice. See Coleman v. State, 484 So. 2d 624 (Fla. 1st DCA 1986) (admission of collateral-crime evidence from three other victims was proper in sexual battery case of child under the age of 11). Moreover, it was the defense counsel's own trial tactics, i.e., calling numerous witnesses to impeach the credibility of the collateral-crime witnesses, which emphasized the collateral-crime evidence. See Travers v. State, 578 So. 2d 793 (Fla. 1st DCA)

(in sexual battery trial involving younger sister, similar-fact evidence involving sexual battery of older sister clearly became feature of trial, both as to quantum of evidence and arguments of counsel; however, excessive emphasis on such evidence was attributable to defensive efforts and thus did not require reversal), review denied, 584 So. 2d 1000 (Fla. 1991).

Considering next the merits of the second issue, although the standard Williams Rule instruction[2] essentially tracks Section 90.404(2)(a), Florida Statutes, the judge modified the standard instruction over defendant's objection by adding the following underscored language regarding victim-corroboration:

> The evidence which has been admitted to show similar crimes, wrongs, or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident on the part of the defendant or to corroborate the testimony of the alleged victim in this case. However, the defendant is not on trial for a crime that is not included in the information.

(Emphasis added.)

Because there was no evidence in the case below that the charged offense arose within a familial or custodial setting, the instruction was an incorrect statement of the law, because section 90.404(2)(a) does not list victim corroboration as a proper purpose for similar-fact evidence, and Heuring only

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[2]Fla. Std. Jury Instr. (Crim.) 50.

authorizes use for corroboration in a familial or custodial situation. The effect of this erroneous instruction was to inform the jury that similar-fact evidence was admissible for the purpose of vouching for the credibility of the victim's testimony; a result which is clearly contrary to established case law. See, e.g., Tingle v. State, 536 So. 2d 202, 205 (Fla. 1988); Turtle v. State, 600 So. 2d 1214, 1221-1222 (Fla. 1st DCA 1992); Page v. Zordan, 564 So. 2d 500, 501 (Fla. 2d DCA 1990); Fuller v. State, 540 So. 2d 182, 184 (Fla. 5th DCA 1989).

Applying a harmless error analysis, see, e.g., Bello v. State, 547 So. 2d 914, 916 (Fla. 1989) (although court erroneously gave instruction on transferred intent, because it was inapplicable under the facts, such error was harmless), we cannot say that the court's instruction at bar "did not contribute to the verdict." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). This is especially true, because the state expressly argued during its closing statements that the evidence could be used to corroborate the victim's testimony.

AFFIRMED in part, REVERSED in part, and REMANDED for new trial.

ZEHMER, C.J., and WEBSTER, J., CONCUR.

G 9-28-93

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

AUGUSTAS J. RAWLS,

Appellant,

v. CASE NO. 92-1146

STATE OF FLORIDA,

Appellee.

APPELLEE'S MOTION FOR REHEARING OR CERTIFICATION

In accordance with the provisions of Fla.R.App.P. 9.330(a), the appellee, State of Florida (hereinafter State), respectfully moves the court for an order granting rehearing or certification. The State submits that the court overlooked controlling points of law or fact, and shows the court as follows:

1. This court reversed the judgement of conviction and ordered a new trial because of an erroneous jury instruction. It stated:

> Considering next the merits of the second issue, although the standard Williams Rule instruction essentially tracks Section 90.404(2)(a), Florida Statutes, the judge modified the standard instruction over defendant's objection by adding the following underscored language regarding victim-corroboration:
>
> > The evidence which has been admitted to show similar crimes, wrongs, or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of motive,

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> opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident on the part of the defendant or to corroborate the testimony of the alleged victim in this case. However, the defendant is not on trial for a crime that is not included in the information. (Emphasis added.)
>
> Because there was no evidence in the case below that the charged offense arose within a familial or custodial setting, the instruction was an incorrect statement of the law, because section 90.404(2)(a) does not list victim corroboration as a proper purpose for similar-fact evidence, and Heuring only authorizes use for corroboration in a familial or custodial situation. The effect of this erroneous instruction was to inform the jury that similar-fact evidence was admissible for the purpose of vouching for the credibility of the victim's testimony; a result which is clearly contrary to established case law. See, e.g., Tingle v. State, 536 So. 2d 202, 205 (Fla. 1988); Turtle v. State, 600 So. 2d 1214, 1221-1222 (Fla. 1st DCA 1992); Page v. Zordan, 564 So. 2d 500, 501 (Fla. 2d DCA 1990); Fuller v. State, 540 So. 2d 182, 184 (Fla. 5th DCA 1989).

18 Fla. L. Weekly at D2028.

A. In stating that the instant case does not involve "a familial or custodial setting," the court has overlooked relevant law. In Bierer v. State, 582 So. 2d 1230 (Fla. 3rd DCA 1991), the defendant was convicted for committing sex crimes on three children (two stepdaughters and a neighborhood friend of stepdaughters). On appeal, the defendant contended that he was entitled to a new trial because the charges against the stepdaughters should have been severed from the charges against the stepdaughters' friend. The Third District agreed that the

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cases were improperly consolidated but concluded that the error was harmless "based on the 'familial context' rule for similar fact evidence as announced in Heuring v. State, 513 So. 2d 122 (Fla. 1987)." Id., at 1231. It stated:

> In Heuring, the supreme court adopted the view that strict standards normally applicable to similar fact evidence should be relaxed in cases involving sexual battery committed on minor children "within the familial context." What constitutes a familial context was not definitively explained. The first district, noting the legislature's intention "to protect minor children from the predatory influences of older persons who establish close family-type ties with them," Stricklen v. State, 504 So. 2d 1248, 1250 (Fla. 1st DCA 1986), set forth a broad definition of the term 'familial" in determining whether a defendant had "familial or custodial" authority over a child victim for the purposes of prosecution for familial sexual battery.
>
> In Coleman v. State, 485 So. 2d 1342, 1345 (Fla. 1st DCA 1986), the first district held that "familial or custodial" must be interpreted to include any person maintaining a close relationship with a child who lives in the same household as the child. That definition was subsequently broadened to include persons who merely have temporary custody of a child. Stricklen upheld the conviction of a defendant who did not reside in the victim's home but who had assumed responsibility for the child's care on weekends. The first district's broadened definition was adopted in Collins v. State, 496 So. 2d 997 (Fla. 5th DCA 1986), rev. denied, 506 So. 2d 1040 (Fla. 1987), which upheld a conviction for familial sexual battery where the defendant had frequent contact with the child, she had ridden in his truck many times, the defendant had daily contact with the victim's mother, and the defendant's care and control of the child was with the mother's approval at the time the crime was committed.

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> Concluding, on the pivotal question, that the factual scenario of this case is contemplated by Heuring, a harmless error analysis is mandated. * * *
>
> In this case the defendant exercised parental-type supervision of the neighborhood child on a daily basis at his home. On the authorities cited, we conclude that such an arrangement constitutes care within the broad familial context. By Livingston's standard the misjoinder in this case was harmless beyond a reasonable doubt since, according to Heuring, the jury would have learned of the other offenses in separate trials under the similar fact evidence rule. §90.404(2)(a), Fla. Stat. (1989).

Id., at 1231-1232.

The day after the instant decision was released, this Court published Saffor v. State, 18 Fla. L. Weekly D2046 (Fla. September 15, 1993). There, the mother's boyfriend was the perpetrator of the sex crime, and he lived in the same house with the victim, who was not related to him by blood or marriage. The boyfriend and the mother had two children, and they also lived in the house. The collateral sex crime victim was the perpetrator's niece. This Court concluded that the case qualified as a familial situation, stating that "[t]he focus should be the relationship of the parties and the nature of the crime rather than the extent of the authority exercised by the perpetrator over the victim." Id., at D2047. It certified the following question:

> WHAT IS THE CORRECT STANDARD TO BE UTILIZED IN DETERMINING THE ADMISSIBILITY OF COLLATERAL CRIME EVIDENCE IN CASES INVOLVING SEXUAL BATTERY WITHIN THE FAMILIAL CONTEXT?

In the instant case, M.R.'s mother had known Rawls for six months. Rawls had problems where he was living and asked M.R.'s mother if he could move into her home. He stated that "he would like to move in with a family that had children" and promised to buy the groceries and pay rent. He slept in M.R.'s room, and M.R. slept on the couch. Rawls had been living there ten days when he was arrested. (T. 67-70, 76-77) Based on the above-cited cases, these facts were sufficient to qualify as a familial situation.

B. In stating that "Heuring only authorizes use for corroboration in a familial or custodial situation," the court has overlooked pertinent law and legal commentary.

Professor Ehrhardt states:

> Although the Heuring opinion appears to limit its theory of admissibility of other act evidence to acts involving sexual battery within the familial context, its rationale may extend to the admission of sexual acts upon other children. The rationale 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. The jury has little basis to determine the victim's credibility if the defense is that the incident never occurred. The seminal law review article suggests that in this situation the prosecution should be able to show that the defendant engaged in similar conduct to corroborate the victim's testimony. In cases where the victim is not acquainted with the defendant, the issue is whether the victim was mistaken in the identification of the defendant, rather than whether the victim is fabricating. In this latter situation, the Heuring rationale would not be applicable and the evidence would not be admissible to corroborate. If the similar fact evidence is to be admitted, it must be to prove some other material issue.

Ehrhardt, Florida Evidence, § 404.18, pp 180-181 (1993 ed.) In Steward v. State, 619 So. 2d 394, 396, fn 1 (Fla. 1st DCA 1993), this Court acknowledged Professor Ehrhardt's commentary but did not respond to it because the perpetrator in the case was a stranger to the victim.

In a criminal case, the State must prove (1) that a crime occurred and (2) that the accused committed it. This second requirement has been explained as follows:

> In a sense, of course, identity is "in issue" in every case. The prosecution must prove beyond a reasonable doubt that the defendant committed the crime. With regard to identity, however, sex cases may be analyzed in terms of two distinct categories. In the first category are those cases in which the victim has been molested by an unknown assailant, someone whom the victim had not encountered on any occasion prior to the time of the offense. Also in this first category are those cases where the victim is simply unable to make an in-trial identification because of the circumstances under which the offense was committed. For instance, a rape victim may have been attacked from behind and knocked unconscious. In this latter situation, the victim may or may not be actually acquainted with the accused. In either event, identity is "in issue." The critical question is not so much whether the crime was committed as whether the accused was the individual who committed it. The prosecution will have to convince the jury that the accused, out of countless possible candidates, was the individual who committed the crime. If the victim makes an in-trial identification, the focus for the jury will be on the victim's faculties for identification and factors bearing on it.
>
> In the second category, the accused is a previous acquaintance of the victim. A typical example is the child molestation case in which the accused is the victim's parent

> or teacher. The focus in this type of case is likely to be on whether the alleged crime was ever committed. Identity is not "in issue." The issue will be the credibility of the victim. Is the victim telling the truth about the crime? If the circumstances under which the crime was committed indicate that the victim could have made an identification error, then the case belongs in the first category, and not the second.

Comment, "Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses," 25 U.C.L.A. L. Rev. 261, 283 n 101 (1977) (hereinafter referred to as Comment).

Traditionally evidence of other crimes has been used to prove state of mind and identification. Unless the defendant in a sex crime case claims that his conduct was unintentional (an accident) or that he made a mistake of fact, such as mistaking the victim for someone else, state of mind is not in issue. Coler v. State, 418 So. 2d 238 (Fla. 1982); Paquette v. State, 528 So. 2d 995, 996 (Fla. 5th DCA 1988). Although identity is always an essential element, the necessity for evidence of other sex crimes to prove this element is greatly diminished when the perpetrator is known to the victim. Under these circumstances, eyewitness testimony will usually suffice. Absent disputed issues relating to state of mind and identity, the primary issue necessarily will be whether the defendant committed a criminal act. On this point, the child's credibility is critical. Evidence of other sex crimes is relevant and necessary to corroborate the child's testimony. Therefore, evidence of collateral sex acts that otherwise would have been admissible to

prove identity or state of mind (indirectly by showing motive, opportunity, plan, design, absence of mistake or accident or directly by way of a signature crime) is admissible to corroborate the victim's testimony. The manner in which such evidence is to be used has been described as follows:

> It is true that a man cannot be convicted of committing a crime merely by showing that he had an opportunity to commit it and that he has committed other crimes of the same generic type. But when a witness gives direct evidence against the defendant that he did commit the crime, and the witness is challenged as a liar, it is surely relevant to consider that the challenge is being issued and not merely against one witness but against a number of witnesses who are giving evidence entirely independently of each other. There is always a possibility that a witness is lying, and the possibility is rather pronounced in sexual cases. But the possibility becomes greatly reduced if there are two witnesses.

Comment, at 286 n 116. Stated another way, "If the prosecution can show that defendant has recently engaged in similar unlawful conduct, it is much less likely that the victim invented the incident." Id., at 288.

When the rationale for the principle announced in Heuring is carefully analyzed, it makes no sense to include some situations where the perpetrator is known to the victim but exclude others. Heuring did in fact involve both a familial and custodial situation. However, all this signified was that the victim's relationship with the perpetrator was sufficiently developed to preclude an error in identification and that most likely the defendant would defend by accusing the victim of falsehood, spite, or delusion.

So far, the State has focused on the relationship between the defendant and the victim in the charged offense. On a closely related issue (relationship between defendant and collateral crime victim), this Court has recognized that Heuring is not limited to crimes of illicit sex between family members. In Flanagan v. State, 586 So. 2d 1085 (Fla. 1st DCA 1991) (en banc), the defendant was charged with sexually battering his young daughter. To prove its case, the prosecutor, in pertinent part, introduced the testimony of a neighbor's child who testified to sexual acts that the defendant had committed on her when she was an overnight guest. Id., at 1089-1090. On appeal, the defendant contended that the testimony was erroneously admitted. The court soundly rejected this argument, stating:

> [W]e do not agree with appellant's argument regarding the Supreme Court's holding in Heuring v. State, 513 So. 2d 122 (Fla. 1987). In Heuring, the court reversed the defendant's conviction because evidence of the defendant's molestations of children other than his step-daughter and daughter was improperly admitted. Appellant argues that Heuring stands for the proposition that the rule permitting similar fact evidence in cases involving sexual battery upon children is limited to only illicit sex between family members. However, in our view, the court in Heuring simply held that the evidence of extra-familial molestations, as presented, was not sufficiently similar to the charged offenses. In the instant case, the trial court found that there was sufficient similarity between the sexual battery of 11 year old neighbor child V. L. and the offense against T. F. We find no error in this ruling and affirm on this point.

Id., at 1092.

Judge Ervin, in a separate opinion, in which Judge Zehmer concurred, stated, "I therefore agree with Judge Miner's opinion in affirming the trial curt's admission of similar-fact evidence...." Id., at 1120. This part of the Flanagan decision was not addressed by the Florida Supreme Court. Flanagan v. State, 18 Fla. L. Weekly S475, 476 n 4 (Fla. September 9, 1993).

In Calloway v. State, 520 So. 2d 665 (Fla. 1st DCA 1988), the defendant was convicted of sexually battering his stepdaughter. His contention that collateral crime evidence was erroneously admitted was soundly rejected. The two collateral crime witnesses were the victim's friend and aunt, who testified to sexual acts committed on them by the defendant when they were in his house as overnight guests. The court stated:

> In the instant case, the victim was the sole eye witness to the alleged offenses and corroborative evidence was scant. Credibility of the victim was the focal issue in the case, the defense being predicated upon the defendant's claim that the victim concocted her story because of reaction on her part to his exercise of parental discipline over her and because she preferred living with her real father.

Id., at 667.

In the instant case, the perpetrator lived in the same house with the victim, and the sexual acts were committed under circumstances that eliminated the possibility of an identification error. Therefore, the disputed issue in the case related to whether a criminal act had been committed. The defendant did not claim that although he committed the sex act,

it was an accident or a mistake; rather, his theory of defense was that the State's witnesses were all liars. (T. 209, 211, 215-221) Evidence of other sex crimes was relevant and essential to corroborate the victim's testimony in the instant case. Therefore, the trial court correctly instructed the jury on the purposes for which the collateral crime evidence could be used.

C. Citing four cases, the court in the instant case stated, "The effect of this erroneous instruction was to inform the jury that similar-fact evidence was admissible for the purpose of vouching for the credibility of the victim's testimony; a result which is clearly contrary to established case law." All evidence presented by a party falls into the category of corroborative evidence. Vouching is one type of corroborative evidence. A witness vouches for the credibility of a victim's testimony when he gives his opinion that the witness is telling the truth. In Tingle at 204-205 and Fuller at 184, witnesses expressly testified that they believed the victim was telling the truth. In Page at 502, an expert witness testified to the results of a test that was designed to determine the truthfulness of the victim's report of sexual abuse. Turtle was not a vouching case. There, an expert testified to characteristics of pedophiles but never testified that the defendant was a pedophile. Tingle, Fuller, and Page are illustrative of the type of corroborative evidence that is condemned. The collateral sex crime victims in the instant case never testified directly or indirectly that they believed the victim was telling the truth. They merely told

their own stories, and this evidence was corroborative of the victim's testimony, just like all the other evidence in the case, such as, for example, the defendant's confession. The limiting instruction was for the defendant's benefit--to ensure that the jury would not use the evidence to convict him because of his bad character. The instruction informed the jury how the evidence could be properly used.

D. At trial, defense counsel objected to the modified jury instruction stating, "We object to giving it because it's not in the form." (T. 230) On appeal, Rawls argued that the instruction was per se improper; that is, the jury could never be told that it may consider certain evidence as corroborating the victim's testimony. He further argued that the judge vouched for the credibility of the victim's testimony. Not one word was mentioned to even remotely suggest that the instant facts failed to qualify as a familial situation. (See attached copy of Rawls' argument on this issue in its entirety.) The State responded that the two grounds raised on appeal were not preserved for appeal because they were different from the ground raised in the trial court. It, nevertheless, addressed the merits of all three grounds. First, it argued that the trial court was not bound by the standard jury instructions, which were mere guides designed to assist the trial court in determining the applicable substantive law. Second, it argued that the jury instruction was authorized by the substantive law, citing Heuring and the law review article relied on by the Heuring court. Third, it

asserted, admittedly without citing any additional authority, that the trial court did not improperly comment on the witnesses' credibility.

This Court has reversed Rawls' judgment of conviction on a ground never addressed by any of the parties at any level of the proceedings. Implicitly this Court rejected Rawls' argument on appeal that the modified jury instruction was per se improper but went on to hold that it was improper in this case because Heuring authorized corroboration only in familial or custodial situations and the instant case did not fall into these categories. In this motion, the State has responded by arguing that Heuring applies to situations broader than familial or custodial situations or, alternatively, that the facts in the instant case qualify as a familial situation.

WHEREFORE, the State respectfully moves the court for an order granting rehearing or, alternatively, to certify the same question that was certified in Saffor.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Carolyn J. Mosley

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
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(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion for an extension of time has been furnished by U.S. Mail to Josephine L. Holland, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301 this 28th day of September, 1993.

Carolyn J. Mosley
Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

AUGUSTAS J. RAWLS,

Appellant,

v. CASE NO. 92-1146

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

Excerpt from Appellant's Initial Brief

ISSUE II:

THE TRIAL COURT'S MODIFICATION OF THE WILLIAMS RULE INSTRUCTION TO INCLUDED CORROBORATION AS A PROPER PURPOSE WAS REVERSIBLE ERROR.

Both the evidence code and the jury instructions relating similar fact, or Williams Rule, evidence enumerate specific purposes for which such evidence may be admitted and considered by the jury. The evidence code states:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Sec. 90.404(2)(a), Fla. Stat. (1991). The standard jury instruction to be given at the close of evidence provides:

> The evidence which has been admitted to show similar crimes, wrongs, or acts allegedly committed by the defendant will be considered by you only as that evidence relates to proof of [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant.

In giving the instructions a trial court selects the appropriate choices and includes only those issues which are relevant.

A trial judge has the duty to instruct the jury properly on the law. See, e.g., Bello v. State, 547 So.2d 914 (Fla. 1989) (error to give transferred intent instruction if no evidence to support such instruction); Freud v. State, 520 So.2d 556 (Fla. 1988) (trial court has obligation to instruct on correct law notwithstanding standards); and State v. Dominguez, 509 So.2d 917

(Fla. 1987) (jury instruction inadequate if fails to include an element of offense).

Here the correct law is contained in the standard, which lists those issues enumerated by the evidence code. The code provides that these are the only issues for which similar fact evidence may be considered. The trial court apparently believed that Heuring v. State, 513 So.2d 122 (Fla. 1987), permitted similar fact evidence to be used for corroboration. However, this Court in Thomas v. State, 17 F.L.W. D1122 (Fla. 1st DCA April 28, 1992) explained Heuring. Heuring recognized that, in cases of sexual battery on a child under twelve by a person in familial standing, similar fact evidence has the effect of corroborating the child victim's testimony. The test for admissibility, however, remains one primarily of relevance to prove disputed issues of material fact - issues permitted by the code. Thomas at D1124-25. The jury is only permitted to consider similar fact evidence as it is relevant to one of the enumerated issues, although the result may be corroboration.

By instructing the jury that it could consider the evidence in corroboration the judge in effect vouched for the credibility of the victim-witness. Any suggestion by the judge of his opinion regarding facts or witnesses is improper. See, e.g., Reyes v. State, 547 So.2d 347 (Fla. 3d DCA 1989). A reasonable juror could easily have interpreted the instruction given as a direction by the court to accept the victim's testimony as credible and corroborated. In so instructing the jury the judge interfered with the jury's sacred duty to weigh the facts and

assess the credibility of witnesses. Mr. Rawls properly objected to this instruction. Mr. Rawls is entitled to a new trial.

Mosley
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DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

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October 28, 1993

CASE NO: 92-01146

L.T. CASE NO. 91-3601-F

Augustas J. Rawls v. State of Florida

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing or certification, filed September 28, 1993, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler

JON S. WHEELER, CLERK

By: Vickie Maloy
Deputy Clerk

DISTRICT COURT OF APPEAL * STATE OF FLORIDA * FIRST DISTRICT * SAT CITO SI RECTE

Copies:

Josephine L. Holland

Carolyn J. Mosley

Docketed
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Florida Attorney General

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ida Statutes (1989), although his plea agreement contemplated that these charges would be dropped. Unless this contention can be proven incorrect, either through record exhibits or testimony, the trial court should vacate the judgments and sentences with respect to those three counts.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

SCHOONOVER, C.J., and DANAHY and FRANK, JJ., concur.

Michael BIERER, Appellant,

v.

The STATE of Florida, Appellee.

No. 90–1526.

District Court of Appeal of Florida, Third District.

July 16, 1991.

Defendant was convicted in the Circuit Court, Dade County, Richard V. Margolius, J., of lewd assault, battery and attempted battery on three second and third grade girls who were under his care or supervision, and he appealed. The District Court of Appeal, Ferguson, J., held that defendant's exercise of parental-type supervision of a neighborhood child on daily basis at his home constituted care within a broad familial context such that evidence of sex offenses allegedly committed by defendant on neighborhood friend of his stepdaughters would have been admissible in separate trial for sex offenses allegedly committed on defendant's stepdaughters under similar fact evidence rule; thus, misjoinder of sex offenses committed on defendant's stepdaughter and those committed on neighborhood friend was harmless error.

Affirmed.

Criminal Law ⇐1166(6)

Defendant's exercise of parental-type supervision of a neighborhood child on daily basis at his home constituted care within a broad familial context such that evidence of sex offenses allegedly committed by defendant on neighborhood friend of his stepdaughters would have been admissible in separate trial for sex offenses allegedly committed on defendant's stepdaughters under similar fact evidence rule; thus, misjoinder of sex offenses committed on defendant's stepdaughter and those committed on neighborhood friend was harmless error. West's F.S.A. § 90.404(2)(a); West's F.S.A. RCrP Rule 3.151.

Bennett H. Brummer, Public Defender, and Robert Kalter, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Joan L. Greenberg, Asst. Atty. Gen., for appellee.

Before NESBITT, FERGUSON and LEVY, JJ.

FERGUSON, Judge.

Bierer, the appellant, was convicted of lewd assault, two counts of battery, and one count of attempted battery on three second and third grade girls who were under his care or supervision. Two of the victims are his stepdaughters. The third victim is a neighborhood friend of the stepdaughters who frequented the appellant's home every day. The main issue on appeal is whether the court's failure to sever the offenses allegedly committed on stepdaughters S.V. and J.V., as charged in counts II, III, and IV of the five-count information, with the offenses allegedly committed on the stepdaughters' friend, G.S., as charged in counts I and V, was erroneous and prejudicial.[1]

1. A five-count information charged the defendant in count I with an attempted sexual battery

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Bierer contends that his motion to sever should have been granted because the offenses occurred at different times and places and involved different victims. In response, the State argues that the offenses were connected in an episodic sense because (1) the involvement of more than one victim does not preclude joinder, (2) the offenses were continuous in nature and overlapping during a seventeen-month period, and (3) the offenses usually occurred in the defendant's home, and were committed in the same fashion. Further, the State contends that even if joinder was not proper, the appellant was not prejudiced because, in a separate trial for the offenses committed against G.S., the evidence of the offenses committed against stepdaughters S.V. and J.V. would have been admissible to show a general pattern, motive, intent or absence of mistake.

We agree with the appellant that his argument for severance is supported by *Wallis v. State*, 548 So.2d 808 (Fla. 5th DCA 1989), and *Ellis v. State*, 534 So.2d 1234 (Fla. 2d DCA 1988).[2] It was held in those cases that the offenses were not so connected in an episodic sense to justify consolidation. *See* Fla.R.Crim.P. 3.151. In *Wallis* the three victims were sisters. As grounds for reversing the convictions, the court ruled that "[t]he acts charged in each information related to a different victim and an entirely separate and different factual event than that charged in each other information." 548 So.2d at 809. In *Ellis* the court concluded that the acts committed against two of the victims were not connected in the episodic sense to the act allegedly committed against a third victim where the evidence showed only that the acts "were sex offenses occurring within the same two month period in defendant's home, the victims knew each other, and the defendant was allegedly guilty." 534 So.2d at 1236. In neither case, however, did the courts subject the improper consolidation to a harmless error analysis based on the "familial context" rule for similar fact evidence as announced in *Heuring v. State*, 513 So.2d 122 (Fla.1987).

In *Heuring*, the supreme court adopted the view that strict standards normally applicable to similar fact evidence should be relaxed in cases involving sexual battery committed on minor children "within the familial context."[3] What constitutes a familial context was not definitively explained. The first district, noting the legislature's intention "to protect minor children from the predatory influences of older persons who establish close family-type ties with them", *Stricklen v. State*, 504 So.2d 1248, 1250 (Fla. 1st DCA 1986), set forth a broad definition of the term "familial" in determining whether a defendant had "familial or custodial" authority over a child victim for the purposes of prosecution for familial sexual battery.[4]

on G.S. between February 1, 1987, and February 28, 1987; in count II with sexual battery on S.V. between July 21, 1986, and December 31, 1986; in count III with a sexual battery on J.V. between June 1, 1986, and July 21, 1986; in count V with committing a lewd assault on G.S. between April 1, 1986, and April 1, 1987. At the conclusion of the State's case the trial court reduced count I to lewd assault, reduced counts II and III to simple battery, and dismissed count IV. The jury convicted the defendant on counts I, II, and III, as reduced by the court, and of attempted battery, as a lesser included offense of the charge in count V.

Departing downward from a three and one-half-year guideline sentence for the attempted battery conviction, the trial court sentenced the defendant to a year and a day, and to concurrent sixty-day sentences for the misdemeanor convictions.

2. Although appellant also relies on *Paul v. State*, 385 So.2d 1371 (Fla.1980), that case is distinguishable from the instant case. There the offenses were committed on different dates, on different college campuses, against adult female students who were unknown to each other.

3. The court noted that cases involving sexual battery in a familial context present peculiar problems which support a different rule. Typically, the victim is the sole eyewitness and corroborative evidence is scant. Credibility becomes the focal issue with the child's testimony pitted against that of an adult. Similar fact evidence is therefore admissible to corroborate the victim's testimony. In this case the offenses against each victim were committed outside the presence of the other victims—a circumstance justifying admission of the similar fact evidence.

4. *See* current § 794.041(2), Fla.Stat. (1989).

In *Coleman v. State*, 485 So.2d 1342, 1345 (Fla. 1st DCA 1986), the first district held that "familial or custodial" must be interpreted to include any person maintaining a close relationship with a child who lives in the same household as the child. That definition was subsequently broadened to include persons who merely have temporary custody of a child. *Stricklen* upheld the conviction of a defendant who did not reside in the victim's home but who had assumed responsibility for the child's care on weekends. The first district's broadened definition was adopted in *Collins v. State*, 496 So.2d 997 (Fla. 5th DCA 1986), *rev. denied*, 506 So.2d 1040 (Fla. 1987), which upheld a conviction for familial sexual battery where the defendant had frequent contact with the child, she had ridden in his truck many times, the defendant had daily contact with the victim's mother, and the defendant's care and control of the child was with the mother's approval at the time the crime was committed.

Concluding, on the pivotal question, that the factual scenario of this case is contemplated by *Heuring*, a harmless error analysis is mandated. § 924.33 Fla.Stat. (1989); *State v. DiGuilio*, 491 So.2d 1129 (1986). In *Livingston v. State*, 565 So.2d 1288, 1290 (Fla.1988), the court, citing *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986), held that the misjoinder of offenses is subject to the harmless error rule and reversible error occurs only if the misjoinder causes actual prejudice by having a damaging effect or influence on the jury's verdict. *See also Beltran v. State*, 530 So.2d 1045, 1047 (Fla. 3d DCA 1988) (misjoinder requires reversal "only if it results in a miscarriage of justice or has injuriously affected the substantial rights of the defendant"), *approved*, 566 So.2d 792 (Fla.1990).

In this case the defendant exercised parental-type supervision of the neighborhood child on a daily basis at his home. On the authorities cited, we conclude that such an arrangement constitutes care within the broad familial context. By *Livingston*'s standard the misjoinder in this case was harmless beyond a reasonable doubt since, according to *Heuring*, the jury would have learned of the other offenses in separate trials under the similar fact evidence rule. § 90.404(2)(a), Fla.Stat. (1989).

Accordingly, the convictions and sentences are affirmed.

Leonard Craig NELSON, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1572.

District Court of Appeal of Florida, First District.

July 17, 1991.

Defendant appealed from an order of the Circuit Court, Leon County, F.E. (Ted) Steinmeyer, J., imposing sentences for violation of community control and for new crimes. The District Court of Appeal, Wigginton, J., held that defendant was improperly sentenced as an habitual offender at two of three sentencing hearings, but was properly classified as an habitual offender at the sentencing for the crimes committed after the sentencings for the two prior felony convictions.

Affirmed in part, and reversed and remanded in part for resentencing.

1. Criminal Law ⇐1202.9

Defendant was improperly classified as an habitual offender at sentencing in three cases where no prior felonies were shown to precede the four felony convictions arising from those three cases, and those convictions and sentences were not sequential. West's F.S.A. § 775.084(1)(a)1.

2. Criminal Law ⇐1202.9

In sentencing defendant in case which resulted in two felony convictions, defen-

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3. Criminal Law

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