O/A 6-6-94 4-16

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,793

AUGUSTAS J. RAWLS,

Respondent.

_____/

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

On August 29, 1991, petitioner, State of Florida, charged respondent, Augustas J. Rawls, with committing capital sexual battery on a male child (M.R.) by putting into his mouth the child's penis on or about July 25, 1991. (R. 247)

The State subsequently filed notices of its intent to introduce evidence at trial that Rawls had performed oral sex on three other young children, T.S., J.F., and K.F., and anal intercourse on one child, K.F. (R. 252-253) The defense moved in writing to exclude the admission of collateral crime evidence on the following grounds:

> 1. The proposed testimony's probative value is outweighed by the prejudicial effect on the Defendant.
>
> 2. The testimony of J.F. that he was threatened with physical violence by the Defendant, Augustas Rawls, is isolated and not part of any pattern or course of conduct.
>
> 3. If the Court allows the proposed Williams Rule testimony only one witness should be permitted to testify as to prior acts so that the evidence is not so distracting as to prevent the Defendant from getting a fair trial.

(R. 261)

The defense's motion was heard immediately preceding commencement of the trial. (R. 3-4) At the outset of the hearing, the State indicated that no evidence of anal intercourse between Rawls and any of the collateral crime victims would be presented. (R. 5) The prosecutor, with the defense's approval (R. 6), summarized the facts showing the degree of similarity between the charged and uncharged offenses:

> Judge, the evidence concerning M.R. [victim in the instant case] is going to show that M.R. was approximately nine years old when Mr. Rawls moved in with him and his family, and at that time Mr. Rawls committed the offense of sexual battery by placing the child M.R.'s penis in his mouth. Also during that time the evidence would show that when Mr. Rawls moved in with the R. family, he paid rent, he gave financial assistance to the family in the way of paying the rent, paying the bills, buying gifts for the children, was frequently -- or was at least alone with the children.
>
> And with regard to the other witnesses, also, Judge, an important factor in the case is that after the commission of the sexual batteries, Mr. Rawls told him not to tell anybody. And with regard to the other witnesses, each of the witnesses was approximately the same age as M.R. when the sexual batteries were committed on them.
>
> Mr. Rawls lived with each family in similar circumstances: would pay rent, would buy gifts for the children over and above rent, help out the family financially and that type of thing. In each case he knew [prior to moving in with the family] the mother of the children that were involved.... ***
>
> Also, Judge, in each case there were similar sex acts involved. There was oral sex with each child, and it was where each child's penis was placed in the defendant's mouth. So it was a similar sex act that was committed.
>
> In each case the child will testify that Gus Rawls told them not to tell anybody. In addition, we have the admission from Mr. Rawls himself that he committed the act on M.R. and that there were other victims.

(R. 6-8)

The defense pointed out that J.F. had testified that the sexual assaults occurred, not in his own home, but in Rawls'

trailer and in Rawls' parents' home, and that Rawls was not residing in J.F.'s home when the sexual assault in the trailer occurred. (R. 9-11)

In support of its motion to exclude the collateral crime evidence, the defense argued the following:

> Judge, we would argue with regard to the Williams Rule testimony or the similar-fact testimony that if it's the State's position that they're just attempting to prove corroboration or that they're trying to show a common plan or to substantiate the story of M.R., that it's possible to do with [sic] that with one witness and no more than one witness.
>
> Basically, what's gonna happen here if the State allows -- if the Court allows the State to proceed with this testimony, is that it's gonna be overwhelming in terms of Mr. Rawls' position and the prejudice to Mr. Rawls' position to have all of these young men coming in.
>
> If their purpose is just to show -- to corroborate the story, then it should be sufficient to have one person do that and not have -- It would be overwhelming in terms of his right to a fair trial, in the prejudicial nature of this testimony, to have this number of boys coming in.
>
> And, Judge, also I do want to -- there's something that was not mentioned. But one of these young men, J.F., indicates that there were some threats of violence made to him should he ever tell anybody about these particular incidents. However, M.R., indicates that at no time -- in the substantive case, in the principal case, he indicates at no time was there ever any type of threat of violence whatsoever. And I would ask that none of that testimony be admitted.

(R. 14-15)

The trial court denied the defense's motion in limine:

> Well, as to the initial objection filed by the defense to this testimony, I'm going to overrule the objection and I'm going to allow the testimony to come in. *** When it's a swearing match between the defendant and one victim, then it would seem that if there are other victims, that their testimony would be admissible to corroborate the testimony of the victim of the case on trial. And once again, in this case you have even stronger grounds for the admission of this testimony because of the relationship between Mr. Rawls and each child involved in this case.
>
> Now, that being said, I think the limitation on the evidence will be that -- or the admission of this evidence will be that only those -- that testimony which is similar in terms of the sexual act, that is, the oral sex of the defendant upon the child involved who is testifying will be allowed. Furthermore, I will not allow the State to question J.F. as to threats of intimidation or violence.

(R. 15-19) Defense counsel raised no objection to the admission of the collateral crime evidence when it was introduced at trial. (R. 110-151)

In opening statement, the prosecutor informed the jury that collateral crime evidence would be admitted to corroborate the victim's testimony. (R. 37-38) In closing, the prosecutor argued:

> [C]redibility is the main issue in this case and it's the credibility of M.R. that's at issue in this case. It's whether or not you believe M.R.
>
> As I indicated to you in jury selection, these are the types of crimes where there is no evidence. There's no medical testimony here that we can present you to show you whether or not oral sex was committed. There

is no medical evidence of that. This is the type of crime that's committed where there are no witnesses. Gus doesn't invite some buddies along to watch him do this type of deed. There's nobody else there. There's no other witnesses.

So how do we know whether or not M.R. is telling the truth? How do we know to give that child any credibility? Well, there are other witnesses, and those other witnesses established certain things. Those other witnesses by their testimony establish for you Gus Rawls' motive, his intent, his preparation, and his plan.

You heard the testimony in this case. It was that this man would basically attach himself to a family, become very good -- be a very good part of that family, pay for rent, help pay bills, buy the children gifts, endear himself to them. That's his plan. That's his method of operation. He did it to Marie S., became part of her family, had the opportunity to do this act to K.F., had the opportunity to do this to J.F. He became a part of Ms. P.'s family, paid bills, was good to that boy, had the opportunity to do that to T.S., and so on and so on. And last summer he did it with [M.R.'s family].

That's why that testimony is so important in this case, because it corroborates what M.R. said. It corroborates what Ms. R. said about how he attaches himself to a family, what he did, how he came to be in their house. All of that is such important testimony.

(R. 201-203)

And later, the prosecutor argued:

How could it not be true? Did M.R. make it all up? Did J.F. make it all up? Did T.S. make it all up? *** To reject the testimony of M.R. is to reject the testimony of J.S., K.F., and T.S. Do you really believe that all four of them would come in here and make something up about this man? Do you really believe that all four would endure what they've had to endure, go this far with a lie? I submit to you that they haven't.

(R. 206-207)

Rawls' theory of defense was that the sexual battery never occurred and that the testimony of all of the State's witnesses was unreliable. No opening statement was given. (R. 39, 155) Defense counsel argued in closing:

> I think you're gonna find that with regard to [the victim], his statements are not reliable with regard to the other children, the statements are not reliable.... (R. 209)
>
> I ask you to totally discredit [the police officer's] testimony because of the fact if they cannot provide the safeguards in a case of this magnitude, where we can hear what questions were asked and what [the defendant] said.... (R. 215)
>
> This is a serious, serious case and I ask you totally disregard that testimony [relating to the defendant's confession]. (R. 216)
>
> I think if you sit down and you consider and review this testimony [of the children], not one piece of it is reliable, not sufficiently reliable to bring back a verdict of guilty in a case such as this. (R. 221)

After closing argument was completed, the trial court called counsel to the bench and engaged them in the following dialogue:

> THE COURT: Regarding the Williams Rule instruction -- and it's indicating 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 -- based upon the Waring [Heuring] decision, I think it would be appropriate to insert also the language "or to corroborate the testimony of the victim in the case."
>
> DEFENSE COUNSEL: I wouldn't ask for it.

PROSECUTOR: The State would request it.

THE COURT: I think that this Williams Rule instruction was created prior to the Waring [Heuring] decision, and the primary basis of Waring is to allow the testimony on the issue of corroboration. So I will go ahead and modify the instruction and I'll note that you're not asking for it, Ms. Nicholas. But if you have any objection, you'd better go ahead and state it on the record.

DEFENSE COUNSEL: We object to giving it because it's not in the form.

COURT: Okay. I'm going to go ahead and modify it.

(R. 229-230) (e.s.)

Thereafter, the trial court instructed the jury, in pertinent part, as follows:

> The evidence which has been admitted to show similar crimes, wrong, 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.

(R. 234) (e.s.)

After deliberating for an hour, the jury returned a verdict of guilty of sexual battery as charged in the information. (R. 239, 241-243, 262)

The defense moved in writing for a new trial, in pertinent part, on the ground that the trial court had erred in "[d]enying Defendant's Motion in limine with regard to the introduction of Williams Rule testimony." (R. 264) At the sentencing hearing,

the defense stated, "Judge, we have submitted a motion for new trial, we submit it without argument." (R. 270) The trial court responded, "I've reviewed the motion and I'm prepared to deny the motion at this time." (R. 270)

Rawls was adjudicated guilty of capital sexual battery and sentenced to prison for life with a 25-year minimum mandatory term. (R. 271-272, 275-277, 280)

At sentencing, Rawls also pled nolo contendere to six counts of attempted sexual battery and one count of lewd and lascivious assault in unrelated cases, for which he received prison sentences to be served concurrently with the life sentence imposed for sexual battery in the instant case. (R. 267-272, 275-281)

Rawls appealed his judgment and sentence for capital sexual battery to the First District Court of Appeal, raising two issues:

> ISSUE I. THE TRIAL COURT'S ADMISSION OF TESTIMONY OF THREE BOYS ALLEGING SEXUAL ACTS BY MR. RAWLS ON THEM WAS REVERSIBLE ERROR.
>
> ISSUE II. THE TRIAL COURT'S MODIFICATION OF THE WILLIAMS RULE INSTRUCTION TO INCLUDE CORROBORATION AS A PROPER PURPOSE WAS REVERSIBLE ERROR.

(I.B. i)

As to the first issue, Rawls argued that (1) the evidence was irrelevant because the degree of similarity between the charged and uncharged offenses was too low, or, alternatively, (2) the probative value of the evidence was outweighed by the

danger of unfair prejudice because the collateral crime evidence became a feature of the trial. (I.B. 9-13) In response, the State argued that (1) the issue was procedurally barred because the collateral crime evidence was not objected to when admitted at trial, as was required by two cases from this Court, Correll v. State, 523 So. 2d 562, 566 (Fla. 1988) and Robertson v. State, 114 So. 534 (1927); (2) the evidence was relevant; and (3) its probative value was not outweighed by unfair prejudice. (A.B. 8-17)

As to the second issue, Rawls argued that (1) there was no authority (rule, statute, or case law) to support the modified jury instruction that was given to explain the purposes for which the collateral crime evidence could be considered by the jury, and (2) the judge vouched for the credibility of the State's witnesses when he told the jury that the collateral crime evidence could be used to corroborate the victim's testimony. (I.B. 14-16) The State responded that (1) the issues raised on appeal were not properly preserved because they were different from the issue raised at trial, (2) the modified jury instruction was authorized by case law, and (3) it was not an improper comment on the witnesses' credibility. (A.B. 18-19) No reply brief was filed.

The First District Court of Appeal issued an opinion affirming the judgment of conviction as to the first issue but reversing it as to the latter. Rawls v. State, 624 So. 2d 757, 758 (Fla. 1st DCA 1993). Rejecting the State's reliance on

Correll and Robertson, the First District concluded that the first issue was preserved because it was objected to "at the outset of the trial." Id., at 758. Ignoring the State's argument that different grounds were presented on appeal than were raised at trial, the First District also concluded that the second issue was preserved for appeal. It stated, "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." Id., at 758.

With respect to the first issue, the First District stated:

> 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.

Id., at 760. The court also rejected Rawls' argument that the collateral crime evidence became a feature of the trial, stating that any excessive emphasis on the evidence was attributable to the defense. Id., at 760.

As to the second issue, the First District 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. 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. [citations omitted]

Id., at 760. The court further concluded that the error was harmful because the State argued to the jury that the evidence could be used to corroborate the victim's testimony. Id., 760-761.

The State filed a motion for rehearing or certification. After pointing out that the ground relied on by the court was different from the ground relied on by the defense at trial or on appeal, the State commented:

> 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.

(Rehearing motion, 13)

Alternatively, the State asked the court to certify the same question that was certified in Saffor v. State, 625 So. 2d 31, 36 (Fla. 1st DCA 1993) (en banc), now before this court for review in Case No. 82,531. The question certified in Saffor was, "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?" Saffor was decided one day after Rawls, and the three judges who decided Rawls dissented in Saffor. The First District denied the State's motion for rehearing or certification.

The State timely invoked the discretionary jurisdiction of this court based on conflict with a decision from the Third District. Jurisdiction was accepted on February 25, 1994 and oral argument set for June 6, 1994.

STATEMENT OF THE FACTS

At trial, the State presented the testimony of eight witnesses: M.R. (sexual battery victim in instant case); Elizabeth R. (M.R.'s mother); Michelle Peavy (sex crime and child abuse investigator for Escambia County Sheriff's Department); Joseph Delsignore (formerly HRS child protection investigator); J.F., K.F., and T.S. (collateral crime victims); and Marie S. (rebuttal witness--mother of J.F. and K.F.). From their testimony evolved the following facts.

M.R., a nine-year old male child, lived with his mother, her boyfriend, and three siblings (two sisters, 7 and 11, and one brother, 1 year old). (R. 40-42) M.R.'s mother met Rawls at a neighbor's house. (R. 68) Rawls saw M.R. at the neighbor's house, but he did not spend any time with him. (R. 75) Rawls, who was having problems where he lived, wanted to move in with a family that had children. (R. 68-69) Six months after they met, Rawls moved into M.R.'s home. (R. 68) He agreed to pay rent ($200 monthly) and buy his own groceries. (R. 70) He was good to the family. (R. 70) He and the children seemed to get along well, and he was generous with them. (R. 70, 73) Rawls slept in M.R.'s bedroom, and M.R. slept on the couch in the living room. (R. 42, 70) M.R. was left alone with Rawls "a lot of times." (R. 51, 57)[1] Rawls stayed in M.R.'s home ten days. (R. 69) M.R.'s mother reported Rawls to the police. (R. 70)

---

[1] M.R.'s mother testified that she left M.R. alone with Rawls once or twice. (R. 72, 73)

Rawls unbuttoned M.R.'s pants and touched M.R.'s penis and put it in his mouth. (R. 43-44) This happened in the living room and kitchen when they were alone at night or during the day. (R. 43, 51) On one occasion, M.R. told Rawls to stop, but Rawls refused. (R. 44-45) Rawls told M.R. not to tell anyone. (R. 45) M.R. was afraid to tell what had happened. (R. 45) He did tell a friend and Michelle Peavy about Rawls' conduct. (R. 45) M.R. did not know J.F., K.F., or T.S. (R. 72)

Michelle Peavy arrested Rawls at M.R.'s home, and she and Joseph Delsignore interviewed Rawls at the sheriff's department. (R. 76-78) Rawls admitted performing oral sex on M.R. but claimed that it was alcohol induced. (R. 80, 90-91) He stated that when he drank, he got the urge to "fool around with little boys," and that there may have been other victims. (R. 90, 94)

J.F., sixteen, and K.F., twenty, were brothers. (R. 110, 122-123)[2] J.F. lived at both his grandfather's home and his mother's home. (R. 111, 124) Rawls previously lived with their family in the mother's home for several years. (R. 111, 123-124) Residing in the house were the mother and four children. (R. 124) When Rawls first started living with the family, K.F. was eight or nine years old. (R. 124) Rawls paid rent and some of the bills and bought the boys' gifts. (R. 113, 124) He also gave J.F. money and took him fishing. (R. 113) J.F. called Rawls Uncle Gus. (R. 113) Rawls put in his mouth J.F.'s penis while

---

[2] K.F. had been convicted of three felonies and two crimes involving dishonesty. (R. 125-126)

they were at J.F.'s grandfather's home and at Rawls' mother's home. (R. 112, 116-117) The first time this occurred J.F. was eight or nine years old. (R. 112) Rawls also put K.F.'s penis in his mouth. This occurred in the early morning hours in K.F.'s bedroom which he shared with his two brothers, who were not always there. (R. 125, 127-128, 135-136) Rawls came into K.F.'s bedroom three to four times each week. (R. 131) Rawls told J.F. and K.F. not to tell anyone. (R. 113, 125) At age twelve, J.F. told his grandparents and his mother about the sexual abuse. (R. 119-120) K.F. told his mother about it once, but his mother responded that Rawls was paying the bills and she did not believe K.F. (R. 130) After Rawls was arrested, J.F. and K.F. told Michelle Peavy what had occurred. (R. 113, 115, 129-130, 133)

T.S., a twelve-year-old male child, met Rawls at a trailer park when he was eight to ten years old. (R. 140-141) Rawls moved in with T.S.'s family, consisting of his mother, mother's boyfriend, T.F., and T.F.'s sister. (R. 141) Rawls paid bills, bought groceries, and bought T.F. gifts. (R. 141) He lived there approximately 1 to 1 1/2 years. (R. 147) Rawls put his mouth on T.S.'s penis in Rawls' trailer and in T.S.'s house after Rawls had moved in with the family. (R. 142, 147) This happened "many times." (R. 146) Rawls told T.S. not to tell anyone what had occurred. (R. 142) T.S. told his mother, and his mother evicted Rawls. (R. 143-144)

The defense called four witnesses: Donna P. (mother of T.S.); Marie S. (mother of J.F. and K.F.); Icie M. (grandmother of J.F. and K.F.); and Michelle Peavy.

Donna P. denied knowing about the sexual abuse. (R. 156) When Rawls left her home, he moved in with Donna P.'s sister and her children. (R. 156-157)

On direct examination, Marie S. denied that she told K.F. to forget about Rawls' sexual abuse because Rawls was paying the bills. (R. 160) She also denied learning about the sexual abuse from J.F. (R. 160-161) On cross-examination, she explained the circumstances under which she had learned about the sexual abuse from her two sons. K.F. was the first to mention it. (R. 162-163) In response, Marie S. confronted Rawls, who denied it and left the house. (R. 163) He was not allowed back in Marie S.'s home. (R. 163) Approximately two years later, Rawls came back to the boys' grandfather's home. (R. 163-164) On one occasion, Marie S. and her father arrived home to find Rawls and J.F. coming out of a bedroom and J.F. zipping up his pants. (R. 164, 168) Later that evening when J.F. was being bathed, he told his mother and grandfather that Rawls bit him in his private. (R. 168) The grandfather confronted Rawls and made him leave. (R. 161)

Icie M. denied knowing anything about Rawls' sexual abuse of J.F. and K.F. (R. 174-175, 182) On rebuttal, Marie S. testified that Icie M., her seventy-one-year-old mother with health problems, was told why Rawls had to leave their house. (R. 185-186)

In a recorded statement, Michelle Peavy indicated that J.F. had told her that his mother knew what was going on and begged

her not to put his mother in jail. (R. 169-170) Ms. Peavy further stated that T.S. told her he felt sorry for Rawls and did not tell his mother while Rawls lived with them. (R. 169-170)

SUMMARY OF ARGUMENT

The trial court correctly modified the standard jury instruction on the limited use of collateral crime evidence. The sexual battery in the instant case was committed within a "familial context." Rawls befriended the child victim's family, moved into the child's home, slept in the child's room while the child slept in the living room, paid rent, bought groceries, and sexually battered the child inside the house when the child's mother was not present.

The critical issue in this case was the child's credibility. Rawls did not defend on mistaken identity or innocent intent but rather accused the child of fabricating the sexual battery. Therefore, evidence of other sex crimes was relevant and necessary to corroborate the child's testimony. The collateral crime evidence was strikingly similar to the charged offense.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN GIVING A MODIFIED STANDARD JURY INSTRUCTION ON THE LIMITED USE OF COLLATERAL CRIME EVIDENCE.

The trial court in the instant case interpreted Heuring v. State, 513 So. 2d 122 (Fla. 1987) as authorizing the following modified jury instruction:

> The evidence which has been admitted to show similar crimes, wrong, 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.

(R. 234) (e.s.) The First District Court of Appeal held that this instruction was an incorrect statement of the law because "Heuring only authorizes use for corroboration in a familial or custodial situation," and the instant case does not involve such a situation. 624 So. 2d at 760. The First District has clearly misapplied, if not outright misinterpreted, Heuring.[3]

---

[3] At trial, defense counsel's sole objection to the modified jury instruction was that it was "not in the form." By no stretch of the imagination could this objection be construed to mean that the jury instruction was unauthorized because the crime was committed in a non-familial situation. In fact, this was not even the argument advanced on appeal, even though it was the ground on which the First District reversed Rawls' judgment of conviction. In disposing of the State's procedural bar argument, all the First District stated was that defense counsel had clearly objected to the modification. Since the procedural issue was not the basis on which this Court accepted jurisdiction, the State does not pursue this issue in its brief. However, it does

The defendant in Heuring was convicted of sexually battering his stepdaughter when she was between the ages of seven and twelve. The State relied on similar fact evidence that the defendant had sexually battered his daughter when she was between the ages of seven and fifteen. The two sexual batteries occurred twenty years apart. The defendant argued, inter alia, that this evidence was not proper Williams rule evidence.

This Court commenced its analysis with a general discussion of collateral crime evidence. After pointing out the inherent prejudicial nature of this type of evidence, it went on to state that to be admitted, the evidence must be relevant to a material fact in issue and meet a strict standard of relevancy. In support of the latter proposition, three cases were cited in which the primary issue was the identity of the perpetrator of the crimes (murder, robbery, and kidnapping). This Court then focused its attention on cases in which identity was not in issue because the accused was an acquaintance of the victim. It stated:

> Cases involving sexual battery committed within the familial context present special problems. The victim knows the perpetrator, e.g., a parent, and identity is not an issue. The victim is typically the sole eye witness and corroborative evidence is scant. Credibility becomes the focal issue. In such cases, some courts have in effect relaxed the strict standard normally applicable to similar fact evidence. These courts have

---

maintain that the substantive issue that is addressed in this brief is in fact procedurally barred.

> allowed evidence of a parent's sexual battery on another family member as relevant to modus operandi, scheme, plan, or design, even though the distinction between sexual design and sexual disposition is often tenuous. We find that the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognize that in such cases the evidence's probative value outweighs its prejudicial effect. See Comment, Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses, 25 U.C.L.A. L. Rev. 261 (1977). The court did not err, in the instant case, in allowing evidence of Heuring's sexual battery of his daughter, Anita.

Id., at 124-125.

The District Courts of Appeal have construed "familial context" to cover situations broader than the situation that was present in Heuring (victim and defendant were related by marriage and lived in same house). See, e.g., Saffor v. State, supra (1st DCA) (victim and defendant lived in same house but were unrelated by blood or marriage); State v. Paille, 601 So. 2d 1321 (Fla. 2d DCA 1992) (victim and 17-year-old defendant lived in same house on weekends but were unrelated by blood or marriage); Bierer v. State, 582 So. 2d 1230 (Fla. 3rd DCA 1991) (victim and defendant were neighbors; victim was frequent guest in defendant's home).

Professor Ehrhardt's interpretation of Heuring is in accord with the decisions of the District Courts of Appeal:

> 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.

Charles W. Ehrhardt, Florida Evidence § 404.18, 180-181 (West 1993) (e.s.).

Pertinent to this Court's analysis in Heuring and Professor Ehrhardt's commentary is the following excerpt from the law review article that was cited:

> 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 Comment).

Turning to the facts in the instant case, the child victim and Rawls lived in the same house but were unrelated by blood or marriage. Rawls paid rent and slept in the child's room, and the child slept on the couch in the living room. Rawls had known the child's mother for six months before moving into the house. He explained to the mother that he was having problems where he was living and that he desired to live with a family who had children. Rawls sexually battered the child inside the home when the mother was not present. The sexual battery occurred within ten days after Rawls moved into the home.

Heuring and the instant case have the following factors in common: (1) the child victim and the defendant resided in the same home; (2) identity was not in dispute because the child and the defendant knew each other; (3) the defendant's theory of defense was that the child was lying; that is, the sex act never occurred; (4) the critical issue was the child's credibility; and (5) evidence of other sex crimes was relevant and necessary to corroborate the child's testimony. The trial court properly modified the standard jury instruction to include corroboration of the victim's testimony as a legitimate use of the collateral crime evidence.

The manner in which such evidence is to be used has been explained 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. This is precisely the manner in which the collateral crime evidence was used in the instant case.

CONCLUSION

For the above reasons, this Court should quash the decision below, approve the giving of the contested jury instruction, and adopt the reasoning of Saffor, Paille, and Bierer on the applicability of Heuring.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits 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 22nd day of March, 1994.

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

Demery's testimony on cross-examination punctuated his lack of personal knowledge and familiarity upon which to predicate a fair market valuation:

Q: You've just indicated that you thought that the utility would have been worth $3 to $4 million in December of 1989, but the utility, you don't have an opinion as to what the value of the utility was in December of 1989, do you?

A. I don't know exactly.

Q. And you don't consider yourself to have any particular expertise, that gives you the ability to make a fair market valuation of the utility, do you sir?

A. I learned from others.

Q. But you, yourself, have no expertise to do that, sir?

A. I do not know that.

[3] The trial court erred in allowing the testimony of Nord and Demery, which constituted the only evidence of value offered by the defense. The only competent FMV testimony remaining is that of Sun Bank's experts. For this reason, we reverse the trial court's final judgment and remand for entry of a new order based on the testimony of Sun Bank's experts. We decline to grant a new trial due to the fact that appellee had ample time to conduct discovery and obtain an expert before the trial given the trial court's order extending the time to disclose experts and subsequent orders further extending the deadline for expert witness disclosure and extending the deadline for discovery. In the Order on Defendant's Motion to Reopen and Extend Deadline for Disclosure of Expert Witness, for Leave to Substitute Additional Expert Witness and for Continuance, the trial court denied the motion for continuance and the motion to reopen and extend deadline for disclosure except with respect to substitution of an expert for Mr. J.B. Miller.

We REVERSE and REMAND for entry of a judgment allocating the fair market value of the Utility at $775,000.00.

BOOTH and BARFIELD, JJ., concur.

Augustas J. RAWLS, Appellant,

v.

STATE of Florida, Appellee.

No. 92–1146.

District Court of Appeal of Florida, First District.

Sept. 14, 1993.

Rehearing Denied Oct. 28, 1993.

Defendant was convicted in the Circuit Court, Escambia County, Kim Skievaski, J., of sexual battery on a person less than 12 years of age. Defendant appealed. The District Court of Appeal, Ervin, J., held that: (1) collateral crime evidence was admissible, and (2) erroneous instruction on collateral crime evidence was not harmless.

Affirmed in part, reversed in part and remanded.

1. Criminal Law ⇐1043(1)

In prosecution for sexual battery on child under 12, issue was properly preserved on appeal when defendant filed written objection to use of collateral crime evidence, and parties argued objection at outset of trial.

2. Criminal Law ⇐1038.1(7)

In prosecution for sexual battery on child under 12, issue was properly preserved on appeal when defense counsel clearly objected to modification of jury instruction at time it was discussed, which was immediately prior to jury charge.

3. Criminal Law ⇐369.2(1)

Similar fact evidence must meet strict standard of relevance to be admissible; 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, and evidence must be relevant to material fact at issue in cause at trial, such as identity, intent, motive, opportunity, plan, knowledge, or absence of mistake or accident.

4. Criminal Law ⇐369.2(5), 372(7)

In prosecution for sexual battery on person under 12, collateral crime evidence of similar conduct involving three other boys was admissible; charged offense and collateral offenses were strikingly similar in that defendant befriended boys' mothers, arranged to move into their homes, paid rent, bought groceries and was generous to all family members, and then, in same manner, sexually molested male youths of approximately same age in their homes while no others were present and instructed them not to tell anyone what had occurred.

5. Criminal Law ⇐369.2(5)

In prosecution for sexual battery on person under 12, admission of collateral crime evidence of similar conduct involving three other boys was not unduly prejudicial; it was defense counsel's own trial tactics of calling numerous witnesses to impeach credibility of collateral crime witnesses which emphasized the evidence.

6. Criminal Law ⇐673(5), 783(1)

In prosecution for sexual battery on child under 12, trial judge improperly modified standard instruction to include corroboration of victim's testimony as proper use of collateral-crime evidence; without evidence that offense arose within familial or custodial setting, collateral-crime evidence could not be used for victim corroboration. West's F.S.A. § 90.404(2)(a).

7. Criminal Law ⇐1172.2

Error in instruction allowing jury to use collateral-crime evidence to corroborate victim's testimony was not harmless in prosecution for sexual battery on child under 12, especially where state expressly argued during closing statements that evidence could be used to corroborate victim's testimony.

Nancy A. Daniels, Public Defender and Josephine L. Holland, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen. and Carolyn J. Mosley, Asst. Atty. Gen., Dept. of Legal Affairs, Tallahassee, for appellee.

ERVIN, Judge.

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 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.

[1, 2] 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

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).

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 12½ 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.

[3] 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.

[4] 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.

[5] 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).

[6] 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 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).

[7] 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

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

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.

James J. WEAVER, Appellant,

v.

SCHOOL BOARD OF LEON COUNTY, Appellee.

No. 91-2920.

District Court of Appeal of Florida, First District.

Sept. 14, 1993.

Rehearing Denied Oct. 22, 1993.

School board sought review of administrative order of Commission on Human Relations, finding that board had committed unlawful employment practice by failing to hire black male for a full-time teaching position. The District Court of Appeal, 556 So.2d 443, affirmed in part, and reversed and remanded in part with directions. On remand the Commission rejected teacher's request for economic damages and awarded attorney fees. Appeal was taken. The Court of Appeal, Smith, J., held that: (1) earlier Court of Appeal's decision was "law of case" precluding reopening to introduce evidence of economic damage, and (2) Commission did not abuse discretion by applying one and one-half multiplier to lodestar, even though it was claimed that case involved public policy for which multiplier was not applicable.

Affirmed.

1. Attorney and Client ⇐147

Oral contingency fee agreement is enforceable. West's F.S.A. Bar Rule 4-1.5(f)(1, 2).

2. Civil Rights ⇐446

Commission on Human Relations did not depart from discretion to award "reasonable attorney's fees," by applying a multiplier of one and one-half to lodestar fee in connection with a suit brought by a teacher against a school board under the Human Rights Act, even though it was claimed that the proceeding was one to vindicate public policy, to which multipliers did not apply; action was essentially private in nature, to secure employment to which teacher claimed entitlement.

3. Administrative Law and Procedure ⇐820

Civil Rights ⇐447

A ruling by the Court of Appeal, that Commission on Human Relations had acted improperly in reopening hearing by teacher claiming entitlement to employment by school district and ordering payment of economic damages, was "law of case" precluding teacher from seeking damages on remand of case to Commission. West's F.S.A. § 120.57(1).

4. Civil Rights ⇐446

Commission on Human Relations did not abuse discretion by applying a one and one-half multiplier to lodestar for attorney representing teacher in successful effort to establish entitlement to employment by school district, even though teacher sought the application of a multiplier of two.

5. Civil Rights ⇐446

Commission on Human Relations did not abuse discretion by declining to compensate teacher, who had won a ruling that he was entitled to employment by school district, for delay in receipt of attorney fees.

Jerry G. Traynham, Patterson and Traynham, Tallahassee, for appellant.