IN THE SUPREME COURT OF FLORIDA

OBA CHANDLER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 84,812

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This brief is filed on behalf'of the appellant, Oba Chandler, in reply to the Answer Brief of the Appellee, the State of Florida. Appellant will rely upon the arguments presented in his initial brief for Issues V, VI, and VII.

Page number references to the record on appeal are designated by V for the volume, R for the record proper, and T for the trial transcript.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL BY ADMITTING IRRELEVANT EVIDENCE THAT HE SEXUALLY BATTERED JUDY BLAIR.

Appellant disagrees with appellee's assertion that the trial court's pretrial order permitting introduction of the collateral crime evidence (V 56, R 9457-58) delineated "some of the apparent similarities" between the murders of the Rogers and the sexual battery of Judy Blair. Answer Brief, p. 49 n. 1. Instead, the order provides, in pertinent part:

> 5) The facts surrounding the alleged homicides and the alleged rape are not only sufficiently similar but also share a unique or unusual characteristic or combination of characteristics to permit the introduction of evidence from the Blaire [sic] case into the Rogers case.
>
> * * *
>
> 7) The Court reserves the right to amend this Order to specifically note all unusual or unique similarities between the two alleged crimes after the trial. To do so at this time may result in speculation since some of the similarities proffered may not be presented to the jury based on the state and defense tactics in presenting their respective cases. Further, in the event the Defendant is acquitted, additional findings will be unnecessary.

(V 56, R 9458) The trial court entered an amended order listing the similarities it found between the crimes on February 2, 1995, (V 68, R 11579-84) after Chandler had been sentenced (V 68, R 11510-30; V 75, 12599-623) and filed his notice of appeal. (V 68, R 11541)

At the pretrial hearing on Chandler's motion to exclude evidence of the sexual battery, (V 44, R 7338-39; V 73, R 12220-387) the state argued that the evidence should be admitted because it was relevant to the issues of identity, motive, and intent; the state did not argue that the crimes were inseparably intertwined. (V 73, R 12328-60, 12364-72) The state's memorandum of law in support of the admission of the sexual battery evidence argued that the evidence was relevant to prove identity through a common modus operandi, motive, and to disprove defense arguments regarding Chandler's intent when he gave directions to the Rogers. (V 54, R 9138-46) The state's memorandum did not argue that the crimes were inseparably intertwined. (V 54, R 9131-47)

In its pretrial order, the trial court ruled that the evidence of the sexual battery was admissible because it was relevant to prove motive, opportunity, intent, plan, identity, and to explain why Joan Rogers allowed herself and her two teenage daughters to accompany Chandler on his boat. (V 56, R 9457) In the post-trial order, the court ruled that the evidence was relevant to establish identity, plan, scheme, intent, motive, and opportunity. (V 68, T 11583) The court instructed the jurors that they could consider the sexual battery evidence for the purpose of proving motive, intent, plan, or identity. (V 94, T 1538)

Because proof of identity was one of the purposes for which the state sought, and the court granted, admission of the sexual battery evidence, this Court should apply the "strict standard of relevance," Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987),

provided by Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981), and reaffirmed in Haves v. State, 660 So. 2d 257, 261 (Fla. 1995), to determine whether the trial court erred in admitting the evidence. This standard requires both "identifiable points of similarity which pervade the compared factual situations," and that "the points of similarity must have some special character or be so unusual as to point to the defendant." Drake, at 1219. This requirement has also been described as "a close similarity of facts, a unique or 'fingerprint' type of information, for the evidence to be relevant." State 'v. Savinb, 567 So. 2d 892, 894 (Fla. 1990).

Appellee's reliance on Crump v. State, 622 So. 2d 963 (Fla. 1993), Answer Brief, pp. 55-56, is misplaced because the collateral offense was much more similar to the charged offense in Crump than the collateral offense was to the charged offenses in the present case. Both the collateral and charged crimes were murders in Crump, while in the present. case the collateral offense was a sexual battery and the charged offenses were murders. In Crump, both victims died from manual strangulation, had ligature marks on their wrists, were found nude and uncovered in an area adjacent to cemeteries within a mile from 'each other, were murdered at different sites from where their bodies were discovered, and were both African-American women with similar physical builds and ages (Clark was 28 years old and weighed 117 pounds; Smith was 34 years old and weighed 120 pounds). Id., at 967-68.

In the present case, the Rogers were killed by asphyxiation, (V 87, T 606-09, 641) but the medical examiner found no evidence of sexual battery. (V 87, T 628, 631, 642-43) In ruling on defense counsel's motion for judgment of acquittal, the court noted the lack of evidence of sexual battery to support a first-degree felony murder conviction. (V 94, T 1719-20) Judy Blair was sexually battered but not killed. (V 94, T 1616, 1618, 1620, 1640-41) The Rogers bodies were found in Tampa Bay (V 87, T 576-600) with duct tape around their mouths, (V 87, T 591-94, 610, 626-27, 633, 635) their wrists and feet bound with ropes, (V 87, T 578, 584, 587, 591-93, 611, 627, 629, 632-33) and ropes around their necks attached to a concrete block or a weight that could not be dislodged. (V 87, T 578, 591, 593-96, 610-11, 627, 629, 633-35) In contrast, Blair was taken into the Gulf of Mexico, (V 94, T 1612-16, 1635-36, 1640) her mouth was not taped, (V 94, T 1616, 1618, 1620, 1641) her hands and feet were not tied and no rope was tied around her neck, (V 94, T 1616, 1618, 1620, 1641-42) she did not see any concrete blocks in the boat, (V 94, 1632, 1635, 1642) and Chandler returned her to shore and told her he was sorry. (V 94, T 1621-22, 1642) Joan Rogers was a 36 year-old wife and mother accompanied by her teenaged daughters, 17 year-old Michelle and 14 year-old Christe, (V 89, T 876) while Judy Blair was a 25 year-old recent college graduate who was not accompanied by friends or relatives went she went on Chandler's boat. (V 94, T 1591, 1602-03, 1612, 1626) The differences-between the murders of the Rogers and the sexual battery of Judy Blair were so substantial that no

common modus operandi was established. See Drake, 400 So. 2d at 1219-20; Peek v. State, 488 So. 2d 52, 55-56 (Fla. 1986); Thompson v. State, 494 So. 2d 203, 204-05 (Fla. 1986); Hayes, 660 So. 2d at 261.

Appellee's reliance on Schwab v. State, 636 So. 2d 3 (Fla.), cert. denied, U.S. , 115 S. Ct. 364, 130 L. Ed. 2d 317 (1994), Answer Brief, p. 60, is misplaced for the same reason. Schwab was tried without a jury and convicted for the first-degree murder, sexual battery, and kidnapping of an 11 year-old boy. Id., at 4. The state was permitted to present evidence of three collateral attacks on other boys, which the trial court found to be relevant to identity, motive, opportunity, and to rebut a story Schwab told his mother. Id., at 4, 6-7. This Court found significant similarities between the charged offenses and the collateral offenses to form a sufficiently unique pattern as to be admissible. Id., at 7. The victims in all four incidents ranged in age from 11 to 15 and had similar physical attributes. Schwab ingratiated himself with the family of the murder victim and with the family of one of the collateral victims, and he tried to befriend the other boys. He held each victim at knifepoint, although only the murder victim was killed. Id., at 7. As argued above, the differences between the murders of the Rogers and the sexual battery of Judy Blair were so substantial that no common modus operandi was established in the present case.

Appellee also cites, and misquotes, Jensen v. State, 555 So. 2d 414 (Fla. 1st DCA 1989). Answer Brief, p. 63. The First

District approved the admission of evidence of eight prior burglaries of the same home of the same victim as in the charged burglary. The court opined, "The more frequently an act is done, the less likely it is that it is innocently done." Id., at 415. Nine burglaries of one home by one person is not fairly comparable to the events in Chandler's case.

Appellee's reliance on Duckett v. State, 568 So. 2d 891 (Fla. 1990), Answer Brief, pp. 65-67, is also misplaced. Duckett was a small town police officer who picked up teehaged, petite women and made passes at them while he was in his patrol car at night, on duty, and in uniform. Id., at 895. He was tried and convicted for picking up an 11 year-old girl, who looked older, in his patrol car while on duty and in uniform, sexually battering her, then murdering her. Id., at 892-894. Duckett's exploitation of his position as a police officer, his uniform, his patrol car, and his night time duty hours to make unwanted sexual advances.to teenaged girls satisfied the pervasive similarity and unusual nature requirements of Drake and made the collateral incidents relevant to establish his mode of operation, identity, and a common plan. Id., at 895.

As argued in Issue I of the initial brief, pp. 77-87, the alleged similarities between the sexual battery of Judy Blair and the murders of the Rogers did not satisfy the requirements of Drake. As an aluminum contractor with a boat and a friendly demeanor, Chandler was not exploiting the special public trust accorded to an on-duty, uniformed police officer like Duckett.

Also, there was a much greater age- disparity among the victims in Chandler's case than among the- victims in Duckett's case. As explained above, Judy Blair was a 25 year-old recent college graduate, while Joan Rogers was a 36 year-old wife and mother accompanied by her teenaged daughters, 17 year-old Michelle and 14 year-old Christe. The collateral act witnesses in Duckett's case were 19 and 18 years-old, Duckett, at 893, while the sexual battery and murder victim was 11 years-old. Id., at 892.

Furthermore, both the collateral acts and the charged crimes in Duckett's case were clearly sexually motivated, despite the differences in result. Duckett tried to kiss the 19 year-old witness, then desisted when she refused. , Duckett, at 893. He placed his hand on the breast of the 18 year-old witness and tried to kiss her, then desisted when she refused. Id. He sexually battered the 11 year-old murder victim. Id., at 892. In Chandler's case, as set forth above, Judy Blair was sexually battered, but the medical examiner found no evidence of sexual battery of Joan, Michelle, and Christe Rogers. It should also be noted that Blair's testimony regarding the details of her sexual battery was more prejudicial to Chandler than the testimony about attempting to kiss the teenagers was to Duckett. Sexual battery is a far more serious offense than an attempt to kiss someone, especially when the attempt ends when the person objects.

Because the state did not argue below, and the trial court did not find, that the murders and the sexual battery were inseparably intertwined, appellee should be foreclosed from presenting that

argument in this appeal. Answer Brief, pp. 67-70. In Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993), this Court ruled that "procedural default rules apply not only to defendants, but also to the State." But see Caso v. State, 524 So. 2d 422, 424 (Fla.), cert. denied, 488 U.S. 870 (1988), ruling that a "decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it." As a matter of basic fairness under the due process clauses of the United States Constitution Amendment XIV and Article I, section 9, Florida Constitution, Cannadv states the better rule. Because defendants are required to preserve an issue for appellate review by presenting the specific legal argument or ground on which it is based to the trial court, Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990), cert. denied, 500 U.S. 938 (1991), the state should be subject to the same rule.

Appellee's reliance on Consalvo v. State, 21 Fla. Law Weekly S423 (Fla, Oct. 3, 1996), Answer Brief, p. 67-69, is misplaced because the collateral burglary evidence was much more closely connected and intertwined with the facts of the murder in that case than the sexual battery evidence was with the murders in this case. The police did not discover that Consalvo's neighbor, Lorraine Pezza, had been murdered until Consalvo had been arrested for the collateral burglary, Pezza's checkbook was found in his possession, and he called his mother from the jail and told her that he was involved in a murder. Id., at S424-425. There is no similar connection between Judy Blair's testimony about the details of how

she was sexually battered by Chandler and the discovery of the fact that the Rogers had been murdered.

In arguing that the sexual battery evidence was inseparably intertwined with the murders, appellee also cites Henry v. State, 649 So. 2d 1361 (Fla. 1994), cert. denied, __ U.S. __, 116 S. Ct. 101, 133 L. Ed. 2d 55 (1995), and Henry v. State, 649 So. 2d 1366 (Fla. 1994), cert. denied, __ U.S. __, 115 S. Ct. 2591, 132 L. Ed. 2d 839 (1995). Answer Brief, p. 70. Henry killed his estranged wife, Suzanne Henry, by stabbing her repeatedly in the throat at her home in Pasco County, then took her five year old son, Eugene Christian, from the home and killed him by stabbing him in the throat nine hours later in Hillsborough County. Henry was convicted and sentenced to death for each murder in separate trials. 649 so. 2d at 1363 and 1367. The Henry cases are distinguishable from Chandler's case because they -involved a single, extended criminal episode in which Henry killed his wife, kidnapped her son, then killed the son. Under those circumstances, the facts of the two murders truly were so inextricably intertwined that it was necessary to admit at least some evidence of the other murder in each of the trials to establish the context in which each murder was committed. 649 So. 2d at 1365 and 1368. Chandler's case is different because the sexual battery of Judy Blair and the murders of the Rogers were completely separate criminal episodes. The facts of the sexual battery were not inextricably intertwined with the facts of the murders, and the murder case could very well have been tried without any reference to the sexual battery.

It should also be noticed that Henry's original conviction for the murder of his wife was reversed for a new trial because of the admission of excessive evidence of the murder of Christian. Henry v. State, 574 So. 2d 73, 75 (Fla. 1991). First, this Court found that the killing of Christian was irrelevant to any material issue in the trial for the murder of Mrs. Henry. Id. Second, this Court found that "the fact that both victims were family members who were stabbed in the neck did not provide sufficient points of similarity from which it would be reasonable to conclude that the same person committed both crimes." Id. Finally, this Court found,

> Some reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. § 90.403, Fla. Stat. (1985).

Id.

Upon remand for a new trial, the trial court abided by this decision and prohibited the state from presenting in-depth testimony about the search for Christian's body, the autopsy photo, or the manner in which he was killed. Henry, 649 So. 2d at 1367. The trial court did allow reference to the facts that Christian was last seen at his mother's house on the day of the murder, he was missing from the house when her body was found, he left the house

with an unknown person, Henry led the police to the location of Christian's body, and Henry confessed to killing Christian. Id., at 1367-68. This Court held that these facts were inextricably intertwined with facts pertaining to the murder of Mrs. Henry. Id., at 1368.

Similarly, if this Court were to find that some reference to the sexual battery of Judy Blair was necessary to explain how Chandler was identified and apprehended as the perpetrator of the Rogers murders, this Court should still reverse Chandler's convictions and remand for a new trial. Blair's testimony about the factual details of the sexual battery was not necessary for those purposes and was not relevant to the facts of the murders. The state did not prove that the Rogers were sexually battered, so there was no similarity between the acts of sexual battery inflicted upon Blair and the murders of the' Rogers. Any probative value the details of the sexual battery may have had was outweighed by the prejudicial effects of this evidence upon the minds of the jurors, so the evidence should have been excluded under section 90.403, Florida Statutes (1993). Henry, 574 So. 2d at 75; Hayes, 660 So. 2d at 261.

ISSUE II

HAVING FOUND THAT APPELLANT HAD THE RIGHT TO REMAIN SILENT REGARDING THE FACTS OF THE PENDING SEXUAL BATTERY CASE, THE TRIAL COURT VIOLATED THAT RIGHT BY REQUIRING HIM TO REPEATEDLY INVOKE HIS FIFTH AMENDMENT PRIVILEGE BEFORE THE JURY IN RESPONSE TO THE STATE'S QUESTIONS ABOUT THE SEXUAL BATTERY.

Appellee argues that Chandler's claim of prejudice from the prosecutor's cross-examination about the sexual battery of Judy Blair, to which he responded by- repeatedly invoking his Fifth Amendment privilege before the jury, is "preposterous" because defense counsel admitted in opening statement that the state could prove he was guilty of the Madeira Beach rape and because the state did prove his guilt of that offense through the testimony of Barbara Mottram and Judy Blair. Answer Brief, pp. 72-73. Appellee is wrong because the prejudice claimed by Chandler is not based on his guilt or innocence of the sexual battery, but upon the effects of his assertion of his Fifth Amendment privilege upon the jurors. It is quite likely that the jurors inferred'that Chandler was a bad person with sinister motives for invoking his constitutional privilege, and that the jurors inferred Chandler's guilt of the charged murders from his refusal to answer questions designed to elicit a direct admission of guilt of the sexual battery.

Moreover, in response to Chandler's motion for mistrial because of the prosecutor's elicitation of Chandler's claim of privilege during cross-examination, (V 98, T 2279) the prosecutor offered the following explanation of his conduct:

> Just for the record, since I've been repeatedly maligned by the accusations that I was causing Chandler to invoke the Fifth Amendment, I want to clarify he has a Fifth Amendment right. I wanted answers to my questions. That is what I would prefer.
>
> It was his election and not my desire that he response [sic] in the way that he did.

(V 98, T 2279-80) The prosecutor's response cannot withstand scrutiny. Regardless of his desire to obtain answers to his questions, he acknowledged that Chandler had a Fifth Amendment right not to answer. He also knew that Chandler had invoked his right not to testify about the sexual battery before Chandler took the stand to testify and that the trial court upheld this claim of privilege, despite its ruling that it would allow the cross-examination. (V 98, T 2161-64) Since the prosecutor knew that Chandler would invoke his privilege, his repeated questions about the sexual battery could only have been intended to cause Chandler to repeatedly invoke the privilege before the jurors. Since the prosecutor knew he could not obtain the answers he claimed to desire, he must have desired instead that the jurors- would draw adverse inferences from Chandler's assertion of his Fifth Amendment rights.

Appellee's reliance on United States v. Hearst, 563 F. 2d 1331 (9th Cir. 1977), cert. denied, 435'U.S. 1000 (1978), Answer Brief, pp. 74-76, is misplaced. Hearst is different from Chandler's case for two reasons. First, both the trial court and the Ninth Circuit ruled that Hearst had waived her Fifth Amendment privilege regarding the collateral crimes about which the prosecution cross-examined her. Id., at 1338-39. In contrast, the trial court in

this case determined before Chandler testified that he retained his Fifth Amendment privilege regarding the sexual battery of Judy Blair (the "Madeira Beach rape case") because that case was still pending. (V 98, T 2161-62, 2164)

In Hearst, at 1341, the court explained:

> In determining whether it is improper for the government to ask a defendant questions which will result in an assertion of the privilege against self-incrimination, the central consideration is whether the defendant has waived his privilege as to the propounded questions. When a witness or a defendant has a valid Fifth Amendment privilege, government questions designed to elicit this privilege present to the jury information that is misleading, irrelevant to the issue of the witness's or the defendant's credibility, and not subject to examination by defense counsel. See Namet v. United States, 373 U.S. 179, 186-87, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963). Therefore, we do not allow this form of questioning. [Emphasis added.]

Thus, the trial court's determination that Chandler retained his Fifth Amendment privilege regarding the sexual battery made it improper for the prosecutor to ask Chandler questions designed to elicit this privilege before the jury.

Second, the cross-examination in Hearst was directly related to the subject matter of Hearst's testimony on direct. The Ninth Circuit found that the central theme of her testimony was that she acted under continual threats of death from the time she was kidnapped until the time of her arrest, thus disputing the main element of the government's case against her, that she acted with criminal intent when she participated in the bank robbery with the group who kidnapped her. The collateral crimes about which Hearst

was cross-examined occurred after the bank robbery but before her arrest and were both relevant and admissible. Id., at 1339-41. In contrast, Chandler contends that the sexual battery of Blair was not relevant to any material issue in his murder trial, see Issue I of appellant's initial and reply briefs, and was not within the proper scope of cross-examination'because 'it was not relevant to his testimony denying that he committed the murders. See Issue II of appellant's initial brief.

The court explained its reasoning in denying the motion for mistrial:

> The record is clear. It was Mr. Crow's position last night, Mr. Zinober, that he did not think he had a Fifth Amendment privilege and didn't want him to plead the Fifth. He wanted answers to the questions.
>
> And it was you and your client who indicated that you wanted to invoke the Fifth, thought I should make a ruling he had the right to invoke the Fifth.
>
> Now, I had to do it one way or another. I had to either make him answer or invoke the privilege. Seems to me that I did what you wanted me to do, which was to allow him to invoke the Fifth.
>
> Mr. Crow wanted 'answers. He lost, you won. So your request for a mistrial is denied.

(V 98, T 2280)

However, because the court determined that Chandler retained his Fifth Amendment privilege regarding the sexual battery, it was wrong for the court to allow the state to subject Chandler to cross-examination concerning the privileged subject matter, so that Chandler was compelled to invoke his privilege before the jury. Hearst, 563 F. 2d at 1341. The court's assertion that it had only

two alternatives, to compel Chandler to answer or to allow him to invoke his privilege before the jury, is also plainly wrong. Having found that Chandler was entitled to the protection of the Fifth Amendment privilege regarding the sexual battery, the court should have prohibited the state from cross-examining Chandler about it.

In Johnson v. United States, 318 U.S. 189, 196 (1943), cited in the Answer Brief at p. 74, the Supreme Court declared,

> [W]here the claim of [Fifth Amendment] privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment. . . . The fact that the privilege is mistakenly granted is immaterial.

Id., at 196. The Court explained;

> An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. . . . If he receives assurance that it will be granted if claimed, or if it is claimed and granted outright, he has every right to expect that the ruling is made in good faith and that the rule against comment will be observed.

Id., at 197. Moreover, the Court asserted,

> When [the trial court] grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers.

Id., at 199. Nonetheless, the Court ultimately concluded that the error in Johnson's case was procedurally defaulted by defense counsel's action in withdrawing his objection. Id., at 199-201.

Under Johnson, it was error for the court to allow Chandler to invoke the Fifth Amendment and then allow his assertion of the privilege to be used against him by the state. Unlike Johnson, Chandler did not withdraw his objection to the procedure adopted by the court, so his claim was not procedurally defaulted.

McGahee v. Massey, 667 F. 2d 1357 (11th Cir.), cert. denied, 459 U.S. 943(1982), quoted in the Answer Brief at p. 74, involved facts which are virtually the opposite of the facts in Chandler's case. McGahee was convicted of rape. The Florida trial court admitted evidence of two prior incidents of indecent exposure, which were similar to McGahee's conduct when he first approached the rape victim, to prove identity and common modus operandi. McGahee testified only about the first indecent exposure incident. The trial court limited the state's cross-examination of McGahee to that incident. In closing, the prosecutor commented on McGahee's failure to testify about the charged rape, but defense counsel did not assert any violation of the Fifth Amendment privilege in the trial court. In a federal habeas corpus petition, McGahee claimed plain error regarding the prosecutor's comment on his silence about the charged offense. The federal district court agreed and issued the writ. The Eleventh Circuit reversed because McGahee failed to raise his Fifth Amendment claim in the trial court and because he had testified on the merits of the charged crime by testifying about evidence admitted to prove his identity. Chandler's case is different because Chandler testified about the charged murders and his subsequent behavior rather than about the collateral crime, the

trial court did not limit the state's cross-examination to the subjects covered on direct, and Chandler invoked his Fifth Amendment privilege when the state cross-examined him about the prior sexual battery of Judy Blair.

In Calloway v. Wainwright, 409 F. 2d 59, 66 (5th Cir. 1968), cert. denied, 395 U.S. 909 (1969), cited in the Answer Brief at p. 74, the Fifth Circuit held,

> That appellant took the stand for the sole purpose of testifying upon the credibility of the voluntariness of his confession should not be taken as a complete waiver of his constitutional privilege against self-incrimination. We find that the trial Court erred in permitting the prosecutor to comment adversely upon appellant's failure to testify on anything other than the voluntariness of his incriminating statements . . . .

Similarly, that Chandler took the stand for the purpose of denying that he killed the Rogers and to explain his subsequent behavior should not be taken as a complete waiver of his Fifth Amendment privilege regarding the prior sexual battery.

Tucker v. Francis, 723 F. 2d 1504 (11th Cir. 1984), cited in the Answer Brief at p. 74, involved a Georgia murder case. The defendant did not testify in the guilt phase but did testify in the penalty phase to minimize his involvement in the murder and to shift most of the blame to another person. In penalty phase closing argument, the prosecutor commented on the defendant's silence during the guilt phase. The Eleventh Circuit held that the defendant waived his Fifth Amendment privilege by testifying in the penalty phase, so it was permissible for the state to comment on

his earlier silence. Id., at 1514. Tucker does not support the trial court's actions in Chandler's case,

Appellee also argues Chandler's claim that the prosecutor's cross-examination of him concerning the sexual battery was beyond the proper scope of cross-examination should be procedurally barred because defense counsel failed to contemporaneously object on this ground each time the prosecutor asked such a question. Answer Brief, pp. 89-93. Yet appellee concedes that defense counsel unsuccessfully sought the court's ruling on this issue before Chandler testified and that he did contemporaneously object on this ground to the prosecutor's last three questions. Answer Brief, pp. 90-93.

This is certainly not a case in which defense counsel failed to raise an issue in the trial court when corrective action could have been taken to avoid or cure the error and then raised the issue for the first time on appeal. Defense counsel gave the court and the state ample opportunity to avoid the error by raising the issue before Chandler testified. The court could have attempted to cure the error when defense counsel repeated his objection before the conclusion of the state's cross-examination. Thus, the fault for the error rests with the trial court and the state for failing to heed defense counsel's objection, and the issue should not be procedurally barred.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT A PRIOR CONSISTENT STATEMENT BY KRISTAL MAYS WHEN HER MOTIVE TO FABRICATE EXISTED BEFORE THE STATEMENT WAS MADE.

Appellee's argument relies upon four cases in which this Court found that the prior consistent statements of state witnesses were properly admitted to rebut defense inferences of improper motive to fabricate: Rodriguez v. State, 609 So. 2d 493, 500 (Fla. 1992); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992); Alvin v. State, 548 So. 2d 1112, 1114 (Fla. 1989); Dufour v. State, 495 So. 2d 154, 160 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987). Answer Brief, p. 98. However, in Rodriguez, Alvin, and Dufour, it was clear that the prior consistent statements were made before the existence of the fact which gave rise to the inference of improper motive. In Jackson, this Court did not expressly discuss the timing of the prior consistent statement in relation to the witness's agreement to testify. Appellant can only presume that the statement was made before the agreement, or that the timing of the statement was not placed in issue.

It is well established that to be admissible under section 90.801(2)(b), Florida Statutes (1993), the prior consistent statement must have been made before the existence of a fact giving rise to the witness's motive to fabricate. Jackson v. State, 498 so. 2d 906, 910 (Fla. 1986); Keffer v. State, 22 Fla. L. Weekly D105 (Fla. 2d DCA Dec. 27, 1996).

Similarly, the United States Supreme Court has held that Federal Rule of Evidence 801(d)(1)(B) permits the introduction of a witness's prior consistent statements to rebut a charge of recent fabrication or improper influence or motive "only when those statements were made before the charged recent fabrication or improper influence or motive." Tome v. United States, 513 U.S. __, 115 s. ct. 696, 130 L. Ed. 2d 574, 588 (1995). In reaching this decision, the Court observed,

> The prevailing common-law rule for more than a century before the adoption of the Federal Rules of Evidence was that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards.

130 L. Ed. 2d at 581. The Court also quoted E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed 1972), as stating,

> "[T]he applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated."

130 L. Ed. 2d at 581.

In the present case, Kristal Mays' prior consistent statement to the State Attorney's Office was made on October 6, 1992. (V 91, T 1197-98, 1200-01) Although the statement was made before she was paid to appear on television to discuss Chandler's case in 1994, (V 91, T 1194, 1197), the statement was made after the existence of facts which gave rise to her motive to fabricate, i.e., her anger over the October, 1990, incident in which Chandler involved her

husband, Rick Maya, in a scheme to take money from drug dealers. During that incident Chandler, "put a gun on" Rick, then left Rick to be beaten and almost killed by the dealers. The incident also resulted in Kristal Mays having to drop out of nursing school to move her family to another house. (V 91, T 1185-87, 1189) She remained very angry with her father because of this incident at the time of his arrest on September 24, 1992, (V 91, T 1190-92) only 12 days before she gave the prior consistent statement to the State Attorney's Office. Because the prior consistent statement was made after the events giving rise to her motive to fabricate, it was not admissible under section 90. 801(2)(b), Florida Statutes (1993). Jackson v. State, 498 So. 2d at 910; Keffer v. State, 22 Fla. L. Weekly at D105.

Appellee argues that the trial court's error in admitting the prior consistent statement was harmless because the jury knew the drug rip-off was before the statement and defense counsel had the opportunity to recross Mays concerning the statement. Answer Brief, pp. 98-99. But appellee's argumeht would make harmless virtually any error in admitting a prior consistent statement which occurred after facts giving the witness a motive to fabricate. In such cases the jury will always know about the prior existence of the facts giving rise to the motive to fabricate because the defense elicitation of such facts is the event which triggers the state's attempt to rehabilitate the witness with the consistent statement. The prejudicial effect of the court's error comes not from the jury's knowledge or lack of knowledge of the motive to

fabricate, but from the improper rehabilitation of the witness by bolstering her credibility with the legally inadmissible consistent statement.

As the beneficiary of the error, the state has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The state has not satisfied that burden in the present case, so Chandler's convictions should be reversed.

ISSUE IV

THE PROSECUTOR'S IMPROPER REMARKS IN CLOSINGARGUMENTVIOLATED CHANDLER'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Appellee is correct in stating that defense counsel did not move for a mistrial when he objected that the prosecutor commented on Chandler's exercise of his Fifth Amendment privilege during closing argument. Answer Brief, p. 101 n. 5. (V 101, T 2645-46) Counsel for appellant was mistaken when he stated in the initial brief, at pp. 64 and 105, that defense counsel moved for a mistrial when he objected. Counsel did not intend to misstate the facts and apologizes to the Court, for his error.

Appellant's argument that the prosecutor's remarks in closing argument violated Chandler's due process right to a fair trial is not dependent on defense counsel's objection. Instead, appellant contends that the prosecutor's improper remarks were so prejudicial that they created fundamental error reviewable in the absence of objection. See Pait v. State, 112 So. 2d 380, 385 (Fla. 1959). Initial Brief, Issue IV, p. 109. See also Perez v. State, 22 Fla. Weekly D243 (Fla. 3d DCA Jan. 22, 1997) (fundamental, reversible error occurred when prosecutor accused defendants of racism in closing when not justified by the evidence and not relevant to the issues).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 24th day of February, 1997.

Respectfully submitted,

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