IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 01-890

FLOYD THOMAS ROBERTSON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

AMENDED BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, Floyd Thomas Robertson, was the appellant in the district court of appeal and the defendant in the Circuit Court. The Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R." will be used to designate the record on appeal and the symbol “T.” shall denote the transcript of the trial proceedings below.

STATEMENT OF THE CASE AND FACTS

Mr. Robertson was charged by information with one count of second degree murder (R. 1). This case arose from the shooting death of his girlfriend, Maria Nelson, in the bedroom of their apartment. The main factual issue at trial was whether the shooting was an accident.

On November 17, 1996, at 7:50 P.M. Officer Dominguez was dispatched to the apartment which Mr. Robertson and Maria shared to investigate an accidental shooting (T. 287). In the bedroom of the apartment, the officer saw Maria Nelson strewn on the bed. On the floor, about five feet from the bed, was a handgun with a bullet clip next to it (T. 293). Maria was still conscious and breathing, but uncommunicative. Dominguez ripped her shirt open and found an entrance wound in the chest and an exit wound in the middle of her back (T. 295-96). The officer applied a towel to the entrance wound in order to stop the bleeding (T. 297). While Dominguez attended to Maria, Mr. Robertson said that he had gone shooting with his son and the gun went off (T. 300). Officer Dominguez testified that Mr. Robertson appeared distraught, "nervous and very upset" (T. 314-15).

Officer Zirio, who was in training at the time, was assigned the task of writing the police report. He sat at a table next to the defendant. Mr. Robertson, as described by the officer, was very nervous and stated repeatedly that it had been an

accident (T. 268-69). Mr. Robertson kept reiterating that he had returned from the Everglades, where he had gone shooting with his son. He said that Maria asked him to show her the gun he had used. When he went to show her the .40 caliber Ruger, it discharged accidentally and struck her (T. 270). Officer Regina Cure also heard the defendant explain that when he returned from the Everglades, Maria asked to see the gun he had used. The defendant removed the weapon from the closet and was showing her how it worked when the gun discharged (T. 337).

Shirley Baumgartner worked for Maria Nelson, who managed the "Cabana Club Apartments" — which is also where she lived with the defendant (T. 360). Ms. Baumgartner testified that on November 17 Maria seemed upset (T. 366). Maria asked her to stay after work and later they had an hour-long conversation (T. 365). The prosecutor asked her if the conversation involved Maria's personal life and whether this had been the most personal conversation she had ever had with Maria (T. 368). The prosecutor also asked if the conversation concerned Maria's relationship with the defendant, to which the court sustained the defense's objection (T. 369). The court allowed the witness to testify that Maria had expressed she was unhappy in her relationship with Mr. Robertson (T. 381).

Maria Serrano was a tenant of the Cabana Club Apartments and lived in a unit directly beneath the apartment where Mr. Robertson and the victim resided (T.

383-84). Between 6:30 and 7:00 P.M. Mrs. Serrano and her husband heard "running" noises coming from the defendant's apartment (T. 386). They also heard five or six thumps against the wall, which Mrs. Serrano characterized as sounding as though someone was being thrown against a wall (T. 387). Forty-five minutes later, Mr. Serrano reported hearing a gunshot, but Mrs. Serrano did not hear it (T. 388, 391). On cross-examination, however, Mrs. Serrano's time-frame collapsed. On direct, she explained that she and her husband heard running and thumping sounds coming from the defendant's apartment between 6:30 and 7:00 P.M.. About forty-five minutes to an hour later, her husband heard a shot. Yet when asked at what time Mr. Serrano heard the shot, she testified that it was 6:45 P.M. (T. 393). Mr. Serrano stated on cross-examination, that he was not sure whether the noises and the gunshot came from inside the defendant's apartment, or outside the apartment (T. 402-3).

At 7:45 P.M. Connie Alvarado was standing on the balcony outside her apartment, which faced the balcony of the defendant's apartment (T. 406, 416). She saw the defendant sitting in the corner of the balcony, he eventually got up and went to the sliding glass door. She saw Mr. Robertson waiving his arms, he then entered the apartment and a few minutes later Maria walked out on the balcony. Shortly thereafter, Maria re-entered the apartment at which point Ms. Alvarado

heard a gunshot (T. 406-15).

Detective Chavarry interviewed Mr. Robertson at the police station. According to the defendant's statement, earlier that day he and his son went shooting in the Everglades. They took several firearms with them (T. 491-92). Later, after leaving his son with his ex-wife, the defendant returned to the apartment at about 6:45 P.M. (T. 494). When he arrived, Maria was upset because he had arrived late. Id. The defendant mentioned that Maria was jealous of his ex-wife and his relationship with his son (T. 495). Mr. Robertson explained to the Detective that he retrieved the Ruger from the closet in order to clean it (T. 496). Meanwhile, Maria was sitting on the edge of the bed facing him. *Id.* He said that they were in the midst of a discussion, but the conversation was calm in tone (T. 497). Mr. Robertson took the gun case out of the closet; he started to unzip the case when a magazine fell to the floor. As he bent over to pick it up, the gun accidentally discharged (T. 498-99).

The pathologist determined that the projectile entered the victim's chest and traveled along a downward path (T. 639-40, 658-59). According to a crime scene expert, the trajectory of the bullet, in conjunction with the victim's injuries, indicated that she was sitting on the bed when she was shot (T. 459).

Steven Angene, the defendant's friend, testified that he and Mr. Robertson

shared a common interest in guns. They had gone target shooting on several occasions and he knew the defendant to be knowledgeable about firearms and gun safety (T. 568-73). Mr. Angene owned the Ruger, which he had loaned it to the defendant six weeks prior to the incident (T. 568-70). On one occasion, Mr. Angene saw the Ruger on the table at the defendant's apartment (T. 585). He noticed that it was loaded and had a bullet in the chamber. He unloaded the gun and observed that the barrel was very dirty (T. 585-86).

A few days after his arrest, Mr. Robertson called Steven Angene from jail (T. 590). The defendant explained that a few nights before the incident high winds were blowing against the front door of the apartment and it sounded as if someone was trying to break in (T. 591). The defendant got out of bed and went to check the front door with the Ruger. At that time, he had the hammer pulled back in the firing position. Id. He placed the gun back in its case with the hammer in the same position (T. 592). The defendant told Angene that on the date of the incident he had gone shooting with his son, but according to Angene Mr. Robertson indicated they had only used a .22 caliber weapon (T. 592-93). Mr. Robertson said that while having a discussion with Maria he went to the closet and removed the Ruger from its case; when he tried to extract the magazine it accidentally fired (T. 593). Mr. Angene stated that the defendant had previously had problems removing the

magazine from the gun (T. 612). At the end of the conversation, the defendant asked Mr. Angene not to tell the police about the difficulties between himself and the victim (T. 599). According to the witness, the defendant said that Maria wanted him to move out of the apartment (T. 616-17).

On cross-examination, Mr. Angene testified that the Ruger did not have a safety (T. 603-4). He also admitted that the Ruger had a light trigger and could discharge if dropped while the hammer was in the firing position (T. 609).

A firearms expert explained the mechanics of the Ruger. The gun involved in this case was a double action semi automatic. When the hammer is cocked, it only requires eight pounds of pressure on the trigger in order to fire (T. 679-80). Although the gun is not equipped with a traditional safety, it has a "de-cocker" such that when the gun is cocked a button will release the hammer without causing the weapon to discharge (T. 670).

Mr. Robertson took the stand. He testified that he worked as a hemodialyses therapist and that he used to work as an ambulance driver (T. 727-28). The day of the incident was a Sunday. At the time, he had been living with Maria for about three months. Mr. Robertson said that he got up early and went to pick up his son (T. 728-29). He and his son spent the day in the Everglades target shooting (T. 730-32). They used a .22 rifle, a .22 Ruger and a BB gun. Mr.

Robertson returned to the apartment between 4:30 and 5:00 P.M. and put the weapons away in the closet (T. 732). He dropped off his son at 6:30 P.M. and returned to the apartment, which was ten minutes away (T. 736). When he arrived at the apartment, Maria was in the bathroom changing out of her work clothes (T. 737). A short time later, they walked out on the terrace for a couple of minutes (T. 741-42). They were next in the kitchen preparing dinner. Maria poured herself a glass of wine and the mood was very casual (T. 741). Mr. Robertson then entered the bedroom closet in order to clean the firearms (T. 743). They had not had any arguments or discussions, only desultory chatter.

He was going to bring the guns to the living room and clean them while watching television. Maria entered the bedroom behind him and indicated that she wanted to order pizza, instead of cooking a meal (T. 745). At this point in time, Mr. Robertson was reaching for the Ruger, which was inside a gun case with a magazine inside the chamber and another in the case (T. 746). Unbeknownst to the defendant, the Ruger had been stored inadvertently with the hammer cocked (T. 753). He stepped out of the closet removing the gun from the case (T. 747). As he turned around, he lowered the gun in order to clear the side panel of the closet. While turning around, his finger slipped and hit the trigger causing the weapon to fire. *Id*.

He heard a loud pop. At first he did not realize that Maria was hurt — he thought for a moment that she had simply laid down on the bed. He suddenly realized that she had been shot (T. 748). When he spoke to her she did not respond. Seeing that she was still breathing he checked her carotic pulse. He then called the 911 operator (T. 749). While waiting for paramedics, Mr. Robertson inspected the victim's wound to see if it was a "sucking chest wound" (T. 750). He lifted her up and detected blood on the back of her shirt. The defendant believed at the time that the injury was not fatal. The police arrived within minutes and Mr. Robertson was ordered to remain seated at the dinning room table (T. 751-52).

The defendant offered no testimony on direct which put his character at issue. Nevertheless, on cross-examination, the state questioned him about an unrelated prior incident involving an assault rifle. Despite the defendant's protestations about the impropriety of such evidence, the trial court allowed the prosecutor to inquire. The prosecutor asked the following questions:

> Q. [The State]: In fact, you are familiar with large assault rifles, weren't [*sic*] you?
>
> A. [Defendant]: Several models, yes sir.
>
> Q. [The State]: In fact, you purchased an AK-47, didn't you?

[Defense Counsel]: Objection, Judge. Irrelevant. It's outside the scope of direct.

[The Court]: Overruled.

Q. [The State]: Isn't that correct, Mr. Robertson?

A. [Defendant]: Yes, right after Hurricane Andrew I did.

Q. [The State]: And in fact, isn't it a fact that you have threatened people with assault rifles before?

[Defense Counsel]: Objection, Your Honor. Totally outside the scope.

[The Court]: Overruled. You can answer "yes" or "no", sir.

A. [Defendant]: No.

Q. [The State]: You have never threatened anyone close to you with an AK-47, Mr. Robertson?

A. [Defendant]: I have never threatened anybody close to me with a weapon, anybody, period, with a weapon, sir.

(T. 766-67).

After creating an issue concerning the AK-47, the state announced that it intended to call the defendant's ex-wife as a rebuttal witness. The trial court, over defense objection, allowed the ex-wife to testify about a prior incident which took place after Hurricane Andrew where the defendant allegedly threatened her with an assault rifle (T. 825-26). The defense objected on grounds of relevance and the

fact that it was tantamount to improper *Williams* rule evidence. *Id*. The trial court overruled the objection because during cross-examination the defendant denied that he threatened anyone close to him with an AK-47. Defense counsel renewed his objection and moved for a mistrial (T. 826).

The prosecution was permitted to call Susan Robertson, the defendant's ex-wife, as a witness. Ms. Robertson testified that after the hurricane, she and her daughter were carrying supplies off a truck (T. 829). The boxes containing the supplies were very heavy and when she told the defendant that they could not lift them, he became angry. According to the witness, the defendant went to the bedroom of their home where he kept an AK-47.

> [Mrs. Robertson]: I had my back to him at that point. I heard a noise like the magazine being loaded into the AK-47 and I thought, my God, he is going to shoot me. I didn't know, and I just ran as fast as I could behind the front door and I looked behind me one time before I ran and he had the AK-47 pointed at my back.

(T. 831). On cross-examination, the witness testified that her marriage with the defendant ended after she caught him in bed with another woman (T. 832).

The prosecutor's closing argument maintained that the defendant had violent propensities based on the incident with his ex-wife. The prosecution postulated that the defendant shot the victim in anger because she asked him to move out.

[The State]: Now you have to figure in the rest of your story, the

anger, the fighting leading up to November 17th, the confrontation that was going to take place that night, her incredible fear of this man as told to Shirley Baumgartner, his anger.

For God sake, you saw his ex-wife on this witness stand because he lied to you on cross-examination about owning an AK-47 which is a huge assault rifle and threatening somebody close to you.

I asked him that question, and, boy, I gave him the opportunity. He could have said, yeah, there was this situation with my wife and, you know, I really didn't mean it, but no, I would never do that. I don't threaten anybody with guns, any type of guns, much less an AK-47.

So, Mrs. Robertson comes in here and tells you about a situation right after the hurricane where they were getting some building supplies and this defendant becomes enraged because mom and daughter can't help him bring in some heavy supplies from the car and what does he do? I am going to teach you a lesson. He goes back into the hallway, grabs the AK-47, slams a magazine, a clip into it and points it at her as she is running out the door and she thinks she is going to get shot in the back.

That gives you a little insight into what you are dealing with here.

(T. 913-14) (Emphasis added).

The jury convicted Mr. Robinson of second degree murder and the court sentenced him to life imprisonment (T. 950; R. 131, 134-38).

On direct appeal, the Third District reversed the defendant's conviction and remanded the case for a new trial holding that " the evidence of the incident occurring six years earlier was not relevant to any material fact in issue in the

current charge against the defendant." *Robertson v. State,* 780 So. 2d 94, 95 (Fla. 3d DCA 2000). The court also concluded that the admission of the ex-wife's testimony under an impeachment theory was erroneous. The court re-visited the case *en banc* and subsequently reversed its original decision holding that the prior act evidence was properly admitted against the defendant. *Robertson v. State,* 780 So. 2d 106 (Fla. 3d DCA 2001).

SUMMARY OF THE ARGUMENT

Despite the fact that the defendant did not put his character in issue, the prosecution cross-examined him regarding an incident which had taken place between the defendant and his ex-wife six years before the death of Maria Nelson. The prosecution asked if he had ever assaulted his former wife with an AK-47 rifle, which accusation the defendant denied. The prosecution subsequently called the defendant's ex-wife as a witness and she gave detailed testimony about the prior incident. The prosecutor compounded the prejudice when, during closing argument, he used the prior incident to allege propensity.

The Third District's opinion contradicts long-standing precedents which hold that the state cannot circumvent the requirements of Section 90.404(2)(b), Florida Statutes (1998), by asking improper questions on cross-examination concerning a prior wrongful act for the purpose of admitting the evidence under the guise of impeachment. The appellate court's determination that the defendant opened the door to the collateral evidence by denying his guilt is completely unsupported by the record and was contrary to law.

Moreover, the record in this case cannot support the Third District's conclusion that the prior assault was inevitably admissible as *Williams* rule evidence because the trial court never conducted the factual and legal analysis required

for the admission of collateral crimes evidence. The Third District's flawed rationale opens the door to improper character evidence in all future cases where the claim of accident is raised as a defense.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL THAT COLLATERAL EVIDENCE OF A PRIOR ASSAULT AGAINST SOMEONE OTHER THAN THE VICTIM, WHICH OCCURRED SIX YEARS BEFORE THE SHOOTING IN THIS CASE AND WHICH WAS INTRODUCED VIA IMPROPER QUESTIONING ON CROSS-EXAMINATION, CONTRADICTED WELL-ESTABLISHED PRECEDENTS IN FLORIDA LAW.

The majority's holding turns on the erroneous premise that the defendant opened the door to evidence of prior wrongful acts by negatively answering the prosecution's question about whether he had ever threatened anyone with an assault rifle.

> The defendant testified he never threatened anyone with a gun. Clearly this statement was intended to buttress his theory of defense and his contention that he shot Maria by mistake while "cleaning" the gun. Having testified that he had never threatened anyone with a gun, the defendant opened the door to questioning about the prior incident where he had threatened his ex-wife with a gun. With the door open, it was then permissible for the State to impeach the defendant's statements and to show that he was not being truthful on the stand

Robertson v. State, 780 So. 2d 106, 110 (Fla. 3d DCA 2001) (citations omitted). The key point in this case, which the majority ignored, was that the defendant's denial that he had threatened anyone with a firearm was in response to improper questioning by the state.

After the defendant admitted during cross-examination that he was familiar with firearms, the state inquired if he had ever threatened anyone close to him with an AK-47 assault rifle. The defendant's denial was then used as a crowbar to pry open the evidentiary door to the six-year old incident involving his former spouse. In his dissenting opinion, Judge Sorondo observed that "[t]his question is exactly the same as asking, '... isn't it a fact that you have committed aggravated assaults in the past?' Florida law is clear that such a question is forbidden, *see Fulton v. State,* 335 So.2d 280 (Fla.1976); *Watson v. Campbell,* 55 So.2d 540, 541 (Fla.1951) ("[E]vidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness."), unless the defendant ***preliminarily*** opens the door to that area of inquiry by placing his character at issue, by purposely giving misleading or untruthful testimony during his direct examination, or by doing so in an unsolicited manner during cross-examination. *See Bozeman v. State,* 698 So.2d 629 (Fla. 4th DCA 1997)." *Robertson,* 780 So. 2d at 114.

The "opening the door" concept comes into play only when a party offers testimony which is favorable to that party, but creates a misleading impression, or is deceptive in nature. In other words, if a defendant attempts to deceive the jury, or presents only partial testimony about a subject matter creating a misleading picture, the state may present evidence to counteract the deception. It is presup-

posed that the defendant must initially offer the misleading or deceptive testimony about a subject relevant to an ultimate issue in the case. In the comments to Section 90.404, the committee specified that the state may not resort to character evidence, unless the defendant first puts his character in issue.

> In *Young v. State*, 141 Fla. 529, 142 Fla. 361, 195 So. 569 (1939) it was further explained that: the doctrine has been established beyond question that a defendant's character may not be assailed by the State in a criminal prosecution unless good character of the accused has first been introduced.

FLA.STAT. §90.404 cmt. (1998).

Florida courts have consistently reaffirmed this tenet: "It is fundamental that the prosecution may not impugn the character of an accused unless the accused *first* puts character into issue at trial." *Bates v. State,* 422 So. 2d 1033, 1034 (Fla. 3d DCA 1982) (emphasis added). Similarly, In *Bozeman v. State,* 698 So.2d 629 (Fla. 4th DCA 1997), the Court stated:

> To open the door to evidence of prior bad acts, the defense must first offer misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled.... The "opening the door" concept is based on considerations of fairness and the truth-seeking function of a trial, where cross-examination reveals the whole story of a transaction only partly explained in direct-examination.

Id. at 630-31; *see also, Wadsworth v. State,* 201 So. 2d 836 (Fla. 4th DCA 1967); *Andrews v. State,* 172 So. 2d 505 (Fla. 1st DCA 1965); *Jordan v. State,* 171 So.

2d 418 (Fla. 1st DCA 1965); *Foy v. State*, 115 Fla. 245, 155 So. 657 (Fla. 1934); *Jordan v. State,* 107 Fla. 333, 144 So. 669 (1932); *Squires v. State,* 450 So. 2d 208 (Fla.1984); *Dixon v. State,* 426 So. 2d 1258 (Fla.2nd DCA 1983).

In the case *sub judice*, the defendant's testimony on direct examination made no mention of his prior conduct; he did not claim to have a peaceful character, nor did he suggest that he had never assaulted anyone in the past. He limited his testimony to the events surrounding the incident. In *Ivey v. State,* 586 So. 2d 1230, 1233 (Fla. 1st DCA 1991), the court concluded that "[t]estimony regarding a person's behavior during one incident cannot be interpreted as character evidence as anticipated in the Florida Evidence Code." The defendant's assertion that the gun discharged accidentally during this single incident was neither misleading nor deceptive, nor did it place his character in issue; it was merely a statement of a legal defense to the charge.

The prosecution cannot benefit from its own improper cross-examination. It is well-settled that a witness cannot be asked a question on cross-examination for the sole purpose of introducing collateral evidence. Over one hundred years ago this Court condemned this improper tactic. *See Eldridge v. State,* 27 Fla. 162, 9 So. 448 (Fla. 1891); *Stewart v. State,* 42 Fla. 591, 28 So. 815, 816 (Fla. 1900). In *Eldridge,* this Court made it clear that a prosecutor cannot ask a question on

cross-examination about a collateral matter "*merely for the purpose of impeaching [the defendant's] credit by contradicting him.*" *Stewart,* 28 So. at 816 (emphasis added). In *DeFreitas v. State,* 701 So. 2d 593 (Fla. 4th DCA 1997), the prosecutor used a similar tactic to the one employed in this case. DeFreitas was accused of aggravated assault after he allegedly pointed a handgun with a laser-guided sight at an individual. The state wanted to show that the defendant had a bad temper and was prone to violence. On cross-examination, the prosecutor asked the defendant if he had once hit his sister over the head with a baseball bat. The exchange was almost identical to the series of questions posed by the state in this case:

> Q. And you stated that Victoria didn't like you very much.
>
> A. Not in any way.
>
> Q. Was it--Victoria didn't like you because you were physically abusive to her?
>
> A. I have never been physically abusive.
>
> Q. You have never been physically abusive to anybody?
>
> A. No.
>
> Q. Did you ever hit your sister in the head with a baseball bat?
>
> A. That's when we were little kids. I swinging the bat and stopped at her, not actually hitting her. But there was no way I would hit my sister on purpose.

Mr. Beamer [Defense Counsel]: I'm going to object

Id. at 600, n. 5.

In Justice Pariente's concurring opinion she noted that the state's contention that the defendant had opened the door to the collateral act evidence was disingenuous.

> The state argues that defendant opened the door to this line of questioning. It is true that earlier in the trial defendant attempted, through his attorney, to question witnesses about whether defendant had ever demonstrated a propensity for violence. These attempts were met with repeated objections from the prosecutor, who asserted that such questioning was "strictly prohibited by the statute rules." The objections were sustained by the trial court.
>
> It is thus difficult to understand how the state can claim that defendant opened the door when it was the prosecutor who asked the series of impermissible questions concerning prior acts of misconduct on cross- examination.

Id. at 605 (citations omitted).

The Tipsy Coachman Argument

The "tipsy coachman" doctrine allows an appellate court to affirm a lower court's correct ruling where it is arrived at through an erroneous line of reasoning. The majority maintains that the evidence was properly introduced as admissible *Williams* rule evidence. In fact, the appellate court's decision goes beyond the "tipsy coachman" doctrine and establishes an "inevitable admissibility" doctrine. In effect the court's decision says that where the procedural requirements of

Section 90.404(2)(b) are ignored (here, the state failed to file a pre-trial notice, the defense was deprived of the opportunity to litigate the issue and the trial court never considered the merits of the evidence vis-à-vis Sections 90.401 and 90.404(2)), the state can sidestep these evidentiary barricades by simply asking the defendant an improper question concerning the desired prior wrongful act. If the appellate court subsequently divines that the collateral act would have been admissible as *Williams* rule evidence, the procedural requirements of Section 90.404(2)(b) are rendered meaningless. This rationale is seriously flawed.

As the dissent noted, the trial court did not evaluate the prior assault on the defendant's ex-wife under the requisite criteria for the admission of *Williams* rule evidence.

> In order for defendant's prior crimes to be admissible, the trial court must be persuaded by clear and convincing evidence that such crimes were, in fact, committed. *See State v. Norris,* 168 So.2d 541, 543 (Fla.1964); *Audano v. State,* 641 So.2d 1356, 1358-59 (Fla. 2d DCA 1994); *Chapman v. State,* 417 So.2d 1028, 1031 (Fla. 3d DCA 1982). In order to establish the alleged prior crime, the state presented only the testimony of defendant's ex-wife. There was absolutely no corroboration of her testimony. She did not report defendant's alleged misconduct to the police at the time of the alleged offense, and no investigation was ever conducted. There is absolutely no indication in this record that the trial judge was aware that she needed to make a credibility assessment and the additional determination that the prior crime was established by clear and convincing evidence by the ex-wife's testimony.

Robertson, 780 So. 2d at 119.

Since the prosecution failed to put the defense on notice that it intended to rely on the ex-wife's testimony, the record below is fatally deficient and cannot support the majority's ad hoc conclusion that the evidence would have been admissible on a collateral crimes theory. The dissent explained that there are a number of factors which a *Williams* rule analysis must weigh which were never addressed by the lower court. The remoteness of the prior incident, for example, is a factor in determining the probativeness of the prior act. *See Heuring v. State,* 513 So. 2d 122, 123 (Fla. 1987), *vacated on other grounds,* 559 So. 2d 207 (Fla. 1990). Despite the fact that the prior assault occurred six years before the incident at issue and involved a different victim remoteness was not considered by the trial court. Nor did the trial court make a determination that the probativeness of the evidence outweighed its prejudicial effect. The court also failed to take into account that in the six years between the two incidents there were no reports of violence by the defendant thus raising the question whether the alleged violent character trait was still attributable to Mr. Robertson. Most importantly, the trial judge failed to make a credibility determination with respect to the ex-wife's testimony in order to find that the evidence was clear and convincing that Mr. Robertson had in fact committed the alleged assault.

This was not a case where the trial judge engaged in a *Williams* rule analysis and admitted the evidence under the wrong category. One cannot conclude, therefore, that the trial judge reached the right conclusion for the wrong reasons because the predicate factual analysis required to justify the admission of the collateral act was never conducted.

The *Williams* Rule Argument

The majority surmised incorrectly that the prior assault against the defendant's ex-wife "had the purpose of assisting the jury to understand defendant's conduct at the time of the shooting with regard to the defendant's intent and his claim of accident." *Robertson*, 780 So. 2d at 111. The prior assault did not rebut the defendant's claim of accident, instead it was used to demonstrate propensity. The prior incident could not rebut the defense because it shed no light on the nature of the defendant's relationship with Maria Nelson; it did not result in a shooting; it was not part of a pattern of conduct toward women; there was no history of violence with respect to Maria Nelson; and there was no history of prior assaults against the victim. At trial, the prosecution improperly argued that the assault demonstrated the defendant's proclivity for violence. In closing argument, the state had this to say about the collateral crime:

[THE STATE]: Now you have to figure in the rest of your story, the

anger, the fighting leading up to November 17th, the confrontation that was going to take place that night, her incredible fear of this man as told to Shirley Baumgartner, his anger.

For God sake, you saw his ex-wife on this witness stand because he lied to you on cross-examination about owning an AK-47 which is a huge assault rifle and threatening somebody close to you.

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So, Mrs. Robertson comes in here and tells you about a situation right after the hurricane where they were getting some building supplies and this defendant becomes enraged because mom and daughter can't help him bring in some heavy supplies from the car and what does he do? I am going to teach you a lesson. He goes back into the hallway, grabs the AK-47, slams a magazine, a clip into it and points it at her as she is running out the door and she thinks she is going to get shot in the back.

That gives you a little insight into what you are dealing with here.

(T. 913-14) (Emphasis added).

The majority relied on a number of cases from other jurisdictions to buttress its claim that the evidence was properly admitted. Most of these cases are distinguishable, however. For example, the majority cited *State v. Grubb,* 675 N.E.2d 1353 (Ohio Ct. App. 1996), where the defendant was charged with causing physical harm to his wife. At trial, the defendant alleged that his wife had attacked him and

that he acted in self-defense. The state called a previous wife who testified that during their marriage the defendant had assaulted her on two occasions. The appellate court rejected the state's argument that the evidence was properly admitted to rebut the defendant's denial on cross-examination that he had ever assaulted a woman. The court explained that the denial was elicited by improper questioning on cross-examination concerning the prior incidents and the defendant had not put his character in issue.

> An examination of this record reveals that defendant did not put his good character in issue in this case. Defendant did not testify on direct examination that he is a peaceful person or that he has never assaulted any woman, including his former wife. Rather, it was the state that elicited that testimony from defendant on cross-examination by the use of specific questions designed for just that purpose. The defense objected, unsuccessfully, to that questioning. Because defendant made no claim at trial regarding his own good character, i.e., did not put his character in issue, the testimony of defendant's former wife, Deidra, was not admissible pursuant to Evid.R. 404(A)(1) to rebut same. *The prosecution cannot circumvent the limited nature of the exception provided in Evid.R. (A)(1) by putting the character of an accused in issue via its own questions, and then present evidence to rebut the answers. Such tactics run afoul of the universal principle that the prosecution may not offer, in the first instance, evidence of an accused's character to show a general propensity to commit the acts underlying the crime charged.*

Id. at 281 (emphasis added).

The *Grubbs* court went on to affirm the admission of the evidence because the defendant attributed violent conduct to the victim asserting that she was the

aggressor and that her injuries were accidentally inflicted. The court cautioned, however, that "[i]n cases where the accused only asserts self-defense and accordingly does not deny or contradict the essential elements of the charged crime, we entertain doubts about whether the state can properly utilize prior crimes, wrongs, or acts by that accused to establish his 'intent', or demonstrate that the injuries suffered by his victim were 'not the result of accident,' as such matters are uncontested and simply not in issue." *Id.* at 1356.

In *Smith v. State,* 501 S.E.2d 523 (Ga. Ct. App.1998), the defendant was lying in bed with his girlfriend when an argument erupted. Smith poured rubbing alcohol on the victim and ignited it with a cigarette lighter. At trial, he testified that she was massaging him with the alcohol when he went to light a cigarette and accidentally set the alcohol on fire. The state introduced evidence that three years before this incident, Smith went to his ex-wife's home with a machete, chopped down the front door and cut her with the weapon. Although the appellate court ruled that the prior incident was properly introduced into evidence, the court first noted the procedural safeguards that collateral crimes evidence must meet.

> As an additional safeguard against the improper introduction of this inflammatory evidence, and Uniform Superior Court Rule 31.3 require that a hearing be held in which the State must demonstrate, and the court must find (by a preponderance of the evidence, as to each independent act the State seeks to introduce (a) the evidence will be

> introduced for an appropriate purpose and not to raise an improper inference as to the accused's character, (b) the accused committed the independent act, and (c) there is a sufficient connection or similarity between the independent act and the crime charged so that proof of the former tends to prove the latter.

Id. at 525.

The appellate court relied on the trial court's findings at a proceeding held outside the presence of the jury:

> The court found that there was no question Smith committed the independent act and that the act was sufficiently similar to show his course of conduct or bent of mind to react violently and without provocation to those with whom he was intimate. Because the evidence focused on his state of mind, it would tend to disprove accident. The court further found the probative value of the evidence outweighed its prejudice to Smith. During trial, the court heard the estranged wife's testimony outside the presence of the jury and reaffirmed its finding of similarity. The court instructed the jury at the time of the testimony and again in the final charge about the limited purposes of the testimony.

Id. at 527.

Moreover, Georgia courts recognize that there is a logical and evidentiary difference between prior acts involving the same victim and acts involving other individuals.

> Unlike similar transactions prior difficulties between the parties are not independent acts or occurrences, but are connected acts or occurrences arising from the relationship between the same people involved in the prosecution and are related and connected by such nexus. Evidence of a defendant's prior act toward the same victim, whether an assault, a quarrel, or a threat, is admissible as evidence of the relationship between the victim and the defendant and may show the

> defendant's motive, intent, and bent of mind in committing the act against the victim which results in the charges for which the defendant is being prosecuted.

Appling v. State, 541 S.E.2d 129, 130 (Ga. Ct. App. 2000).

In the case *sub judice*, where there existed a legitimate question concerning the ex-wife's credibility and bias, the record is devoid of substantive factual findings because of the state's failure to comply with the notice requirements of the rule.

In *State v. Clark*, 507 N.W.2d 172 (Wis. Ct. App. 1993), the defendant beat up his girlfriend when she accused him of seeing other people. Prior to trial, the victim recanted and said that she fabricated the accusation because she was angry that the defendant had been seeing other women. Clark denied the incident and said that the victim's injuries were incurred when she fell. The prosecution called a previous girlfriend who testified that after she had confronted Clark about seeing other women he punched her in the face. The appellate court opined that the collateral evidence was admissible because of the closed similarities between the two incidents.

> There are many similarities between the two incidents including: (1) each victim was Clark's girlfriend when Clark battered her; (2) in each instance, Clark and the victim quarreled about his dating other females; (3) in each instance, Clark physically attacked the victim as a result of the quarrel; and (4) each victim required medical attention for her

> injuries. These similarities are significant and render the prior-act evidence highly probative.

Id. at 176.

An exhaustive review of the case-law throughout the country will yield a range of opinions, rather than a clear consensus. Each case has its own factual nuances, but there is universal agreement that prior act evidence threatens to undermine the fundamental fairness of a trial and thus the trial judge must prudently weigh the relevance and prejudicial effect of the evidence. One of the principal defects in the majority's logic is the unavoidable implication that in a domestic violence case where the defendant claims accident as a defense any prior acts of violence against third persons are automatically admissible. The majority gave no consideration to the ambiguous distinction between evidence that refutes the defense of accident and evidence that merely implies propensity. Nor did it seem to bother the majority that the prosecution in fact used the prior act to argue propensity to the jury. The decision thus leaves the door open for confusion and abuse. Hence, the dissent was rightfully distressed about the negative ramifications of the majority's rationale.

> I am concerned about the far-reaching consequences of the majority's opinion. The Court holds that in a case where the accused is charged with a completed substantive violent offense and defends by raising the defense of accident, evidence of a prior incident involv-

ing a threat of violence directed to a person other than the victim in the charged offense is admissible to prove motive, intent or absence of mistake or accident.

The defendant in this case was charged with the completed, violent offense of second degree murder. The prior, alleged misconduct was an offense that threatened violence. Although such a prior threat against the victim in this case, if not too remote, may have been admissible to show intent and the absence of mistake or accident, the same cannot be said of a threat against another. Reducing these events to their simplest and most common form--if the defendant had been charged with aggravated battery by punching his wife in the nose and breaking it, and he defended by claiming that he accidentally struck her while flailing his arms during an argument, under the majority's reasoning, evidence that the defendant had threatened to punch a former wife in the nose six years earlier would be admissible to rebut his claim of accident. As morally satisfying as this type of evidence may be, in my judgment, such evidence serves only to establish defendant's propensity to commit violent crimes.

Robertson, 780 So. 2d 121-122 (footnotes omitted).

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully requests that this Court reverse the decision of the Third District Court of Appeal in *Robertson v. State*, 780 So. 2d 106 (Fla. 3d DCA 2001).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Petitioner on the Merits has been forwarded to Assistant Attorney General, Michael J. Neimand, at the Office of the Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Miami, Florida, this 20th day of November, 2001.

BY:_____
MANUEL ALVAREZ
Assistant Public Defender

CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

BY:_____
MANUEL ALVAREZ
Assistant Public Defender