IN THE SUPREME COURT OF FLORIDA

VINCENT ROEBUCK,

Petitioner,

Case No. SC07-807

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Vincent Roebuck, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

The record on appeal consists of five volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner’s statement of the case and facts as being generally supported by the record subject to the following additions:

Prior to the commencement of trial, the State filed a motion in limine to preclude evidence that the victim may have had sexual relations with persons other than appellant pursuant to F.S. 794.022 and 90.401-.403. (R, 17-19). Defense counsel

informed the court that he anticipated that he would cross-examine regarding the victim's sexual relationship with a young man her own age based on Lewis v. State, 591 So. 2d 922 (Fla. 1999), asserting that the relationship was relevant to establish that she fabricated the charges against appellant to avoid pressure or punishment for being involved in a consensual sexual relationship with a 14-15 year old boy and to be able to remain in the continental United States. (TI, 8-10).

In response, the prosecutor pointed out that the victim had nothing to do with the young man until after this case was reported, that she came to the area to attend school in July and this incident occurred in August. (TI, 11-12). The court ruled that it would grant the motion in limine without prejudice to its being reconsidered based upon the testimony of the witnesses, but did not prohibit questions relating to a motive to fabricate due to immigration status, so long as it did not relate to sexual relationships with other people. (TI, 17-18).

Defense counsel indicated he wanted to explore false accusations made by the victim against another person who was convicted to establish a pattern of conduct. (TI, 19). The court indicated it would require a proffer prior to questioning in this area. (TI, 19-20).

Teshia Miller, the victim's sister-in-law, testified A.B. moved in with them in June or July. (TI, 35). Appellant was at the house on a daily basis. (TI, 36). Miller's mother Saurita Tirado, who also lived in Tallahassee, called her at work and asked if Miller was sitting down. (TI, 37). That evening, she and her husband, Okolo Donaldson, spoke with A.B. and called the police. (TI, 39-40).

A.B. has never wavered in her statement. (TI, 41). A.B. was not threatened with being sent back to the Virgin Islands, she had just gotten there and the plane ticket was expensive. (TI, 40). A.B. was not in trouble for anything at the time. (TI, 40). As a result of this incident, family members have made threats to A.B. (TI, 41).

On cross-examination, Ms. Miller testified that when A.B. came to live with them, she was not aware of any disciplinary problems in St. Croix. (TI, 47).

Miller had recently gone to the prosecutor to try to have the charges dropped. (TI, 49). The judge sustained the prosecutor's relevance objection to appellant's question, "What did you tell them?" and appellant did not seek to proffer the response. (TI, 49).

Miller's husband had little jobs here and there. (T, 46-47). She was not good with dates. (TI, 48).

Officer Mazerac testified that on his arrival at the home, Ms. Miller was very upset, pacing, and very frustrated. (TI, 52). Mr. Donaldson was very upset, slamming doors; he cursed and hit the wall. (TI, 52). The 14 years old victim was upset and withdrawn. (TI, 52-53).

Okolo Donaldson, A.B.'s brother, testified that A.B. was not in any kind of trouble in August or September of last year. There was no talk of her returning to the Virgin Islands until after this incident was reported. (TI, 60-61).

On the occasion he returned home and found appellant alone with A.B., Donaldson was working as a painter. (TI, 61). He arrived home early that day, around 12:30-1:00. (TI, 62). Donaldson found it unusual that appellant was there because it was not acceptable for anyone to be alone with his sister at the house. (TI, 62).

Since the report, there had been problems with Ms. Miller's family. They did not like him or his sister. He knew of no reason why A.B. would fabricate her claim. (TI, 64).

A.B. testified that she considered appellant to be like family and he was over at the house nearly every day. (TI, 73). She let appellant in that day because of that. (TI, 74). Appellant repeatedly told her that her brother owed him money when he started to caress her face and neck. (TI, 74-75). When

she asked what he was doing, appellant repeated that her brother owed him money and took her by the hand to the couch where he began to fondle her breasts over her shirt. She froze up and was scared. Appellant then fondled her breasts under her shirt, then stuck his hand in her pants and started to "finger" her. (TI, 75). Appellant pushed her underwear to the side, but did remove it when he had sex with her. (TI, 76). A.B. did not fight him because she was really scared and did not know what to do; appellant was strong. (TI, 77). She felt very threatened because she had never been in that type of situation before, she did not expect it, and appellant betrayed her trust. (TI, 78).

While having sex, appellant forced his way in and out and asked her "whose pussy was this." (TI, 79). She was not sure if he ejaculated or not. She felt threatened by appellant's statement that if she ever told anyone about what happened he would kill her brother. (TI, 79).

After that, when appellant called, if she answered the phone he would make comments to her, asking if she loved him. (TI, 80). Once Ms. Miller asked her about the situation, she told what happened. (TI, 81).

On cross-examination, A.B. stated that her brother had gotten home from work and went to the store or a friend's house when appellant came over. (TI, 83). Appellant said Donaldson

owed him money for marijuana. (TI, 84). While she had never seen appellant act violently, she had heard talk about what kind of person he was and in general conversation he stated that he would shoot people. (TI, 85).

A.B. had known her brother to be angry, but he did not act violently towards her or others. (TI, 85-87). She came to Tallahassee to go to school and was unaware of any financial or other reasons behind her move. (TI, 88).

On proffer, A.B. testified that she had only one boyfriend since her arrival, a boy she first met in October or November of 2004. (TI, 93, 95). She did not have sexual relations with anyone, other than what she alleged appellant did to her. (TI, 95).

When she was in the fourth grade, she fell asleep on the couch while ironing, and hit the cord, causing the iron to fall on her face. (TI, 96). Her teacher sent her to the school nurse who called her mother to the school. They questioned her for about three hours and kept telling her that the burn did not occur the way she said it did. She had a disagreement with her brother the day before and was upset with him, so she let him ‘take the fall for it’ not realizing he would go to jail for it. (TI, 96). She did not see her brother for several days and when she asked her mother, she was told he had been sent to juvenile

detention for six months. (TI, 97). She never testified in any proceeding relating to it. (TI, 97, 100). She has never made any other false accusations. (TI, 98).

The court stated that the testimony was not relevant and admissible. (TI, 100). Appellant conceded that there was no evidence of any animosity between him and the victim, but asserted that she fabricated the story to get attention away from herself and anticipated calling other people and her brother about problems. (TI, 101). The prosecutor responded that the testimony would fall within the purview of F.S. 90.404(2) as evidence of other acts and appellant had not provided statutory notice of his intent to introduce it. (TI, 102-03). The State objected on the grounds of relevance, admissibility, and failure to provide notice. (TI, 103).

The court ruled the evidence was not proper impeachment, declining to rule on the matter of notice. (TI, 103). The judge distinguished appellant's case law on the grounds that the victim's relationship with her boyfriend started after the report in this case. (TI, 104).

On proffer Saurita Tirado testified that A.B. did not have a key to the house because her daughter did not trust A.B. (TI, 119). The court stated that the case did not involve whether she had a key or not and appellant admitted, "that's not an issue in

the case." (TI, 121). The court ruled, it was not proper testimony with regard to whether other witnesses trusted A.B. or not. (TI, 121). Ms. Tirado stated that her daughter had mentioned that she was making plans to send A.B. home and needed financial help to do so; A.B. was allegedly not helping at the house, keeping late hours and had a major attitude so that sooner or later Miller was going to hit A.B. (TI, 122-24).

Appellant called Ms. Miller who testified that she determined that it was best to send A.B. home after she made accusations against appellant. (TI, 132-33). A.B. had been asked to help with household chores and washed dishes. (TI, 133). Miller stated she did not force A.B. to do things, but there had sometimes been problems about her fulfilling those responsibilities. (TI, 133). She was supposed to come home by dark and one time lost track of time so her brother went to get her and grounded her. (TI, 133-34).

Ms. Miller approached her mother for financial assistance to send A.B. home about a month prior to trial, after she found something in A.B.'s room that was beyond her ability to help with. Miller stated, "[t]hat was also one of the reasons why I had went to the lawyer's office and was trying to, you know, because that kind of blew me away." (TI, 135). Her mother and grandmother were at the house when she found it and her mother

said she would loan Miller the money to send A.B. back. (TI, 136).

On cross-examination, Ms. Miller said that starting several weeks before trial she had her mother had not been getting along; they were angry with each other and she told her mother that she did not want anything else to do with her. (TI, 137-38).

Appellant recalled Saurita Tirado who stated that after the allegations were made, she went with appellant to the police. (TI, 141). Her daughter, Teshia Miller, asked her for money because Donaldson was not working and she was pregnant. (TI, 141-42). A.B. allegedly would not help Miller at the home and Miller said she would have her husband handle it, but nothing changed. (TI, 142). A.B. came to Tallahassee because her mother had 6-8 children and could not afford to keep her, not because she wanted a better education. (TI, 145). A.B. was allegedly causing problems in St. Croix. (TI, 145).

On cross-examination, Ms. Tirado stated that she and her daughter had been having a lot of problems lately. She had not liked Donaldson being with her daughter for a long time because he has cheated on her. (TI, 146). She was not happy when A.B. came to live with them. (TI, 147).

Barry Harris had one conversation with A.B. about going back to St. Croix; he did not know when it was but did not think it was in September. (TI, 152-53, 155). Harris then said that Donaldson said something about sending her back but did not say why. (TI, 154-55).

Okolo Donaldson said that when A.B. came to stay it was expected that she would help out at home; she was willing to do so and it had never been a problem. (TII, 167-68). His relationship with his wife's family was not good; while he had no problem with them, they had a problem with him. (TII, 168). He denied threatening his mother-in-law or her side of the family. (TII, 171-72).

A.B. did not notice if appellant had an erection when he entered the house. (TII, 174). Appellant was wearing baggy clothes and a long shirt which came below his waist. (TII, 175).

SUMMARY OF ARGUMENT

Appellant contends that the trial court reversibly erred in declining to apply a false accusation exception to the impeachment statute when the statutes does not authorize an exception. The State respectfully disagrees.

This issue is not preserved. Even if it were, the exception created by the Second District Court of Appeal is violative of the doctrine of separation of powers and principles of statutory construction.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DECLINING TO APPLY A FALSE ACCUSATION EXCEPTION TO THE IMPEACHMENT STATUTE NOT AUTHORIZED BY IT? (Restated)

Appellant contends that the trial court reversibly erred in declining to apply a false accusation exception to the impeachment statute. The State respectfully disagrees.

Standard of Review

The admissibility of evidence is within the sound discretion of the trial court and the trial court's ruling will not be reversed absent a showing that the trial court abused its broad discretion in this area. Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981), *cert. denied*, 457 U.S. 1111 (1982); Gray v. State, 640 So. 2d 186, 194 (Fla. 1st DCA 1994). Furthermore, "relevancy determinations are within the trial court's discretion and absent a clear abuse of discretion, such rulings will not be overturned." Howard v. State, 616 So. 2d 484, 485 (Fla. 1st DCA 1993).

Preservation

On appeal, appellant alleges that his rights to a fair trial and confrontation were violated as a result of the trial court's ruling. Appellant **never** articulated any objection to the

court's ruling that the line of questioning did not constitute proper impeachment, let alone one of constitutional dimension. (TI, 103). Because the argument he now makes on appeal was not made below, the issue is not preserved.

Merits

F.S. 90.404 provides that with regard to the character of a victim, evidence is inadmissible to prove action in conformity therewith on a particular occasion.[1]

[1] Appellant correctly acknowledges this provision, but contends that it is limited by a number of exceptions. None however apply in this case. F.S. 90.404(1)(b)1. discusses F.S. 794.022 which relates to prior consensual sexual acts by the victim. F.S. 90.405 addresses those situations where character evidence is admissible and subsection (2), relied upon by appellant, only permits evidence of specific instances of conduct to prove facts **other than** character, e.g., identity and intent. Ehrhardt, Florida Evidence, s. 405.3. F.S. 90.609 addresses the use of reputation evidence to prove character; it does not apply to evidence of specific acts of misconduct. F.S. 90.610 allows evidence of a prior conviction, if the crime was punishable by imprisonment of more that one years duration, or if the **crime** involved dishonesty or a false statement.

The Exception Created by the Second District Violates the Doctrine of Separation of Powers and Principles of Statutory Construction

When construing the meaning of a statute, we must first look at its plain language. Montgomery v. State, 897 So. 2d 1282, 1285 (Fla. 2005). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Id.* (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)).

Here, the statue at issue, F.S. 90.610, is clear as to its provisions and the State submits that there is no need to resort to interpretation, as did the Second District Court of Appeal to create an exception to the statute not contemplated by the Legislature. Courts have "no authority to change the plain meaning of a statute where the legislature has unambiguously expressed its intent." Graham v. State, 472 So. 2d 464 (Fla. 1985). The Second District, "in purporting to construe the intent and meaning of the statute ignores the quoted plain language… and judicially legislates an exception…" Florida Real Estate Com. v. McGregor, 268 So. 2d 529, 530 (Fla. 19720. "Without legislative approval, such an exception … does violence

to the plain language of the statute" and has the effect of creating ambiguity where none previously existed. "Courts should not add additional words to a statute not placed there by the legislature." In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1137 (Fla. 1990). Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the legislature clearly has not done so. Florida Dept. of Revenue v. Florida Mun. Power Agency, 789 So. 2d 320 (Fla. 2001). Had the Legislature intended to carve out the exception to the statute improperly created by the Second District, it would have expressly done so. As recognized by the lower court, Professor Charles Ehrhardt, an acknowledged expert on Florida Evidence, states,

> Occasionally decisions ignore the limitation and permit impeachment with prior acts of misconduct of a witness when they involve prior false accusations of a crime by the witness…. The drafters of the Code specifically intended not to adopt provision similar to Federal Rule 608(b) because it did not reflect the existing Florida law and because they felt the possibility for abuse of this type of evidence was great. 953 So. 2d at 42.

Furthermore, the cases relied upon by appellant are distinguishable from the case at bar. In Williams v. State, 386 So. 2d 25 (Fla. 2d DCA 1980), for example, the witness, Brown,

made false accusations to the police on a prior occasion in an incident involving the victim of the shooting. In Cliburn v. State, 710 So. 2d 669 (Fla. 2d DCA 1998), the victim had previously filed a false kidnapping charge against another boyfriend. Finally, in Jaggers v. State, 536 So. 2d 321 (Fla. 2d DCA 1988), Jaggers was charged with capital sexual battery and sought to cross-examine a ***Williams Rule*** witness who testified that appellant had sexually battered her approximately three years before, regarding a prior incident in which she charged her father of committing a sexual battery against her, then admitted the falsity of that accusation. Thus, in those cases, while the witnesses were not actually convicted of a crime, both had actually committed a crime by filing false police reports in violation of F.S. 817.49 and in making false reports to law enforcement officers in violation of F.S. 837.05.

The Court below also recognized that the Second District, in Jaggers and Cliburn in providing for an exception to the statute, did so without articulating a specific legal reason for its creation. The Court found that the cases highlighted the existence of other statutory provisions that would allow introduction of the evidence, notwithstanding the prior conviction requirements of F.S. 90.610 as support for the exception's creation, to establish bias or motive pursuant to

F.S. 90.608(2) or when character or a trait of character of a person is an essential element of a charge, claim, or defense pursuant to F.S. 90.405. The lower Court found that neither of the provisions would apply in this case because here, the false accusation involved A.B.'s brother, not Petitioner, the false report concerned a dissimilar crime, and the proffered evidence did not establish a motive on A.B.'s part to lie about the charged offense. It also found that the evidence was not admissible based upon A.B.'s character which was not an essential element of the crime charged or defense, because cases in which character are actually at issue are relatively rare and do not impede the traditional rule that specific instances of misconduct are generally not admissible to prove character. Dragovitch v. State, 492 So. 2d 350 (Fla. 1986). The Court concluded, "[w]ere this court to expand the narrow application of section 90.405(2)'s character at issue provision to all cases in which the veracity of a witness is pertinent to the proceedings, section 90.610's confinement of impeachment evidence to only prior convictions would be rendered meaningless." 953 So. 2d at 44. Koile v. State, 934 So. 2d 1226, 1233 (Fla. 2006) ("Courts should avoid readings that would render part of a statute meaningless").

In direct contrast to the cases relied upon by Petitioner, in this case, the proffered testimony established that the victim **never reported any crime whatsoever to law enforcement officials**. Instead, she was confronted by a school nurse and her mother and their unwillingness to accept her account of what happened caused her to tell **them** that her brother had burned her. **They** in turn apparently took the story to juvenile authorities. The victim did not: make a statement to police, execute an affidavit, or provide false sworn testimony. Nor can it be determined from the proffer what exactly she told her mother and the school nurse about how her brother purportedly ended up burning her. She may have told them that it was the result of horseplay or other activity or they may have suggested that he was the person who caused the injury.

Thus, the victim's prior false statements did not involve a report to law enforcement regarding a crime and the false statement did not subject the victim to criminal liability as a result of making the statement. The proffered testimony therefore does not fit within the type of impeachment contemplated by Cliburn, Williams and F.S. 90.610.

Additionally, as noted by the prosecutor, had appellant sought to introduce this evidence, it would have fallen within the requirements of F.S. 90.404(2) as evidence of other crimes,

wrongs or acts. Appellant did not provide notice of his intent to rely on this evidence as required by F.S. 90.404(2)(c) and as such, it properly should have been excluded for this reason.

State v. Guenther As Persuasive Authority

Before this Court, Petitioner relies upon State v. Guenther, 854 A.2d 308 (N.J. 2004) in support of his position that this Court should follow the rationale of the Second District Court and adopt a false accusation exception to F.S. 90.610. Assuming that Guenther was correctly decided and applicable to this case, which the State does not, it nonetheless does not apply. Petitioner fails to mention that following that decision, New Jersey adopted a new subsection to N.J. R. Evid. 608 which provides that "[t]he credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person **of a crime similar to the crime with which defendant is charged** if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation." If that rule were applied to the facts of this case, the evidence would not be admissible, because its application is limited to false accusations involving similar crimes and the iron incident is clearly dissimilar to the sexual battery charge at issue. Furthermore, it is doubtful that the

prior incident would survive a finding that the victim "knowingly" made the false accusation since the record in this case establishes that A.B. did not come forward and accuse her brother of anything. Instead, after three hours of questioning and being told that her account was not believed, the fourth grader was, in essence, brow-beaten into blaming her brother, without knowing that he would get into trouble because of it. (TI, 96).

Also of significance is the fact that the New Jersey Court denied that its holding, in creating the exception, was creating a new law of evidence, and instead insisted that it was merely a procedural modification of an existing rule, to avoid violating the doctrine of separation of powers. Petitioner here also attempts to argue, for the first time before this Court, thus rendering the argument unpreserved, that amendment to the Rule would be procedural, not substantive.

Substantive law, which is the domain of the legislature, is that part of the law which creates, defines and regulates rights. Havan Federal Savings & Loan Assn. v. Kirian, 579 So. 2d 730 (Fla. 1991). Procedural law, which is the sole responsibility of the courts, encompasses the form, manner, order, process, or steps by which a party enforces substantive rights or obtains redress for their violation. Id.

As recognized by this Court, Rules of evidence may be substantive law. In re Fla. Evidence Code, 372 So. 2d 1369 (Fla. 1979). The legislature has the general power to establish and alter rules of evidence. Id.; Black v. State, 77 Fla. 289, 81 So. 411 (1919); Goldstein v. Maloney, 62 Fla. 198, 57 So. 342 (1911); Campbell v. Skinner Mfg. Co., 53 Fla. 632, 43 So. 874 (1907); Goode v. State, 50 Fla. 45, 39 So. 461 (1905). Here, the ruling by the Second District creates a substantive right to cross-examine a witness about a prior false accusation that did not previously exist by altering the existing statute.

Petitioner's Confrontation Claim Is not Preserved

In the last prong of his argument, Petitioner complains that the trial court's ruling denied him his constitutional right to confront witnesses against him. This aspect of the issue is not preserved as it was never raised at the trial court level, in the context of either Florida or Federal law. (TI, 103). Appellant's claim that the District Court rejected his constitutional claim is therefore misleading.

Furthermore, as the District Court properly found, no due process violation exists in this case because:

> In Florida, section 90.403, Florida Statutes (2004), authorizes the exclusion of otherwise relevant evidence where the evidence's prejudice outweighs its probative value. Such a balancing test is authorized and does not violate due process. Id. In the instant case, the prior

> incident of false reporting did not involve appellant and was not made concerning allegations of sexual abuse. As such, the evidence lacked the necessary relevance needed to amount to a due process violation. See § 90.403, Fla. Stat.; Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991) (quoting Olden v. Kentucky, 488 U.S. 227, 231, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988), for the proposition that the trial court may limit examination of a witness "to take account of such factors as 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant.").

For all of these reasons, this Court should affirm.

CONCLUSION

Based on the foregoing, the State respectfully submits this Court should affirm the District Court below and find that the false accusation exception created by the Second District Court of Appeal is not warranted by the Florida Evidence Code.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Michael Ufferman, Esq., Counsel for Petitioner; Michael Ufferman Law Firm, P.A., 2022-1 Raymond Diehl Road, Tallahassee, Florida, 32308, by MAIL on ____ day of August, 2007.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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APPENDIX

Roebuck v, State, 953 So. 2d 40 (Fla. 1st DCA 2007).