IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

CASE NO.: SC08-1240
LOWER CASE NO.: 2D03-3894

RANDOLPH WIGHTMAN,
Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

On Conflict Jurisdiction From the
Second District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts in the Initial Brief by Petitioner to the extent that the facts are in the record on appeal. Petitioner has omitted the facts as to how the Second District Court of Appeal below decided the issue in this case. In Wightman v. State, 982 So.2d 74 (Fla. 2d DCA 2008), the Second District Court of Appeal found that when the victim testified she said it was difficult for her to remember things and she could not remember dates. 982 So.2d at 74. Defense counsel objected to a general question about Respondent becoming sexually abusive - the question was too general and the witness may be getting into collateral acts. 982 So.2d at 75. Defense counsel suggested the prosecutor could lead the witness to go to the acts that are alleged. 982 So.2d at 75. The prosecutor agreed - the prosecutor asked the victim if she could recall how many times Respondent committed the acts - the victim said she could not recall - the prosecutor then asked for none than a handful. 982 So.2d at 75.

Defense counsel then moved for a mistrial and pointed out the State had not file a notice of the intent to use Williams Rule Evidence. 982 So.2d at 75-76. The State argued it had filed representative counts and the defense knew there were no

specific dates and times. 982 So.2d at 76 As to notice, the State again argued representative counts. 982 So.2d at 76. The trial court denied the motion for mistrial and the victim testified about oral sex that occurred repeatedly; one only specific instance was recounted by the victim and her mother - the victim and mother gave conflicting accounts of what happened. 982 So.2d at 76.

In the opinion below, the Second District Court of Appeal noted that the State did not make the key representative counts argument and that general testimony of repeated abuse was admissible to prove the two counts alleged. 982 So.2d at 76. The Court below noted the State made two arguments on appeal not presented to the trial court. The evidence was not Williams Rule Evidence but was admissible as inextricably intentional evidence. 982 So.2d at 76. The Second District Court of Appeal rejected this argument because the inextricably intertwined evidence was not necessary to describe the charged crimes. 982 So.2d at 76. The Wightman Court relied upon Griffin v. State, 639 So.2d 966 (Fla. 1994) and that because Petitioner allegedly committed similar acts of abuse on different undetermined dates was not necessary to understand the two discrete acts charged in the information took place at any time. 982 So.2d at 76.

SUMMARY OF ARGUMENT

For the reasons stated in Respondent's Brief on Jurisdiction, there is no conflict jurisdiction in this case. Petitioner's arguments before this Court also demonstrate there is no conflict because the State now raises arguments not considered by the Second District Court of Appeal. The State has put this Court in the untenable position of trying to resolve a conflict which does not exist because the basis for the decision below did not address the alleged basis of the conflict.

On the merits, the Second District Court of Appeal correctly decided that the collateral crimes evidence was not extricably intertwined with the charged crimes because the collateral crimes evidence was not necessary to describe the charged offenses. This Court should not consider the representative counts theory for two reasons: 1) the State did not present this argument to the Second District Court of Appeal; 2) Even if the State may use this theory, Section 90.404(2)(b)(1) Florida Statutes and its notice provisions still apply.

Pursuant to Section 90.404(2)(b)(1) and McLean v. State, 974 So.2d 1248 (Fla. 2006), the error was not harmless.

Petitioner has cited no authority which has held that the failure to comply with the notice requirements, under the circumstances of this case, is harmless error. Consequently, this Court should approve the decision of the Second District Court of Appeal.

I.

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY FOUND THAT THE INTRODUCTION OF COLLATERAL EVIDENCE OF OTHER BAD ACTS WAS IMPROPER BECAUSE THE EVIDENCE WAS NOT INEXTRICABLY INTERTWINED AND PURSUANT TO SECTION 90.404(2)(b)(1), FLORIDA STATUTES, THE STATE FAILED TO FILE NOTICE OF INTENT TO USE THE EVIDENCE.

A. Standard of review.

Respondent accepts the statement of the appropriate standard of review for a mistrial.

B. Whether this Court should allow the State to raise arguments in this Court not considered by the decision below.

This Court has accepted jurisdiction in this case based with a conflict with State v. Generazio, 691 So.2d 609 (Fla. 4th DCA 1997) and Lazarowicz v. State, 561 So.2d 392 (Fla. 3d DCA 1990). Respondent adopts and incorporates by reference his arguments in his Jurisdictional Brief as to why there is no direct and express conflict between this cause and State v. Generazio, *supra*.

Petitioner's arguments before this Court has demonstrated that there is no conflict because Petitioner now raises arguments which were not a part of the decision below. In the

appeal before the Second District Court of Appeal, the State did not make the representative count argument. Consequently, this argument cannot be the basis of a conflict decision which this Court has the jurisdiction to correct. The decision in this case did not involve the use of representative counts. AS to this point of law there is no express/direct conflict with Generazio. In Re: Amendments to Florida Rules of Appellate Procedure, 780 So.2d 834 (Fla. 2000). See also Tippens v. State, 897 So.2d 1278 (Fla. 2005). In this case, at trial the prosecutor agreed it would attempt to address only the two specific charged acts of abuse. Despite this agreement, the State asked if the acts occurred more than a handful of times. Given the two charges in the information, the question by the State was unfair. If a witness cannot remember when two acts occurred, proof that similar acts occurred over and over do not establish proof of the two acts.

If the State may charge "representative counts" of multiple acts within a given time frame, then Section 90.404(2)(b)(1) still requires notice of intent to use such evidence. Therefore, State v. Generazio, 691 So.2d 609 (Fla. 4th DCA 1997) is not dispositive in this case. This Court will invite appellate chaos if it allows the State to do what it did in this

case - make certain arguments at trial to justify introduction of such evidence and then abandon that argument on appeal and then resurrect the argument before this Court to establish conflict jurisdiction and to argue the merits before this Court.

The issue in this case is not whether the State may charge a discrete count which may involve ongoing sexual abuse. The issue is whether if the State alleges and attempts to prove such charges, it must give notice of the intent to use proof outside the discrete and specific charges in the information. Otherwise, Section 90.404(2)(b)(1) would be meaningless and superfluous. The Second District Court of Appeal implicitly and correctly found that Section 90.404(2)(b)(1) requires the filing of a notice even if the State uses the representative count theory.

In summary, apart from the arguments on the merits raised above, this Court should resolutely reject the representative count theory. The State did not present it to the Second District Court of Appeal. This Court should not allow the State to withhold such arguments and then resurrect them before this Court in an effort to establish conflict jurisdiction and to attempt to reverse the decision - on a basis not presented to the lower appellate court.

C. Whether the evidence in question was inextricably intertwined with the charged crimes.

The State did not make this argument to the trial court. Even if one assumes that the State may raise such an argument on appeal, the argument is without merit. Petitioner recognizes that inextricably intertwined evidence must be necessary to **describe** the crime charged. Griffin v. State, 639 So.2d 966 (Fla. 1994) The answer to this question as it relates to this case is simple: Did the evidence of the other uncharged crimes **necessarily** describe the crimes charged? Absolutely not. Logically, the fact that Respondent may have committed other acts of oral sex (no problem with the description of acts in this case) over a period of time does not describe nor explicate a similar act of the exact same type of abuse. The Second District Court of Appeal correctly analyzed this problem pursuant to Griffin v. State, *supra*. The evidence of the other crimes was not necessary to give an intelligent account of the charged crimes or to establish the context or describe events leading up to the crime. Scott v. State, 957 So.2d 43 (Fla. 1st DCA 2007) The State agreed that it would limit its general questions to the two specific instances of abuse. After the State made this agreement, it then asked whether the acts occurred more than the number of the charged crimes (two). This

question was not necessary to establish the context of the crime or to give an intelligent account of the crime. The State had already done this and the parties agreed to limit any further questions to the two specific instructions. Although Respondent will not attribute any sinister motive to the State's question ab out the number of times the abuse occurred, the question about the abuse occurring more than the charged number (2) violated the State's agreement and was unnecessary. At this point, the State should be estopped from making the inextricably intertwined argument (as well as the representative court theory) based upon how the trial in this case happened. The State should not be able to agree it will limit itself to the two charges incidents and then adduce evidence of abuse in a number greater than the charged number. Such a position is illogical and unfair.

The cases cited by Petitioner on this issue are not dispositive in this case because they involve several discrete acts committed in a single criminal episode during a single time period. Simmons v. State, 790 So.2d 1177 (Fla. 3d DCA 2001); Canion v. State, 793 So.2d 80 (Fla. 4th DCA 2003); D.M. v. State, 714 So.2d 1117 (Fla. 3d DCA 1998).

D. Whether the evidence was admissible pursuant to 90.404(2)(b)(1) and whether the failure to file notice of the intent to use such evidence was harmless.

The decision of the Second District Court of Appeal did not find that the evidence could not be admissible under 90.404(2)(b)(1) - the Court found that the failure of the State to file the requisite notice was contrary to Sections 90.404(2)(b), 90.403 Florida Statutes and McLean v. State, 934 So.2d 1248 (Fla. 2006). Although Petitioner argues the error was harmless, Petitioner cites no case which has held the failure to file the requisite notice under the circumstances of this case can be harmless error.

Given the uncertainty of the testimony as to whether the State proved the two charged crimes (the specific acts within the time periods alleged as opposed to other uncharged acts), the evidence of guilt as to the charged crimes was not overwhelming. As the Second District Court of Appeal noted there was conflicting testimony as to the proof of the one specific incident described by the victim and her mother. The Second District Court of Appeal correctly found that all of the facts described above contributed to the verdict in this case. The harmless error test is not an overwhelming evidence test but whether the State can establish, beyond a reasonable doubt, that

the error did not contribute to the verdict. See Myles v. State, 967 So.2d 450 (Fla. 2007). Under this standard, the error in this case was not harmless.

CONCLUSION

This Court should approve the decision of the Second District Court of Appeal in Wightman v. State, 982 So.2d 74 (Fla. 2d DCA 2008).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 14th day of January, 2009 to: Elba Caridad Martin, AAG, Attorney General's Office, Concourse Center 4, 3507 E. Frontage Road, Ste. 200, Tampa, Florida 33607-7013.

James T. Miller

CERTIFICATION OF TYPEFACE COMPLIANCE

Appellant certifies the type size and font used in this brief is Courier New 12.