IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION "W"

CASE NO. 91-5482 CF A 02

STATE OF FLORIDA)
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v.)
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WILLIAM KENNEDY SMITH)
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MOTION TO EXCLUDE WILLIAMS RULE EVIDENCE

Florida Bar No. 390860

The Defendant, WILLIAM SMITH, by and through undersigned counsel, hereby moves this Court for an Order prohibiting the State from presenting any so-called "Williams Rule" evidence in its case-in-chief or rebuttal. In support of this Motion, Mr. Smith states the following:

INTRODUCTION

In July, the State publicly released witness statements concerning a claimed sexual battery and two claimed attempts to commit sexual battery allegedly committed by Mr. Smith. The alleged incidents were completely unrelated to the offense with which Mr. Smith had been charged. They concerned different people and different circumstances. They allegedly occurred a number of years ago in different cities. They had not been reported to the police or any other authority until after Mr. Smith was charged in this case.

The release of the witmess statements concerning the alleged incidents was part of the State's campaign to win its case

in the public arena by besmirching Mr. Smith's character. The State now seeks permission to use this same tactic at trial.

As we demonstrate below, Rule 90.404(2)(a) of the Florida Evidence Code plainly bars the admission of such collateral evidence. Under the Rule, similar fact evidence is only admissible where "evidence of other crimes, wrongs, or acts [is] relevant to prove a material fact in issue," such as "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or fact." The admission of similar fact evidence is expressly prohibited if it is relevant only "to prove bad character or propensity".[1]

The State must make two showings to meet the requirements of Rule 90.404(2)(a). First, the State must demonstrate that the collateral offense evidence it is offering is relevant to prove a material fact in issue. Second, the State must establish that these collateral matters are "strikingly similar" to the charged offense and "share some unique characteristics or combination of

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[1] Rule 90.404(2)(a) is a codification of the rule established in Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L.Ed.2d (1959). It provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

characteristics which set them apart from other offenses." Heuring v. State, 513 So.2d 122, 124 (Fla. 1987).

In Section I, we demonstrate that the evidence proffered by the State does not meet the stringent requirements of the Rule. Because Mr. Smith's defense is consent and the issue of consent is unique to an individual, evidence of any other alleged incidents is irrelevant. Moreover, the other alleged incidents are not "strikingly similar" to the other charges in this case. Indeed, they are strikingly dissimilar. In Part II, we demonstrate that even if the State could meet the stringent requirements of the Rule, the evidence nonetheless must be excluded because its probative value is outweighed by the undue prejudice to Mr. Smith and there is a danger that this evidence will become a feature of the trial, rather than an incident to it.

I. THE COLLATERAL EVIDENCE DOES NOT MEET THE REQUIREMENTS OF RULE 90.404(2)(a)

A. The Collateral Evidence is Not Relevant to Any Material Fact at Issue

Before collateral crime evidence can be admitted, the State must establish that this evidence is relevant to a material fact at issue. This requirement of relevancy has been strictly construed by the Florida courts. See, e.g., Garron v. State, 528 So.2d 353, 358 (Fla. 1988) (reversible error to admit prior acts of sexual misconduct when such evidence is not relevant to prove

a material fact in issue); Coler v. State, 418 So.2d 238 (Fla. 1982) (reversing sexual battery conviction where evidence of other sexual misconduct evidence had been admitted to prove state of mind, but neither state of mind nor intent was at issue); Thomas v. State, 16 FLW D2320 (Fla. 1st DCA 1991) (reversing sexual battery conviction where state had put in evidence of prior rape to show opportunity, scheme or plan; but these were not disputed factual issues); Hodges v. State, 403 So.2d 1375 (Fla. 5th DCA 1981) (reversing sexual battery conviction where evidence of other sexual misconduct not relevant to any material fact at issue).[2]

In Hodges v. State, the court was presented with a situation closely analogous to that presented here -- an alleged "date rape". The complaining witness in Hodges testified that she had invited the defendant to her apartment, and after sharing some wine and watching television, the defendant forced himself on her. The trial court admitted, over objection, testimony of another woman who stated that about three years earlier, the defendant had made advances to her at his home and, when she demurred, he became insistent and forced her to submit to sex. The state argued that

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[2] The Florida courts only have relaxed the requirements for admissibility of similar fact evidence in the specific context of sexual abuse in the familial or custodial setting. See, e.g., Heuring v. State, 513 So.2d 122, 124 (Fla. 1987). The relaxation of the rules does not apply to a case such as this one where the complainant is an adult woman, and the alleged sexual battery did not occur within the familial context.

this evidence was admissible to show a "modus operandi" or "common scheme or plan." 403 So.2d at 1376.

In a carefully reasoned opinion, the court rejected the State's argument concerning the admissibility of the similar fact evidence. After reviewing the policy considerations underlying the limited admissibility of similar fact evidence and analyzing the elements of criminal sexual battery, the court held that in a sexual battery case where the defense is consent, sexual assaults allegedly committed by the defendant upon other women are inadmissible because they are not relevant to any material fact at issue.

The defendant in Hodges -- like Mr. Smith -- had been charged with sexual battery in violation of Section 794.011, Florida Statutes. The acts he was accused of committing were not illegal per se; they were criminal only if committed on or with another "without that person's consent." Section 794.011(5).[3] The gravamen of the offense of sexual battery, and the one fact that determines whether the accused's acts can be characterized as criminal, is not the act or intent of the accused, but the mental assent of the "victim." Hodges, 403 So.2d at 1376-7. The court

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[3] Section 794.011(5), Florida Statutes states:

> A person who commits sexual battery upon a person twelve years of age or older, without that person's consent, and in the process thereof uses physical force and violence not likely to cause serious personal injury is guilty of a felony of the second degree.

held that similar fact evidence is not relevant when the only material issue is consent because:

> The issue of consent is unique to an individual, and the lack of consent of one person is not proof of the lack of consent of another. Evidence of the previous crime . . . does not fit within the parameter of admissibility under the rule in Williams either as evidence of consent or identity because it is not relevant to either.

Id. at 1378 (quoting, Helton v. State, 365 So.2d 1101, 1102 (Fla. 1st DCA), cert. denied, 373 So.2d 461 (1979)).[4]

Indeed, in a "date rape" situation, the accused's knowledge, designs, plans, motives or other mental intents or emotions have no relevance. The accused's "state of mind is not a fact in a sexual battery charge, nor is intent an issue." Coler v. State, 418 So.2d 238, 239 (Fla. 1982). See also Askew v. State, 118 So.2d 219 (Fla. 1960) (specific intent is not the essence of crime of rape). As the court explained in Hodges:

> Assuming the worst, that the accused was so vilely motivated that he fully intended to have sexual relations with the prosecutrix whether or not she consented, if she consented, he is not guilty of any crime which he planned or intended to commit, despite all of his evil

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[4] Mr. Smith also is charged with one count of battery in violation of Section 784.03 (1)(a), Florida Statutes. Since an act only constitutes a battery if it is done against the will of another, the analysis described above is fully applicable to this offense as well.

> intent and plans. The ultimate issue is the prosecutrix's consent.

403 So.2d at 1378 (emphasis added).[5]

Thus, to the extent consent is a defense to sexual battery, any evidence of prior incidents of conduct offered to rebut such a defense is not relevant to any material fact at issue. Its only possible relevance is the inference that the defendant is a bad man in that "he did it once, he must have done it again". People v. Tassell, 36 Cal.3d 77, 201 Cal. Rptr. 567, 679 P.2d 1

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[5] That consent is the only material issue in a so-called "date rape" is amply demonstrated by the Florida Standard Jury Instructions for sexual battery. The standard charge reads as follows:

> Before you can find the defendant guilty of sexual battery upon a person 12 years of age or older by the use of slight force, the State must prove the following four elements beyond a reasonable doubt:
>
> 1. [The alleged victim] was 12 years of age or older.
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> 2. The defendant committed an act upon [the alleged victim] in which the sexual organ of the defendant penetrated or had union with the vagina of [the alleged victim].
>
> 3. The defendant in the process used physical force and violence not likely to cause serious personal injury.
>
> 4. The act was committed without the consent of [the alleged victim].

(emphasis added).

(1984). And, it is precisely this inference that the Rule prohibits. See Rule 90.404(2)(a) (evidence not admissible to prove "bad character or propensity").[6]

Courts repeatedly have held that evidence of other alleged sexual assaults are not admissible in a sexual battery case where consent is the sole material issue in dispute. See, e.g., Helton v. State, 365 So.2d 1101 (Fla. 1st DCA 1979), cert. denied, 373 So.2d 461 (1979); Lovely v. United States, 169 F.2d 386 (4th Cir. 1948) (error to admit testimony of woman that defendant had raped her fifteen days prior to rape for which he was prosecuted, where the only issue involved in the case was whether the complainant had consented; the fact that one woman was raped has no tendency to prove that another woman did not consent to the intercourse); Velez v. State, 762 P.2d 1297 (Alaska App. 1988) (error to admit evidence of prior assault on former girlfriend in

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[6] In many respects, this is a corollary to the legislative finding that a victim's sexual past is not relevant to whether she consented to sexual intercourse on a particular occasion and that therefore her prior sexual conduct is inadmissible in a sexual battery trial. Section 794.022(2), Florida Statutes. Just as an alleged victim's past sexual activity is not relevant in determining consent to sexual intercourse on a particular occasion, neither is evidence of prior incidents of alleged misconduct by a defendant relevant to whether the alleged victim consented on that occasion.

This Court already has ruled that Ms. Bowman's sexual past will not be admissible at trial because it is irrelevant to the issue of whether she consented to have sexual intercourse with Mr. Smith on March 30, 1991. Fairness requires that the Court rule that Mr. Smith's past is also inadmissible because it is irrelevant to this issue as well.

sexual assault case where victims knew the defendant and defense was consent); Foster v. Commonwealth, 5 Va. App. 316, 362 S.E.2d 745 (Va. 1987) (in rape prosecution, where prosecutrix' consent is at issue, reversible error to admit evidence of defendant's subsequent attempted rape of another woman in that it had no bearing on issue of prosecutrix's consent, but merely showed that defendant had propensity to commit that kind of crime); Jenkins v. State, 474 N.E.2d 84 (Ind. 1985) (in rape prosecution where victim's consent is sole issue; trial court committed reversible error in admitting testimony of alleged victim of subsequent rape by defendant); Malone v. State, 441 N.E.2d 1339 (Ind. 1982) (error to admit evidence about unrelated rape charge where defendant admitted intercourse with complainant and her consent was only element at issue; fact that another woman had been raped by defendant had no tendency to prove the complainant in this case did not consent); State v. Pace, 51 N.C. App. 79, 275 S.E.2d 254 (N.C. 1981) (evidence of prior rape held inadmissible where defense was consent); State v. Irving, 24 Wash. App. 370, 601 P.2d 954 (Wash. 1979) (testimony of a woman who was raped by the defendant five years previously held inadmissible to establish use of force and lack of consent by complainant); State v. Beaulieu, 116 R.I. 575, 359 A.2d 689 (1976) (testimony of woman that two weeks prior to alleged rape for which accused was prosecuted the accused had also given her a ride in his car and had assaulted her by grabbing her

breasts was inadmissible where the only issue involved in the case was whether the complainant had consented to have intercourse with the accused); Caldwell v. State, 477 S.W.2d 877 (Tex. Crim. 1972) (error to admit testimony from complainant's sister that the defendant raped her one month earlier where the sole issue was whether the complainant consented to the intercourse and the fact that one woman was raped has no tendency to prove that another woman did not consent to intercourse).

To be sure, when a defendant disputes material facts and raises other defenses to a sexual battery charge, in addition to consent, the State may be permitted to present similar fact evidence to refute these additional defenses. In Williams v. State, 110 So.2d 654 (Fla. 1959), the prosecutrix testified that she had parked her car in a parking lot and did some shopping. After she returned to the car and started driving, the defendant reached over from the back seat, stabbed her and thereafter raped her. At the time of his arrest, the defendant told the police that he had crawled into the back seat of the prosecutrix's car to take a nap under the mistaken belief that the car belonged to his brother. He said nothing about knowing the prosecutrix or of having consensual sex with her. 110 So.2d at 657.

In its case in chief, when the identity of the assailant was still at issue, the State presented evidence that about six weeks earlier, a young girl found the defendant on the floor in the

back of her automobile parked in the same lot, that she screamed and the defendant ran from the car. The defendant was later arrested and told police that he had crawled into that car to take a nap under the mistaken belief it was his sister's car. Id. at 657-58.

The defendant then took the stand in his own defense, denied that he had told the police anything about taking a nap in the prosecutrix's car and claimed that he knew the prosecutrix and had consensual sex with her. Id. at 656. The Supreme Court of Florida found that under these circumstances, where the circumstances of the second incident were so strikingly similar to the charged offense, the collateral evidence was admissible because it tended to establish a "pattern", and at the time it was admitted, was relevant to proving "identity." Id. at 663.

Similarly, the Fifth District Court of Appeal in Jackson v. State, 538 So.2d 533 (Fla. 5th DCA 1989), permitted the use of similar fact evidence where the defendant in a sexual battery case denied material facts and claimed that he paid the prosecutrix for sex. The prosecutrix in that case testified that she met the defendant at a bar in Dade City and that she had agreed to go with the defendant in his car to run some errands. After running the errands, the defendant drove to Hernando County. The prosecutrix became frightened and the defendant sped up to prevent her escape. He stopped on a dirt road, threatened to kill her, beat her up, raped her several times, and forced her to stand naked in front of

the headlights of his car. She eventually escaped and found a house where she received help from strangers. 538 So.2d at 534.

Jackson's defense was that he had picked up the prosecutrix at a bar in Dade City after she had offered him sex for $20.00. They ran some errands and then went to a rural area about one mile outside Dade City where they had consensual sex. He also claimed that he drove her back to the bar in Dade City. He denied, however, that he had gone to Hernando County with the prosecutrix and denied any knowledge of how she got to that county. 538 So.2d at 535. The prosecutrix denied agreeing to have sex in exchange for money. Id.

The State introduced evidence from another woman and a police officer concerning a sexual battery which occurred 13 1/2 months earlier. This other woman testified that the defendant had offered to give her a ride, that instead of heading in the direction of her friend's house, he drove her on dirt roads in Hernando County to a spot not far from where the alleged sexual battery at issue occurred. The defendant threatened to kill her, beat her up and then raped her in front of the headlights of his car. The police officer who investigated this other incident testified that the defendant claimed that he had paid $25.00 to have sex with the woman. 538 So.2d at 534-5. The woman involved in this incident also denied agreeing to have sex for money. Id.

The court held that the collateral evidence was relevant and admissible because it showed a modus operandi and it rebutted the material fact issue that the defendant had raised as to whether he had sex with the prosecutrix in Hernando County.[7] Further, the identical explanation that he had paid $25.00 for sexual favors was relevant to rebut the disputed claim of sex for pay. Id. at 535.

The instant case is readily distinguishable from both Williams and Jackson. Unlike the defendant in Williams, Mr. Smith never offered conflicting explanations for his behavior. Mr. Smith has never claimed that he encountered Ms. Bowman by mistake. He has never denied knowing Ms. Bowman or having sex with her. Mr. Smith's defense to the charges is, and always has been, that he had consensual sexual relations with Patricia Bowman. Moreover, the Williams case presented a classic signature crime. As we demonstrate, infra, the alleged incidents that the State wants to introduce in this case do not have such unique characteristics as to provide a signature to the alleged crimes.

And, unlike the defendant in Jackson, Mr. Smith has never raised any material issue as to where he met Ms. Bowman or where they had sex. He has never claimed that he paid to have sex with

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[7] The defendant on appeal conceded that the similar fact evidence testified to by the second woman was admissible as modus operandi. The only issue he pursued on appeal was the propriety of permitting the police officer to testify that he had stated he paid $25.00 to have sex with the woman. Id. at 535.

Ms. Bowman. There is no dispute that Mr. Smith met Ms. Bowman at the Au Bar, that she agreed to drive him home, that she agreed to go inside the house and then agreed to take a walk on the beach. The "identity" of the "perpetrator" is not at issue.[8] Nor is Mr. Smith's "intent," "motive," "opportunity," "plan" or "knowledge" at issue. There is no claim of "mistake". The only material dispute is whether Ms. Bowman consented to having sexual relations with Mr. Smith in the back yard of the Kennedy estate after their walk on the beach. Thus, like the defendant in Hodges, Mr. Smith's defense is simply consent. As such, collateral evidence of any other alleged assaults have no relevance other than attempting to prove "bad character or propensity" and must be excluded.

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[8] The most common reason for permitting the use of similar fact evidence in sexual assault cases is to prove identity. As the court in Hodges v. State correctly noted, concepts such as "modus operandi" or "common scheme or plan" also relate to the issue of identity by recognition of unusual aspects of the method that an individual uses to accomplish a particular act. See Dean v. State, 277 So.2d 13 (Fla. 1973); Williams v. State, 110 So.2d 654 (Fla. 1959); Talley v. State, 160 Fla. 593, 36 So.2d 201 (1948); Sweet v. State, 313 So.2d 130 (Fla. 2d DCA 1975); Fivecoat v. State, 244 So.2d 188 (Fla. 2d DCA 1971); Hines v. State, 243 So.2d 434 (Fla. 2d DCA 1971); Mims v. State, 241 So.2d 715 (Fla. 1st DCA 1970); Blackburn v. State, 208 So.2d 625 (Fla. 3d DCA 1968); Coney v. State, 193 So.2d 57 (Fla. 3d DCA 1966).

B. The Other Alleged Acts are not Strikingly Similar and Do Not Share Any Unique Characteristics That Set Them Apart From Other Offenses

Even if the State could demonstrate the potential relevance of the evidence to a material fact in issue, the allegations are not so "strikingly similar" to the alleged incident in this case to satisfy the Williams rule as applied by Florida courts. As explained by the Supreme Court of Florida in Heuring:

> To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses.

Heuring v. State, 513 So.2d at 124 (emphasis added). Accord Peek v. State, 488 So.2d 52, 55 (Fla. 1986) (citation omitted). The "strikingly similar" requirement applies even when "identity" and "modus operandi" are not the stated bases for admission. Heuring, 513 So.2d at 124; Edmond v. State, 521 So.2d 269, 270 (Fla. 2d DCA 1988).

The Florida courts consistently have applied a strict test of similarity, requiring that there were some unique characteristics which provide a signature to the crime. Collateral crime evidence is not admissible merely because it involves the same type

of offense. Peek v. State, 488 So.2d at 55. In order to meet the "strikingly similar" requirement, the similar fact evidence must be similar in almost every respect, including the location, manner of solicitation, amount of force used, type of sex engaged in, and other identifying characteristics.

In Edmond v. State, supra, for example, the court reversed a conviction for sexual battery where the court found that the charged and collateral offenses were not "strikingly similar". In that case, there were significant points of similarity between the offense -- both crimes began as a social contact; force was used in each instance including the defendant's hands around the victim's throat; and both offenses occurred in the early morning hours. The dissimilarities, however, included the fact that one offense occurred in a car on a road near a golf course, whereas the other occurred in the victim's home; there was an initial failed attempt at sexual intercourse in one case but not the other; oral sexual battery was an aspect of only one of the two criminal episodes; and the perpetrator remained dressed during the commission of one offense while removing his clothes in the other. 521 So.2d at 271. The court found that given the dissimilarities, the common aspects of the two crimes were "not so unusual as to establish 'a sufficient unique pattern of criminal activity to justify admission of [the collateral crime evidence]'". Id. (citations omitted).

Numerous other cases have held that evidence of a prior sexual assault was inadmissible because there was only a general similarity between the collateral and the charged assault. See, e.g., Thompson v. State, 494 So.2d 203 (Fla. 1986) (prior sex crime not sufficiently similar where one involved physical abuse and the other did not); Peek v. State, 488 So.2d 52, 55 (Fla. 1986) (prior sex crime not sufficiently similar where victims differed in age and one victim was bound and the other was not); Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981) (prior sex crime evidence not sufficiently similar where both involved binding hands but one involved physical abuse and the other did not); Robinson v. State, 522 So.2d 869 (Fla. 2d DCA 1987) (second sexual assault not sufficiently similar, despite the fact that both sexual assaults involved elderly victims and occurred at night within the same year and geographic area); White v. State, 407 So.2d 247 (Fla. 2d DCA 1981) (second sexual assault not sufficiently similar despite the fact that assailant admonished both victims not to scream, the eyes of both victims were taped, both victims were tied up, both victims were raped, and the assailant disguised his voice in both instances); Frieson v. State, 512 So.2d 1092 (Fla. 2d DCA 1987) (second sexual battery not sufficiently similar where one offense occurred at a gas station and the other at the defendant's home, even though the offenses occurred within hours of one another, and both victims were grabbed by the throat).

In the present case, the collateral evidence which the State seeks to introduce and the sexual battery with which Mr. Smith is charged plainly do not share "some unique characteristic or combination of characteristics which sets them apart from other offenses". Heuring v. State, 513 So.2d at 124. In fact, as we demonstrate below, there are "striking dissimilarities" between the incidents alleged by the three women and Ms. Bowman's story.

1. The Alleged Attempted Sexual Battery of Lisa Lattes.

At her deposition, Lisa Lattes testified that, approximately nine years ago, in 1983, she had gone to Manhattan to attend a concert and stay at a friend's Aunt's house overnight. Lattes Deposition at p.25. The concert was rained out, and she went to a party instead. Id. at 28; 32. She wanted to remain at the party later than her other friends, and she needed a place to spend the night. Mr. Smith, who was her boyfriend's cousin, suggested that she could stay in the guest room at his house which was only a short distance away. Id. at 34; 36. Ms. Lattes accepted Mr. Smith's offer and, after the party, they walked to his house.

According to Ms. Lattes, Mr. Smith had been drinking at the party and had another drink at his house. He was "truly drunk". Id. at 37; 38; 48. He showed her to the guest room. Id. at 50. While there, he grabbed her by her shoulders, pushed her onto the bed, covered her body with his, and tried kissing her.

Id. at 52; 55. Although he touched her underwear, he never touched her underneath her underwear. Id. at 57-8. When Ms. Lattes protested, Mr. Smith got up and apologized. Id. at 61. He then suddenly grabbed her shoulders and again pushed her onto the bed. Id. at 65. After struggling for awhile, Ms. Lattes claimed that Mr. Smith let her get up a second time. Id. at 72. He then tried to convince her to stay and apologized again. Id. at 73. As Ms. Lattes walked down the stairs to leave, Mr. Smith grabbed her roughly and tried to get her to stay. Id. at 75. He said that she had misunderstood him and that he just made a pass at her. Id. at 77. She left the house and took a cab to a friend's house where she spent the night. Id. at 80. She was not bruised or injured. Id. at 54.

There are numerous dissimilarities between Ms. Bowman's allegations and those made by Ms. Lattes. Ms. Bowman claimed she was raped in Palm Beach, Florida; Ms. Lattes claimed she was assaulted in New York City. Ms. Bowman allegedly was raped in a yard; Ms. Lattes allegedly was assaulted on a bed in a guest bedroom. Ms. Bowman only met Mr. Smith that evening at a bar and did not know Mr. Smith or his family; Ms. Lattes was the girlfriend of Mr. Smith's cousin. Ms. Bowman has acknowledged that she and Mr. Smith had kissed before the alleged assault; Ms. Lattes testified there had been no previous kissing. Ms. Bowman claimed that Mr. Smith was not drunk at the time of the alleged

assault on her (in fact, she told the police that she couldn't even smell alcohol on his breath); Ms. Lattes testified that Mr. Smith was "truly drunk" at the time he assaulted her. Ms. Bowman testified that Mr. Smith was naked during the assault; Mr. Smith was fully clothed during the alleged assault on Ms. Lattes. Ms. Bowman has not claimed that Mr. Smith apologized; Ms. Lattes testified that Mr. Smith apologized profusely for his actions. Ms. Bowman claimed that Mr. Smith pulled up her dress, pulled her panties to the side and penetrated her, even though his penis was only partially erect; Ms. Lattes testified that Mr. Smith never pulled aside her panties and never penetrated her either with his finger or his penis. Ms. Bowman claimed that she was only able to get away from Mr. Smith after he ejaculated in her; Mr. Smith let Ms. Lattes go when she protested and never penetrated her. Ms. Bowman did not claim that Mr. Smith tried to convince her to stay; Ms. Lattes testified that he tried to convince her to stay and to stop her from leaving. Ms. Bowman allegedly suffered injuries; Ms. Lattes suffered none.

A chart comparing the allegations made by Ms. Bowman with those made Ms. Lattes is attached hereto as Exhibit "A".

2. The Alleged Sexual Assault of Michele Meyer.

At her deposition, Michele Meyer testified that in 1988, she was at a party in Washington, D.C. where she got very drunk. Meyer Deposition at p. 36; 38. Mr. Smith, who she knew as a fellow

student, offered her a ride home. Id. at 41. Ms. Meyer accepted, but Mr. Smith drove them back to his home rather than to hers. Id. at 44.

Ms. Meyer wanted to go to sleep because she was not feeling well. She accepted Mr. Smith's offer to stay overnight and "sleep it off". Id. at 47-8. Mr. Smith also was intoxicated. Id. at 48. Mr. Smith showed her upstairs to his bed. As she started to lie down, Mr. Smith began kissing her, although not aggressively. Ms. Meyer asked him to stop and she rolled over away from him. Mr. Smith then took off his clothes and got into the bed with Ms. Meyer. Id. at 50. He became more aggressive, pulling at her clothes and trying to kiss and touch her. Id. at 52-4. Although Ms. Meyer was telling him not to, he removed all of her clothes, put on a condom, and pushing her down with his weight, penetrated her vagina with his penis. Id. at 52-70. A while later, Mr. Smith attempted to have oral sex with Ms. Meyer and she passed out. Id. at 70. Ms. Meyer slept with Mr. Smith in the same bed, for the remainder of the night. Id. at 71.

The next morning, the phone rang. Ms. Meyer picked it up and handed it to Mr. Smith. Kathy, Mr. Smith's fiancee, was on the other end of the line and Mr. Smith told her that he did not have a woman over at his house. Id. at 73. Ms. Meyer then called her roommate from Mr. Smith's bedroom because she was concerned about missing work. Id. at 77-9. She did not tell her roommate

that she had been raped. Ms. Meyer went downstairs, took a shower and then went back upstairs to get dressed. Id. at 76. Ms. Meyer later went with Mr. Smith to a corner shop where they bought croissants and orange juice. Id. at 88. They had breakfast together at Mr. Smith's house. Mr. Smith read the newspaper while they ate and they discussed the Contras. Id. at 89-90. After they finished eating, Mr. Smith grudgingly walked her to the corner. Id. at 97-8.

Again, there are numerous dissimilarities between Ms. Bowman's allegations and those made by Ms. Meyer. Ms. Bowman allegedly was assaulted in a yard in Palm Beach, Florida; Ms. Meyer allegedly was assaulted in Mr. Smith's own bed in Washington, D.C. Ms. Bowman only met Mr. Smith at a bar earlier that evening; Ms. Meyer was a classmate of Mr. Smith's at Georgetown University. According to Ms. Bowman, neither Mr. Smith nor she were intoxicated at the time of the alleged assault; according to Ms. Meyer, Mr. Smith was somewhat intoxicated and she was very drunk. Ms. Bowman was fully clothed at the time she allegedly was assaulted; Ms. Meyer claimed that Mr. Smith removed all her clothes and she was nude. Ms. Bowman claimed that she was tackled to the ground; Ms. Meyer was never tackled. Ms. Bowman claimed that Mr. Smith did not use a condom; Ms. Meyer stated that he used one. Ms. Bowman has not claimed that Mr. Smith attempted oral sex with her, whereas Ms. Meyer stated he did. Ms. Bowman did not spend the night with Mr.

Smith and accompany him at breakfast; Ms. Meyer, however, did. Ms. Bowman claimed she suffered injuries; Ms. Meyer suffered none.

A chart comparing the allegations made by Ms. Bowman with those made by Ms. Meyer is attached hereto as Exhibit "B".

3. The Alleged Attempted Sexual Assault of Lynn Gulledge.

At her deposition, Lynn Gulledge testified that in 1988 she was at a party in Washington, D.C. with other medical students. Gulledge Deposition at 43. Mr. Smith, a fellow student who was also at the party, invited a number of people back to his house to go swimming. Id. at 50-51. Ms. Gulledge followed Mr. Smith in her car to his apartment, where they had drinks together. Id. at 52-3. They then walked to the pool which was a few blocks away. Id. at 56. The other people who had been invited to go swimming did not show up. Id. at 55. Mr. Smith took off his clothes and went swimming. Id. at 62-3. Ms. Gulledge remained clothed and did not swim. There was no physical contact between Mr. Smith and Ms. Gulledge at the pool. Id. at 61. When Mr. Smith got out of the swimming pool, he got dressed again and he and Ms. Gulledge went back to his apartment. Id. at 68.

Ms. Gulledge testified that when they were back in the apartment, they engaged in small talk for a few minutes. Id. at 73. Mr. Smith then grabbed her wrists and pushed her onto the edge of the couch and she landed on the floor. Id. at 79. According to Ms. Gulledge, he then started kissing her face and neck. Id.

at 84. She asked him to let her go and he asked what was wrong. Both of them were speaking in a normal tone of voice. Id at 85-6. Mr. Smith held her down a little bit longer; Ms. Gulledge said that he needed to let go and that she needed to get home. He then let go of her and got up. Id. at 87. Mr. Smith walked up the stairway to his bedroom and tried to convince her to come upstairs. Id. at 89. She insisted that she had to get up early and needed to leave. Mr. Smith then came downstairs, unlocked the door, and let her out. Id. at 92. Ms. Gulledge did not suffer any injuries and did not receive any medical treatment. Id. at 111.

There are also significant dissimilarities between the alleged incident concerning Ms. Gulledge and the alleged sexual battery upon Ms. Bowman. Ms. Bowman allegedly was assaulted by Mr. Smith on a lawn by the beach in Palm Beach; Ms. Gulledge has claimed she was assaulted in his apartment in Washington, D.C. after they came back from a swimming pool. Ms. Bowman only met Mr. Smith at a bar earlier that evening; Ms. Gulledge was a classmate at Georgetown University. Ms. Bowman was the only person invited by Mr. Smith to take a walk on the beach; Mr. Smith invited other people to go swimming with them. Ms. Bowman claimed she had nothing to drink at the Kennedy Estate; Ms. Gulledge testified that she and Mr. Smith had a drink at his apartment. Ms. Bowman claimed that Mr. Smith was naked when he assaulted her; Ms. Gulledge said that he was fully clothed. Ms. Bowman claimed that Mr. Smith

pulled up her dress and pulled her underwear aside; Ms. Gulledge has testified that Mr. Smith did not attempt to move or remove her clothes.

Although both Ms. Gulledge and Ms. Bowman used the term "tackle" in describing what happened, they were describing different acts. Ms. Gulledge testified that she was facing Mr. Smith in his living room. He allegedly "tackled" her by grabbing her tightly around the wrists and pushing her backwards. Ms. Bowman testified that she was walking away from Mr. Smith. He allegedly grabbed her leg and Ms. Bowman stumbled. Ms. Bowman claimed she then ran and that Mr. Smith "tackled" her by hitting her upper body from behind and that she fell forward. Ms. Bowman claimed that Mr. Smith did not stop his assault and that he actually had intercourse with her, even though she was telling him no; Ms. Gulledge claimed that she was able to talk Mr. Smith into letting her go - - Mr. Smith never exposed his penis, never placed his hands on her vagina or pulled her underwear aside or down. Ms. Bowman claimed she was injured; Ms. Gulledge did not suffer any injuries.

A chart comparing the allegations made by Ms. Bowman with those made by Ms. Gulledge is attached hereto as Exhibit "C".

* * *

Whatever general similarities Ms. Bowman's allegations may have to the three incidents described above, there are no

"unique characteristics or combination of characteristics" which sets these charges apart from other "acquaintance" rapes. The common points are not so unusual as to establish "a sufficiently unique pattern of criminal activity to justify admission of [the collateral crime] evidence." Peek v. State, 488 So.2d at 55. Accordingly, any evidence concerning the three alleged incidents must be excluded.

II. EVEN IF THE STATE COULD MEET THE STRINGENT REQUIREMENTS OF 90.404(2)(A), THE COLLATERAL EVIDENCE MUST STILL BE EXCLUDED

A. The Probative Value of the Collateral Evidence is Outweighed by its Unfair Prejudice

Even assuming, arguendo, that the collateral evidence met the requirements for admissibility under Rule 90.404(2)(a), the Court has the discretion to exclude the evidence on the ground that the probative value is substantially outweighed by the damage of unfair prejudice. Rule 90.403. See, e.g., Bryan v. State , 533 So.2d 744, 747 (Fla. 1988) (finding that similar fact evidence should have been excluded on these grounds). The Court should exercise its discretion in this case to exclude the evidence proffered by the State.

The probative value of the collateral evidence the State seeks to introduce is extremely limited. As we explained above, at best, there are only superficial similarities between the

alleged incidents and the charges in this case. There are numerous dissimilarities. The alleged collateral incidents involve other women who had known Mr. Smith under different circumstances. None of the women had reported the alleged incidents to the police. Moreover, the women's own statements raise substantial questions as to what actually happened and why.

On the other hand, the potential prejudice against Mr. Smith of three other women coming to Court, testifying against him, and accusing him of misconduct, is enormous. There would be a substantial danger that Mr. Smith would be convicted, not because the State proved its case beyond a reasonable doubt, but because the jury inferred that he was a bad man who should be punished.

B. The Evidence Will Become a Feature Instead of an Incident to the Trial

In Williams v. State, 117 So.2d 473 (Fla. 1960), the Supreme Court of Florida placed equitable limits upon the use of similar fact evidence. In that case, evidence establishing that the murder weapon had been found in the defendant's care also established that the weapon had been found in the course of the investigation of a later murder-robbery committed by the defendant. In reversing the murder conviction, the court stated:

> Inasmuch as evidence of the later crime was admissible only because of its relevance to the identity of the accused and the murder weapon and the similarity of the pattern defined in the two incidents, the question then arises

> whether or not the State was permitted to go too far in introduction of testimony about the later crime so that the inquiry transcended the bounds of relevancy to the charge being tried, and made the later offense a feature instead of an incident. This may not be done for the very reason that in a criminal prosecution such procedure devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant whose character is insulated form attack unless he introduces the subject.

Id. at 475-6.

Following Williams II, courts have analyzed whether the similar fact evidence was made "a feature instead of an incident" of the trial. When such evidence has become a feature, it is considered an impermissible character attack. See Reyes v. State, 253 So.2d 907 (Fla. 1st DCA 1971); Matthews v. State, 366 So.2d 170 (Fla. 3d DCA 1970); Knox v. State, 361 So.2d 799 (Fla. 1st DCA 1978).

There is no question that if the State were permitted to present evidence concerning three other incidents, the "similar fact" evidence would become a feature of this trial. The transcripts of the women's depositions alone consume close to six hundred pages. Evidence presented by the State to corroborate their stories would likewise consume considerable time. Of course, the defense also will offer substantial evidence to refute these allegations and the trial necessarily will be prolonged as these collateral issues are litigated. The focus of the trial will be

deflected from what occurred in Palm Beach in the early morning hours of March 30, 1991 to an analysis of Mr. Smith's past and character. This cannot be permitted.

CONCLUSION

For all the above reasons, this Court should issue an Order precluding the State from presenting any evidence in its case-in-chief or in rebuttal concerning any collateral offenses allegedly committed by Mr. Smith.

Respectfully submitted,

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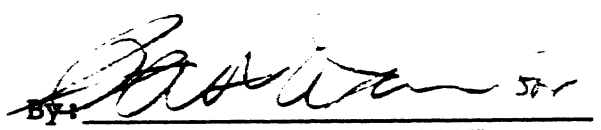
By: 
HOLLY R. SKOLNICK

Attorneys for WILLIAM SMITH

COMPARISON OF BOWMAN and LATTES ALLEGATIONS

PATRICIA BOWMAN	LISA LATTES
Incident occurred in 1991 in Palm Beach, Florida.	Incident occurred in 1983 in New York City.
Incident occurred in a yard.	Incident occurred in guest bedroom.
Did not know Smith or his family; met Smith at a bar that evening.	Was the girlfriend of Smith's cousin.
Smith requested ride home from bar; asked if she wanted to see Estate and walk on beach.	Lattes needed a place to stay after party; Smith offered the guest bedroom at his house.
Kissed before incident.	Did not kiss before incident.
Smith was not drunk during incident; no odor of alcohol on his breath.	Smith was "truly drunk" during incident.
Smith was naked during incident.	Smith was fully clothed during incident.
Smith pulled up her dress, pulled her panties to the side and penetrated with partially erect penis.	Smith never pulled her panties aside; never penetrated her.
Was not able to get away until after Smith ejaculated.	Smith let her go when she protested.
Smith did not apologize.	Smith aplogized profusely.
Smith did not try to convince her to stay.	Smith tried to convince her to stay.
Bowman suffered injuries.	Lattes did not suffer injuries.

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EXHIBIT "A"

COMPARISON OF BOWMAN and MEYER ALLEGATIONS

PATRICIA BOWMAN	MICHELE MEYER
Incident occurred in 1991 in Palm Beach, Florida.	Incident occurred in 1988 in Washington, D.C.
Incident occurred in a yard.	Incident occurred in Smith's bedroom.
Did not know Smith; met him at a bar that evening.	Was Smith's classmate at Georgetown University.
Smith requested a ride home from bar; asked if she wanted to see Kennedy Estate and walk on beach.	Smith offered Meyer a ride home, but took her to his house instead.
Bowman was not intoxicated.	Meyer was "very drunk".
Smith was not intoxicated; no odor of alcohol on his breath.	Smith was intoxicated.
Bowman was fully clothed during incident.	Meyer was nude during incident; Smith had removed her clothes.
Bowman was tackled to the ground.	Meyer was never tackled.
Smith did not use a condom.	Smith used a condom.
Smith did not attempt oral sex.	Smith attempted oral sex.
Bowman did not spend the night with Smith.	Meyer spent the night with Smith.
Bowman did not have breakfast with Smith.	Meyer had breakfast with Smith.
Bowman suffered injuries.	Meyer did not suffer injuries.

11/24/91\WDS\BOW-MEYE.CMP

EXHIBIT "B"

COMPARISON OF BOWMAN and GULLEDGE ALLEGATIONS

PATRICIA BOWMAN	LYNN GULLEDGE
Incident occurred in 1991 in Palm Beach, Florida.	Incident occurred in 1988 in Smith's apartment in Washington, D.C.
Incident occurred in a yard.	Incident occurred in Smith's apartment.
Did not know Smith; met him at a bar that evening.	Was Smith's classmate at Georgetown University.
Invited by Smith to see Kennedy Estate and to take a walk on the beach; no other persons invited.	Invited by Smith to go to a pool party at his apartment; other people invited as well.
Bowman gave Smith a ride in her car.	Gulledge followed Smith in her car to his apartment.
Bowman had nothing to drink at the Kennedy Estate.	Gulledge and Smith both drank at Smith's apartment.
Smith was naked during incident.	Smith was fully clothed during incident.
Smith pulled up Bowman's dress and pulled underwear aside.	Smith did not attempt to move or remove Gulledge's clothing.
Smith, while facing Bowman, grabbed her wrists and pushed her backwards.	Smith hit Gulledge's upper body from behind and she fell forward.
Smith did not stop his assault, notwithstanding her protests.	Smith let her go after she protested.
Smith penetrated her vagina with his penis and ejaculated.	Smith never exposed his penis; never penetrated her with his penis or his hand.
Bowman suffered injuries.	Gulledge did not suffer injuries.

EXHIBIT "C"