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)
)
v.)
)
WILLIAM KENNEDY SMITH)
)
)
)

DEFENDANT'S REPLY TO STATE'S MEMORANDUM OF LAW ON WILLIAM'S RULE EVIDENCE

Florida Bar No. 390860

The Defendant, WILLIAM SMITH, by and through undersigned counsel, hereby files its reply to the State's Memorandum of Law on the admissibility of so-called "William's Rule" evidence in this case.

INTRODUCTION

On the first page of its Memorandum, the State correctly underscores that evidence of other crimes, wrongs or acts are admissible only when relevant to prove a material fact in issue. Such evidence is not admissible when relevant solely to prove bad character or propensity. However, after paying lipservice to the express limitations placed by Rule 90.404(2)(a), the State then ignores these threshold requirements of admissibility in the remainder of its memorandum.

Indeed, the State completely fails to demonstrate how the proffered evidence has any relevance to the only material fact in issue -- whether Patricia Bowman consented to sexual intercourse. It is apparent from the Memorandum itself that the only purpose the

State has for admitting the collateral evidence is to improperly prove that Mr. Smith has the "propensity" to commit sexual assaults.

The State's arguments concerning the second requirement of admissibility -- that the other alleged incidents are strikingly similar to the charged offense -- are equally disingenuous. The points of similarity noted by the State are the same facts that one would expect to find in virtually any "acquaintance" rape. They do not show the kind of unique characteristics that would justify the admission of collateral crime evidence.

I. THE COLLATERAL EVIDENCE IS NOT RELEVANT TO ANY MATERIAL FACT AT ISSUE

As we explained in our Motion to Exclude Williams Rule Evidence ("Motion"), the Florida courts have required that before collateral evidence may be admitted, the State must establish that such evidence is relevant to a fact in issue. For evidence to be relevant, "it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action." C. Ehrhardt, Florida Evidence, §401.1 at 83 (2d Ed. 1984). (emphasis added).

Thus, in Coler v. State, 418 So.2d 238 (Fla. 1982), the Supreme Court of Florida reversed a conviction for three counts of sexual battery because the trial court had improperly admitted evidence of other sexual misconduct. As the Court explained:

> To be relevant, evidence must prove or tend to prove a fact in issue. The state argues that the objected-to evidence proves Coler's state of mind, Coler's state of mind, however, is not an issue. State of mind is not a material fact in a sexual battery charge, nor is intent an issue.

Id. at 239 (emphasis added).

This requirement of relevancy was specifically applied to a "date rape" situation in Hodges v. State, 403 So.2d 1375 (Fla. 5th DCA 1981) where, as here, the sole disputed issue was consent. The court observed that because consent is unique to an individual, the lack of consent of one person is not proof of the lack of consent of another. Accordingly, evidence of prior sexual misconduct is inadmissible because it does not prove or tend to prove a fact in issue. See generally Motion, at pp. 4-8.

Contrary to the State's contention in its Memorandum, Hodges is not in "aberrant" opinion. It applied well settled principles of law to the specific facts of a so-called "date rape". Courts in Florida and other jurisdictions repeatedly have held that the fact that another woman may have been raped by the defendant has no tendency to prove that the complainant in that case did not consent. See Motion, at pp. 8-10 (citing cases).

The State's other attempts to distinguish Hodges are also without merit. Nothing in the opinion in any way indicates that the reason the court found the other crime evidence inadmissible is because the court did not believe that the collateral evidence

did not constitute a sexual battery. See State's Memorandum at 30. There is nothing in the opinion indicating that the admission of the collateral evidence was barred because it was not sufficiently similar. Id. Rather, the court carefully analyzed the requirement of Rule 90.404 and the elements of the offense of sexual battery and clearly held that when the only material fact at issue is consent, evidence of other crimes is inadmissible because it is irrelevant. Hodges, 403 So.2d at 1376-8. The reasoning and conclusions reached by the Court in Hodges are fully applicable herein.

The State claims that the relevance of the collateral fact evidence in this case is illustrated by Williams v. State, 110 So.2d 654 (Fla. 1959) and Jackson v. State, 538 So.2d 533 (Fla. 5th DCA 1989). The State's reliance upon these cases is completely misplaced. As we explained in our Motion, the defendants in these cases did not simply raise consent as a defense, but had offered conflicting explanations for their conduct. See Motion at pp. 10-14. For example, Williams initially claimed to the police that he had encountered the prosecutrix by mistake and did not acknowledge that he either knew or had sex with her. At the time that the collateral evidence was offered, the identity of the assailant was also still at issue. 110 So.2d at 657. Likewise, the defendant in Jackson raised material issues as to where he met the prosecutrix, where they had sex and whether she agreed to sex for

pay. 538 So.2d at 535. Indeed, the Fifth District in Jackson specifically distinguished that case from Hodges in that the defense in Jackson was not "consent vel non." 538 So.2d at 535.

The State's attempts to find other rationales for the admissibility of the collateral evidence are equally flawed.

Corroboration

The cases cited by the State in support of this rationale involved victims who are minors that suffered abuse in a familial setting. See, e.g., Hodge v. State, 419 So.2d 346 (Fla. 2d DCA 1982) (sexual battery in familial setting; an eleven year old victim); Calloway v. State. 520 So.2d 655 (Fla. 1st DCA 1988) (sexual battery in familial setting). In such settings, the courts have recognized that there are special problems of proof and need for corroboration. See Heuring v. State 513 So.2d 122, 124 (Fla. 1987).

The relaxation of the rules of admissibility do not apply when, as here, the complainant is an adult woman and the alleged sexual battery did not occur in a familial or custodial context. Accordingly, the "corroboration" rationale cannot apply. Indeed, the only way that the prior incidents could "corroborate" Ms. Bowman's story is if one draws the inference that Mr. Smith "did it once, he must have done it again". This is precisely what the State is seeking to do -- and precisely the type of inference that the Rule prohibits.

Modus Operandi/Plan/Scheme

The State also claims that the other act evidence is relevant to show "modus operandi," "plan" or "scheme." But "modus operandi," "plan" nor "scheme" are not at issue in this case. Nor is "identity" -- which is often proven by demonstrating a "modus operandi" -- an issue. As the court explained in Duncan v. State, 291 So.2d 241, 243 (Fla. 2d DCA 1974):

> Neither a continuing course of conduct, a plan or scheme nor a modus operandi is an end in and of itself which must be proved in a criminal case. If they were, then by whatever reason therefore so would propensity be admissible. Evidence relating to a similar offense is admissible only when, they, or any of them, are relevant in a given case to one of the essential or material issues framed within the charge instantly being tried. (Emphasis in original.)

Opportunity

The State next argues that the evidence is relevant to show "opportunity." Again, this is not a material fact in dispute in this case. Mr. Smith admits that he asked Ms. Bowman if she would like to see the Kennedy estate and walk on the beach. He admits that he was with her at the time of the alleged incident. And, he admits that he had sex with her. Since opportunity is not at issue, if the State cannot argue that this is a grounds for the admission the collateral evidence.

In Thomas v. State, 16 F.L.W. D2320 (Fla. 1st DCA 1991), the Court reversed a sexual battery conviction where the State had

introduced evidence of another sexual battery to prove "opportunity" or "scheme or plan." The court found a "fatal flaw" in the State's argument for admissibility in that:

> Neither opportunity nor scheme nor plan is a disputed factual issue relevant to specific elements of the charge against appellant. None of the elements of the charged sexual battery requires the State to prove a scheme or plan; nor do the elements of the offense require proof of opportunity. Although the State had to prove that appellant was present at the time and place when the charged offense allegedly occurred, appellant admitted he was present at the time and place, and his defense at trial did not create any issue as to "opportunity" to commit the offense.

Id at D2321.

* * *

In sum, the only material issue in this case is whether Patricia Bowman consented to sexual intercourse with Mr. Smith on March 30, 1991. The State has completely failed to show how the collateral evidence is relevant to this issue other than attempting to prove "bad character or propensity". Because the collateral evidence proffered by the State cannot meet even the threshold requirements of admissibility, it must be excluded.

II. THE OTHER ALLEGED ACTS ARE NOT STRIKINGLY SIMILAR

In its Memorandum, the State misleadingly cites Bryan v. State, 533 So.2d 744 (Fla. 1988) for the proposition that similar fact evidence need not be "strikingly similar". Memorandum at 15.

Bryan, however, did not concern "similar fact" evidence and therefore has no applicability to this case. Bryan concerned evidence of other crimes which were otherwise relevant to material facts at issue. The Court in that case permitted evidence of an unrelated and factually dissimilar bank robbery committed by the appellant because the evidence of the bank robbery was relevant to the issue of the ownership and possession of the murder weapon. Id. at 746-7.

Moreover, the Court in Bryan did not retreat from the requirements laid out in Heuring v. State, 513 So.2d 122, 124 (Fla. 1987). In that case, the Court clearly held that 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 characteristics or combination of characteristics which sets them apart from other offenses." Id.

The State, apparently recognizing its miscitation to Bryan, does go to great lengths to show that the alleged other incidents were similar to the allegations made by Bowman. Upon close analysis of the purported similarities, however, it is plain that the alleged incidents show no unique characteristics and share only those factors which would be common to any "acquaintance" rape. Moreover, as we demonstrate below, the State has improperly stretched and manipulated the facts so that they will "fit" into its list of so-called similarities.

The purported similarities are as follows:

1. Mr. Smith met all of the alleged victims at a social gathering.

While the other woman were at parties, i.e., "social gatherings", Ms. Bowman met Mr. Smith at a bar. Even if a bar can be equated to a party, there is nothing unique about this fact to an "acquaintance" rape. People often meet members of the opposite sex at bars and social gatherings. This is no different from any dating situation.

2. Each of the alleged woman had not been escorted by dates.

Obviously, if a woman had been escorted by another man, she would not have left with Mr. Smith.

3. Mr. Smith was "nice," "gentlemanly" and possessed a "nice demeanor" when each woman met him.

Again, this would be common in any dating situation. If a man were not "nice" or "gentlemanly", a woman would not spend time with him.

4. Mr. Smith exhibited a change in character and turned violent.

A rape is necessarily a violent act. At the time of the attack, an otherwise "nice" person turns "brutal" and "violent". This type of change in personality would be common to any "acquaintance" rape.

5. **Mr. Smith held down each of the women with his body weight.**

There is nothing unique about this in a sexual battery case. If a man is committing a forcible act of intercourse, the woman necessarily would be under him, rather than in a superior position.

6. **Mr. Smith had a drink or had been drinking.**

This grossly mischaracterizes the evidence. Ms. Bowman has testified that Mr. Smith was <u>not</u> intoxicated and that she did not even smell alcohol on his breath. Lisa Lattes testified that Mr. Smith was "truly drunk" and Michele Meyer claimed he was "intoxicated". In any event, even if drinking were common to each incident, having a drink, especially at a bar or a social gathering is hardly a unique characteristic which sets these offenses apart.

7. **Mr. Smith "imprisoned" each woman.**

While the State may be permitted some poetic license, this characterization of the facts borders on the absurd. Patricia Bowman, the complainant in this case, was allegedly attacked outdoors in an open yard by a beach. Her car was parked in the adjacent parking lot. It is difficult to see how this could in any way be considered "imprisonment".

Given what the other women have alleged, this is not a point of similarity, but of dissimilarity.

8. Mr. Smith denied he did anything wrong.

There is nothing unique about a person denying that he committed any wrongdoing.

* * *

In short, the purported similarities that the State points to are factors that are fairly descriptive of any "acquaintance" rape and are insufficient to meet the "strikingly similar" requirement. See Motion at pp. 16-17 (citing cases). The State has ignored the numerous dissimilarities between the alleged offenses. See Motion at pp. 18-25; Exhibits "A", "B" and "C". We respectfully submit that arguing that these incidents are "strikingly" similar is akin to arguing that two armed robberies are similar because the defendant pointed a gun and took the victim's money in each instance.

CONCLUSION

Notwithstanding its dramatic recitation of the facts and its lengthy Memorandum of Law, the State has not made the requisite showing for admissibility of collateral crime evidence. It has not shown how this evidence is relevant to anything other than Mr. Smith's character. It has not shown that the collateral incidents

had anything more than a general similarity to the offense charged herein.

As explained in our initial Motion, the evidence should be excluded for other reasons as well. The probative value of incidents that occurred so long ago would be limited under even the best of circumstances. In this case, the women's own statements and their failure to report the incidents, raise questions about what really occurred and why. Such evidence would be unfairly prejudicial and would consume considerable trial time.[1]/ The jury and the Court necessarily would be diverted from the facts at issue in this case -- what occurred in Palm Beach, Florida on March 31, 1991 -- to an analysis of Mr. Smith's past and character. The Court should not permit this to happen.

Respectfully submitted,

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1/ For example, additional legal issues, such as the applicability of the Rape Shield law to each woman will need to be decided.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant's Reply to State's Memorandum of Law on William's Rule Evidence was Telecopied to: MOIRA K. LASCH, Esquire, Assistant State Attorney, The Law Building, 315 Third Street, West Palm Beach, Florida 33401, FAX NO. 407-355-3158; this 27 day of November, 1991.

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