IN THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

RICKY TOLBERT	)	
	)	DCA CASE NO. 2D19-2326
Appellant.	)	L.T. CASE NO. 18-CF-15699
v.	)	
	)	
STATE OF FLORIDA	)	
	)	
Appellee.	)	
_____	)	

An Appeal from the Circuit Court of the Twentieth Judicial Circuit
In and for Lee County

APPELLANT'S INITIAL BRIEF

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PREFACE

The parties are referred to herein as Mr. Tolbert and the State. The following symbols are used throughout: the Record is cited as (R. *P*), and the Transcript (T. *P*), where "P" the page. Counsel notes that the two supplements to the record on appeal have not been sequentially numbered by the circuit clerk. The first supplement docketed with this Court on December 11, 2019, is numbered 603 – 620, and instead of commencing with page 621, the second supplement, docketed June 30, 2020, is numbered 603 – 626. Accordingly, the supplements are cited herein as (S. I: *P*) and (S. II:*P*).

STATEMENT OF THE CASE AND FACTS

a. The pertinent facts of the alleged offenses

Mr. Tolbert was alleged to have sat one of three girls who were present at the time in a barbershop on his lap where she reported feeling his penis. (R. 21).

She "…stated that she sat on Ricky's lap for approximately 10 minutes in a mostly dark room. The room was where clients would get their hair washed - there were sinks and chairs in the room. Ricky was sitting in one of these chairs. During this incident, REDACTED did not have any conversation with Ricky and she did not see Ricky's penis physically exposed. - REDACTED did, however, feel Ricky's penis under her and

believed it could have been exposed. After approximately 10 minutes of sitting on Ricky's lap, - entered the room and stated that Ralph had returned. - REDACTED immediately removed herself from Ricky's lap and returned to the main room of the barbershop. REDACTED observed Ricky turn around and face the wall and move his arm up and down as if he were zipping his pants up, but did not hear the noise of a zipper being closed." (R. 22).

The call to law enforcement occurred January 7, 2018. (R. 20).

As to T.E., Mr. Tolbert was alleged to have placed her on his lap and on another occasion caused her to put her hand through a partially opened door into a room where he was located and she touched something that she did not see. (T. 184-185).

b. The course of proceedings and disposition of the case below

Mr. Tolbert was charged with two counts: one lewd and lascivious on A.A.W., under 16, contrary to Florida Statute 800.04(6)(b) for the alleged January, 2018 incident, and one lewd and lascivious on T.E., under 16, contrary to Florida Statute 800.04(6)(b), between August 1, 2016 and December 31, 2017. (R. 27).

Both counts alleged that Mr. Tolbert's penis made contact with A.A.W. and T.E. (R. 27).

The State filed a notice that Mr. Tolbert qualified as a Habitual Felony Offender. (R. 31).

The State also filed notices to rely on child hearsay statements of T.E. and A.A.W., as well as a notice of similar fact evidence pursuant to Florida Statute 90.404(2)(a) ("Williams Rule"). (S. II:605, 613, and 622).

The Williams Rule Notice involved a third party, A.E., and conduct alleged to have occurred in 2010. (S. II:622). The purported statutory basis for A.E.'s testimony was "for the purpose of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." (S. II:622).

At hearing on the Williams Rule motion, the State argued the similarity of alleged victim's ages, and "I'd call Your Honor's attention to the striking similarity that all of these happened at a barber shop." (R. 511).

The State noted that A.E. "was the most well spoken of the three" alleged victims, likely because – unlike T.E. and A.A.W., both still children at the time of trial – "[s]he's now a senior in college at the University of Florida." (R. 511).

The State's argument that followed included:

> "This went back to when [A.E.] was thirteen years old and described for the Court the situation where she was getting her hair

done or they were getting her hair washed and the defendant specifically put something over her eyes, a towel, so that she couldn't see. And then he put his penis in her hand. That is strikingly similar -- that's the same type of act that the defendant did with T.E. … who testified earlier at this proceeding. When the defendant asked her to put her hand through the door, the first time it was a water balloon. The second time it was his penis when she put her hand through the door.

"Both are strikingly similar. The defendant wanted to mask the eyesight of the victims in both situations so that the victims had to feel it and not see it. Both were at the barber shop. All three of the victims were solicited by the defendant at the barber shop as well as engaged in lewd or lascivious manner at the barber shop.

"Looking at McLean versus Sate, Your Honor, we ask the Court to grant our Williams Rule because not only is this motive, intent, absence of mistake, what could come up at trial is that the defendant made a mistake or it was a - - they're not sure. This all goes to motive, opportunity, intent.

"All of it happened at the barber shop. Planned at that barber shop. Knowledge, identity of the defendant, and the absence of

mistake or accident.

> "The testimony of [A.E.] is particularly important to show the absence of mistake or accident because of the youthful age of the two charged victims."

(R. 511-512).

"And if you look at all three of the situations at the barber shop, there was water involved… [t]hat is his MO… [h]is modus operandi. This wasn't a mistake." (R. 513).

Counsel for Mr. Tolbert pointed out that A.E.'s allegations were not similar to the allegations at issue for trial: "… her allegations are much more - - there's a lot more to them than there is in both [T.E.'s and A.A.W.'s] testimony. [A.E.] is indicating that there was touching under the clothes of both her breasts and her gen - - and her vagina. There was rubbing. There was a lot - - a lot more that happened, and I'm fearful and I think the Court should take notice of the fact that the Williams Rule evidence should not become the center of the trial; and I'm fearful and I think the Court should be leery as well that testimony such as that from someone who is now an adult… will become the center of the trial while both [T.E. and A.A.W.] are young and their stories are not quite to the level that [A.E.]'s was, I think by having an older, more experienced, and more eloquent woman testify to

things that have happened to her. There's the comparison that oh, well, he's done it before, he must have done it again, which is propensity evidence which is not what this type of evidence should be admitted for." (R. 516-517).

The acts that were described by [A.A.W.] and the acts that were described by [A.E.] are not similar at all. [A.A.W.] is describing sitting on the lap and essentially believing that she felt something underneath her. That is the extent of her testimony. She does not indicate that there was touching of any sort. There was no under the clothes. There was nothing indicating that she saw or felt his private part exposed other than sitting on top of his lap. I think there was a drastic difference between the testimony of those two witnesses despite the fact that they occurred in a barber shop, I think that is the only thing that was similar.

(R. 517).

Another strikingly different fact about [A.E.] is that she was thirteen. She had probably entered into puberty. She indicated that she was wearing a bra. So she is not as similar to Tatiana who was eight years old and not having any womanly features whatsoever. The ages may be similar in

time, but I think once girls hit twelve, thirteen, there is a distinction. There is a big difference there. So again, the only similarity between [A.E.], [T.E.], and [A.A.W.], is that it happened at a barber shop, and I don't think that that is sufficient to prove or to admit this type of evidence with the caveat that such evidence is so prejudicial to the defendant and can there is such an opportunity for the jury to think he's done it before, he must have done it again without taking the credibility of the testimony from the victims and looking at that and looking at the -- whether or not it occurred to those two by just simply giving a more eloquent, womanly testimony. I don't think that that's fair, and I don't think there's that similarity between the three different types.

(R. 517-518).

The court reserved ruling at hearing and subsequently granted the State's motion. (R. 521). (R. 79-83).

In granting the motion, the court found the prior act was proven by clear and convincing evidence. (R. 82). As to relevance, the court found:

The majority of the abuse of all three victims occurred in the barber shop where Defendant worked, when the owner or parent was outside or could not see what was happening in the other room. The prior act occurred in

2010, while the incidents in this case occurred in 2018, so the acts were not close in time. However, the prior act does tend to negate any implication that the victims in this case had a motive to lie or make up the abuse. The victim of the prior act is unrelated and unknown to the two victims in this case. The Court is unaware of the presence or lack of any intervening circumstances. While the acts are not all similar between all three victims, it appears that Defendant was tailoring the acts to the age and temperament of the victim. Portions of the acts are similar between the three victims. Defendant put his penis in the hand of A.E. and T.E. Defendant pushed his unclothed penis against the clothed buttocks of A.E. and A.A.W. Defendant had A.A.W. and T.E. sit on his lap over his penis.

(R. 82-83).

The jury found Mr. Tolbert guilty of both counts as charged. (R. 97-98). (T. 740).

He was sentenced to 30 years on count 1 as a habitual felony offender and 30 years on count 2 as a habitual felony offender, consecutive. (R. 150). (R. 599).

c. The pertinent facts of the trial

Mr. Tolbert was tried May 7-9, 2019 before the Honorable Nicholas Thompson. (T. 3).

In opening, the State summarized the anticipated testimony of A.E. as follows:

> And then, to make sense of what this MO is, motus operandi I would call it, is something very similar. It happened years ago to a woman women named [A.E.]. And you're going to hear from her. This defendant, years ago, in a barbershop, in a different barbershop all together, Rick Tolbert was friends with [A.E.]'s dad, did something very similar to her years ago. It's not charged but the judge is going to give you a special instruction regarding that. It is to be used for the only purpose that the judge gives you and nothing else. He is not charged with that.
>
> But it's the State's position that the evidence will show that this is his MO in a barbershop playing games with children and then touching them inappropriately when the adult has their back turned. And that's the case.

(T. 188).

T.E.'s direct examination occupies 12 pages of transcript. (T. 193-

225). She testified on redirect for three pages. (T. 250-253). A.A.W.'s direct examination occupies 30 pages. (T. 314-344). She testified on redirect for one page. (T. 359-360).

A.E., the Williams Rule witness, testified on direct for 19 pages and on redirect for one. (T. 543-562). (T. 575-576).

Early in closing, the State argued:

> What do you believe happened in that barbershop? Not what I think happened or the Defense Attorney, what you think happened. But you didn't hear from one witness, you heard from three, two of which are the crimes charged.
>
> The third one, there's a special instruction on. We'll read that to you later one. There is a special instruction for [A.E.]'s testimony. But looking at it you might think to yourself, weird, right? Strange, odd. Use your life experiences and common sense. These are an eight and a nine-year-old child. They're communication skills versus [A.E.] at 13 and now 23, use your common sense and your life experience, an eight and a nine-year-old describing what they perceive what happened to them, not what happened with them, what he did to them on

different occasions. Try to wrap your head around the dynamic here.

(T. 682-683).

In arguing as to A.A.W.'s testimony, counsel argued

> What else is a very important detail about -- that the evidence showed happened back there? The lights were off. He called her back there to sit on his lap while the lights were off. Starting to sound similar to you? The lights were off, doors creaked. [A.E.], something over her face. It's going to make sense. Go through it one at a time, one child at a time. That chair right here is where she was. The lights are off. She feels his penis touching her butt and she tells you that it was soft. It was soft. What did [A.E.] say when it happened to her? Squishy is the word she described when she was 13. She now is a grown adult and knows it was a penis.

(T. 684-685).

"What's her motive? What does [A.A.W.] get out of this at nine-years-old? There is no relationship with him. They don't know each other that well." (T. 686).

The State next referenced the testimony of Ralph Evans by arguing, "You heard from Ralph. They played with those things but why would you

want a door open this much with the lights off to touch a water balloon? You wouldn't. You wouldn't. He did it so that he could put his penis in her hand without her seeing what it was, either her eyes not able to see what he was doing. Starting to sound familiar to [A.E.] from eight years ago? A cloth over her face. Can't see. Put your hand out is what he told [A.E.]. And he put his penis in her hand while she was – she had a towel over her face. Sounding familiar? That's his M.O. That's his thing. That's what he does." (T. 688-689).

Returning to A.A.W., "So think about how it adds up. She doesn't have the life experience of [A.E.] or a grown adult." (T. 690). "Juan Estrada was in the next room when he molested [A.E.]." *Id*.

"The eight and nine-year-old, we'll get back to that, is not going to describe the same way as the 13-year-old or 23-year-old. Life experience." (T. 696).

"The judge read you an instruction why [A.E.] was allowed to testify when she testified. We'll get into that. That's the third witness." (T. 698).

You also heard the testimony of a child. No witness is disqualified just because of their age. There is no precise age. Some of you might have been wondering, Hey, why is the prosecutor asking those questions? Well, there is no precise age to determine whether a witness will

testify. What we all want to make sure of are the girls were telling the truth, the way they know what the truth is, right? Are we in a bowling alley or a courtroom? What color suit am I wearing? Those reasons because they are kids. Them putting their hand on a Bible and raising their hand up like this (indicated)is a little bit different from us as adults.

(T. 698).

In rebuttal, the State immediately went to A.E. to rebut Mr. Tolbert's reasonable doubt argument. "So in one way the Defense is asking you not to use your common sense because look at all of the facts and circumstances and using your common sense on how [A.E.] told you what happened to her at her age now versus the eight and nine-year-olds trying to detail what happened to them at a young age." (T. 717).

The Court gave you a similar instruction before you heard [A.E.]. That's why that was admitted. It's real simple. It's easy to wrap your head around it. She was 13. They are 8 and 9. Harder to talk about the details. She is 23. Just graduated University of Florida. You saw her on that witness stand. Do you think those were just allegations? Think it might have happened, might not have happened? It happened. You heard her. What's her motive?

Her dad was best friends with Ricky Tolbert. Common theme. Ralph Evans, good friends with Ricky Tolbert. Who are we taking advantage of? A friend's daughter. Let your guard down because it's Ricky, just Ricky. It's okay to have your guard down because it's Ricky. Going to the hair salon for years [A.E.] told you. What did he decide to do one day? Preparation, plan. Where did it happen? A barbershop. Where did happen with [A.A.W.]? A barbershop. Where did it happen with [T.E.]? A barbershop. Hm, that's odd. Let's ignore that. No, we don't ignore that. That's why the law gives you this instruction. We don't ignore things like that where it's a motive, where it's an opportunity. Look at that opportunity. A barbershop. What did he do? Took advantage of his friend's kids in a barbershop twice with [A.A.W.] and [T.E.]. Does that explain it?

(T. 719-720).

The State called out A.E. by name six more times after in the final three pages of rebuttal transcript before concluding with, "And you also heard the evidence of [A.E.] to corroborate their testimony because it's the same, same MO. Ladies and gentlemen, thank you for your time and attention to this case." (T. 720-723).

The State did not discuss the Williams Rule instruction in any detail during closing or rebuttal, beyond telling the jury twice that the State would do so. (T. 682-682). (T. 698).

SUMMARY OF THE ARGUMENT

The State made A.E.'s testimony – the Williams Rule evidence – not merely *a* feature of the trial but *the* feature of the trial, in fundamental error. *Seavey v. State*, 8 So.3d 1175 (Fla. 2d DCA 2009).

The trial court abused its discretion by admitting the Williams Rule evidence at all. *Corson v. State*, 9 So. 3d 765 (Fla. 2d DCA 2009).

The entire theme of the State's closing argument was bolstering A.A.W.'s and T.E.'s credibility by referencing and featuring A.E.'s testimony, in fundamental error. *Howard v. State*, 152 So. 3d 825, 829 (Fla. 2d DCA 2014).

The cumulative effect of these errors denied Mr. Tolbert his Due Process right to a fair trial. *Evans v. State*, 177 So. 3d 1219 (Fla. 2015), *receded from on other grounds by Johnson v. State*, 252 So. 3d 1114 (Fla. 2018).

The State cannot establish beyond a reasonable doubt that the errors complained of herein did not contribute to the verdict or that there is no

reasonable possibility that the error contributed to the conviction. *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986).

ARGUMENT

I. The State made the Williams Rule evidence a feature of the trial.

This Court reviews the trial court's rulings on the admissibility of evidence for an abuse of discretion, but the trial court's discretion is limited by the evidence code and applicable case law, and the erroneous interpretation of these authorities is subject to *de novo* review. *Sottilaro v. Figueroa*, 86 So. 3d 505, 507 (Fla. 2d DCA 2012), *review denied*, 103 So.3d 139 (Fla. 2012).

Florida Statute 90.404(2)(a) provides that "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, 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."

"Collateral crimes evidence becomes a feature of the trial when inquiry into the collateral crimes transcends the bounds of relevancy to the charge being tried and the prosecution devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant." *Seavey v. State*, 8 So. 3d at 1177, *internal*

quotations and citations omitted.

In opening, the State summarized the anticipated testimony of A.E. as constituting what would make sense of Mr. Tolbert's alleged propensity to have committed the crimes alleged against T.E. and A.A.W. "[T]to make sense of what this MO is, motus operandi I would call it, is something very similar. It happened years ago to a woman women named [A.E.]. And you're going to hear from her. This defendant, years ago, in a barbershop, in a different barbershop all together, Rick Tolbert was friends with [A.E.]'s dad, did something very similar to her years ago. It's not charged but the judge is going to give you a special instruction regarding that. It is to be used for the only purpose that the judge gives you and nothing else. He is not charged with that. But it's the State's position that the evidence will show that this is his MO in a barbershop playing games with children and then touching them inappropriately when the adult has their back turned. And that's the case." (T. 188).

Because, by definition, touching children inappropriately is the crux of every allegation of lewd and lascivious, it is unclear which of the enumerated reasons for admitting prior acts pursuant to Florida Statute 90.404(2)(b)(1) applied to "barbershop" or "playing games" or "[other] adult has their back turned" the State thought made A.E.'s testimony relevant.

Please see the second issue on appeal raised herein.

Regardless, A.E.'s testimony at trial constituted 30.3% of all alleged victim testimony. (T. 543-562). (T. 575-576).

Early in closing, the State set their theme:

> What do you believe happened in that barbershop? Not what I think happened or the Defense Attorney, what you think happened. But you didn't hear from one witness, you heard from three, two of which are the crimes charged.
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> The third one, there's a special instruction on. We'll read that to you later one. There is a special instruction for [A.E.]'s testimony. But looking at it you might think to yourself, weird, right? Strange, odd. Use your life experiences and common sense. These are an eight and a nine-year-old child. They're communication skills versus [A.E.] at 13 and now 23, use your common sense and your life experience, an eight and a nine-year-old describing what they perceive what happened to them, not what happened with them, what he did to them on different occasions. Try to wrap your head around the dynamic here.

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This all constitutes what making Williams Rule evidence a feature of a trial looks like.

The State cannot show that there is no reasonable possibility that making the Williams Rule evidence a feature of the trial did not contribute to the guilty verdicts. *State v. DiGuilio*, 491 So.2d at 1125. It was, by calculated design and implementation, a concerted and consistent effort to persuade the jury to convict Mr. Tolbert on A.E.'s testimony, *i.e.* for reasons outside and beyond the issue of his guilt or innocence of the crimes that were actually charged in the information.

The State cannot establish beyond a reasonable doubt that the errors complained of herein did not contribute to the verdict or that there is no reasonable possibility that the error contributed to the conviction. *State v. DiGuilio*, 491 So.2d at 1135.

His judgments and sentences must be vacated and remanded for new trial.

II. The court abused its discretion in permitting the testimony of A.E. at trial.

This Court reviews the trial court's admission of Williams Rule evidence for an abuse of discretion. *Corson v. State*, 9 So. 3d at 766.

Here, the State's motion merely listed all the reasons the statute permits a court to allow Williams Rule evidence if relevant without actually explaining why the court should do so here: "for the purpose of showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity or

absence of mistake or accident." (S. II:622).

The notice makes no attempt to explain why the A.E.'s testimony was relevant, why it would help prove any material fact in issue in Mr. Tolbert's case; no explanation of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, appear anywhere in the notice, merely the words themselves.

At hearing, the State repeated this approach by again simply reciting off the statute's list without regard for either context or explanation or, at times, even full sentences.

"I'd call Your Honor's attention to the striking similarity that all of these happened at a barber shop." (R. 511).

> "This went back to when [A.E.] was thirteen years old and described for the Court the situation where she was getting her hair done or they were getting her hair washed and the defendant specifically put something over her eyes, a towel, so that she couldn't see. And then he put his penis in her hand. That is strikingly similar -- that's the same type of act that the defendant did with T.E. … who testified earlier at this proceeding. When the defendant asked her to put her hand through the door, the first time it was a water balloon. The second time it was his penis when she put her hand through the

door.

"Both are strikingly similar. The defendant wanted to mask the eyesight of the victims in both situations so that the victims had to feel it and not see it. Both were at the barber shop. All three of the victims were solicited by the defendant at the barber shop as well as engaged in lewd or lascivious manner at the barber shop.

"Looking at McLean versus Sate, Your Honor, we ask the Court to grant our Williams Rule because not only is this motive, intent, absence of mistake, what could come up at trial is that the defendant made a mistake or it was a - - they're not sure. This all goes to motive, opportunity, intent.

"All of it happened at the barber shop. Planned at that barber shop. Knowledge, identity of the defendant, and the absence of mistake or accident.

"The testimony of [A.E.] is particularly important to show the absence of mistake or accident because of the youthful age of the two charged victims."

(R. 511-512).

"And if you look at all three of the situations at the barber shop, there was water involved… [t]hat is his MO… [h]is modus operandi. This wasn't

a mistake." (R. 513).

That is all: a barber shop and water was involved. "Because of the youthful age of the two charged victims" – literally, "to bolster the credibility of the two alleged victims we're prosecuting Mr. Tolbert for" – does not constitute legally tenable relevance.

Even the State acknowledged the actual reason they wanted A.E.'s testimony at trial, she "was the most well spoken of the three" alleged victims, because – unlike T.E. and A.A.W., both still children at the time of trial – "[s]he's now a senior in college at the University of Florida." (R. 511).

None of that, however, made A.E.'s testimony legally relevant.

The court should have excluded the extensive dissimilar acts and events testimony from A.E., and the court abused its discretion by allowing the admission of same. *Corson v. State*, 9 So. 3d at 766.

"As we explained in *Foreman v. State*, 965 So.2d 1171, 1173–74 (Fla. 2d DCA 2007), relevancy is the threshold question of whether testimony proffered under section 90.404(2)(b)(1) is admissible. The similarity of the prior act and the charged offense remains part of a court's analysis in determining whether to admit the evidence.... First, the less similar the prior acts, the less relevant they are to the charged crime, and therefore the less

likely they will be admissible. Second, the less similar the prior acts, the more likely that the probative value of this evidence will be substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." *Corson v. State*, 9 So. 3d at 766, *internal quotations omitted*.

Counsel for Mr. Tolbert opposed admission of A.E.'s testimony expressly because the allegations were not similar to the allegations at issue at trial: "… her allegations are much more - - there's a lot more to them than there is in both [T.E.'s and A.A.W.'s] testimony. [A.E.] is indicating that there was touching under the clothes of both her breasts and her gen - - and her vagina. There was rubbing. There was a lot - - a lot more that happened, and I'm fearful and I think the Court should take notice of the fact that the Williams Rule evidence should not become the center of the trial; and I'm fearful and I think the Court should be leery as well that testimony such as that from someone who is now an adult… will become the center of the trial while both [T.E. and A.A.W.] are young and their stories are not quite to the level that [A.E.]'s was, I think by having an older, more experienced, and more eloquent woman testify to things that have happened to her. There's the comparison that oh, well, he's done it before, he must have done it again, which is propensity evidence which is not what this type

of evidence should be admitted for." (R. 516-517).

The acts that were described by [A.A.W.] and the acts that were described by [A.E.] are not similar at all. [A.A.W.] is describing sitting on the lap and essentially believing that she felt something underneath her. That is the extent of her testimony. She does not indicate that there was touching of any sort. There was no under the clothes. There was nothing indicating that she saw or felt his private part exposed other than sitting on top of his lap. I think there was a drastic difference between the testimony of those two witnesses despite the fact that they occurred in a barber shop, I think that is the only thing that was similar.

(R. 517).

Another strikingly different fact about [A.E.] is that she was thirteen. She had probably entered into puberty. She indicated that she was wearing a bra. So she is not as similar to Tatiana who was eight years old and not having any womanly features whatsoever. The ages may be similar in time, but I think once girls hit twelve, thirteen, there is a distinction. There is a big difference there. So again, the only similarity between [A.E.], [T.E.], and [A.A.W.], is

that it happened at a barber shop, and I don't think that that is sufficient to prove or to admit this type of evidence with the caveat that such evidence is so prejudicial to the defendant and can there is such an opportunity for the jury to think he's done it before, he must have done it again without taking the credibility of the testimony from the victims and looking at that and looking at the -- whether or not it occurred to those two by just simply giving a more eloquent, womanly testimony. I don't think that that's fair, and I don't think there's that similarity between the three different types.

(R. 517-518).

Notwithstanding the foregoing, the court permitted A.E. to testify, yet even the court's own findings as to relevancy do not constitute a lawful basis for admitting all the Williams Rule evidence:

The majority of the abuse of all three victims occurred in the barber shop where Defendant worked, when the owner or parent was outside or could not see what was happening in the other room. The prior act occurred in 2010, while the incidents in this case occurred in 2018, so the acts were not close in time. However, the prior act does tend to negate any implication that the victims in this case had a motive to lie or make up the abuse. The

victim of the prior act is unrelated and unknown to the two victims in this case. The Court is unaware of the presence or lack of any intervening circumstances. While the acts are not all similar between all three victims, it appears that Defendant was tailoring the acts to the age and temperament of the victim. Portions of the acts are similar between the three victims. Defendant put his penis in the hand of A.E. and T.E. Defendant pushed his unclothed penis against the clothed buttocks of A.E. and A.A.W. Defendant had A.A.W. and T.E. sit on his lap over his penis.

(R. 82-83).

Restated, even by its own order the court found the incidents were not close in time and not all acts were similar. The court abused its discretion in permitting the dissimilar testimony at trial. *Corson v. State*, 9 So. 3d at 766. Further, that final sentence, that Defendant had A.A.W. and T.E. sit on his lap over his penis, is entirely immaterial; there was no Williams Rule issue there, nor did A.E. testify that Mr. Tolbert had A.E. sit on his lap.

Finally, "the prior act does tend to negate any implication that the victims in this case had a motive to lie or make up the abuse" is not a basis for admitting Williams Rule evidence – it is the Defendant's motive enumerated in the statute, not the alleged victim's – and what the court described here was

more akin to a prior consistent statement to rebut a defense of recent fabrication, something that did not apply here at all, and even if it had, the court was not at liberty to preemptively rebut a hypothetical scenario by allowing Williams Rule evidence. *See Howard v. State*, 152 So. 3d 825, 828 (Fla. 2d DCA 2014) and *Monday v. State,* 792 So. 2d 1278 (Fla. 1st DCA 2001). It was not relevant.

The State cannot establish beyond a reasonable doubt that the errors complained of herein did not contribute to the verdict or that there is no reasonable possibility that the error contributed to the conviction. *State v. DiGuilio*, 491 So.2d at 1135.

Mr. Tolbert's judgments and sentences must be vacated and remanded for new trial.

III. The State impermissibly bolstered witness testimony during closing argument, in fundamental error.

When the prosecutorial argument taken as a whole is of such a character that neither rebuke nor retraction may entirely destroy their sinister influence, a new trial should be granted, regardless of the lack of objection or exception. *Brown v. State*, 787 So. 2d 229, 230 (Fla. 2d DCA 2001).

Prosecutorial misconduct constitutes fundamental error when but for the misconduct the jury could not have reached the verdict. *Miller v. State*, 782 So. 2d 426, 432 (Fla. 2d DCA 2001).

Generally, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. *Poole v. State*, 997 So. 2d 382, 390 (Fla. 2008), citing *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001). The exception is when the error reaches down into the validity of the trial itself so that the conviction could not be obtained without the error. *Poole v. State*, 997 So. 2d at 390.

"Closing argument is not intended to be an unfair display of glib oratory skills that impugn opposing counsel or bolster a witness's testimony; an attorney is limited to assisting the jury in analyzing, evaluating, and applying the evidence. For example, and germane to this end, it is error for an attorney to bolster the testimony of a witness during closing argument by vouching for his or her credibility, providing an opinion on the witness's truthfulness, referring to information outside of evidence that would support the witness's testimony, or otherwise placing the prestige of the government behind the witness." *Howard v. State*, 152 So. 3d at 829, *internal quotations and citations omitted*.

The entire theme of the State's closing argument – the concept they went to first in closing, stuck with throughout, and pounded on to the exclusion of anything else during rebuttal, as reflected in pages 10-14 and

17-22 herein – was that A.E.'s testimony about 2010 proved that T.E. and A.A.W. were telling the truth, and as such constituted impermissible bolstering. *Howard v. State*, 152 So. 3d at 829.

The State cannot establish beyond a reasonable doubt that the errors complained of herein did not contribute to the verdict or that there is no reasonable possibility that the error contributed to the conviction. *State v. DiGuilio*, 491 So.2d at 1135.

Mr. Tolbert's judgments and sentences must be vacated and remanded for new trial.

IV. The cumulative effect of the errors denied Mr. Tolbert's Due Process right to a fair trial.

The cumulative effect of the errors identified in the issues on appeal herein is not harmless beyond a reasonable doubt, and accordingly Mr. Tolbert's Due Process right to a fair trial was denied. *Evans v. State*, 177 So.3d at 1224.

Accordingly, Mr. Tolbert's judgments and sentences should be vacated and remanded for a new trial.

CONCLUSION

For the reasons and on the authority cited herein, this Court must vacate Mr. Tolbert's judgments and sentences for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a that a true and correct copy of the foregoing was sent via the Florida Courts E-Filing Portal to Ashley B. Moody, Office of the Attorney General, CrimappTPA@myfloridalegal.com, on this 8th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font size used in this Brief is Times New Roman 14 point and Courier New 12 point in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

S/ KEITH W. UPSON