IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

RICKY TOLBERT,

Appellant,

v.

CASE NO. 2D19-2326
L.T. No. 18-CF-15699

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL

BLAIN A. GOFF
Assistant Attorney General
Florida Bar No. 0109467
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7900
Facsimile: (813) 281-5500
Blain.Goff@myfloridalegal.com
CrimAppTPA@myfloridalegal.com

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

STATEMENT OF THE CASE AND FACTS

On May 11, 2018, Ricky Tolbert hereinafter referred to as "Appellant," was charged by information with two counts of lewd and lascivious conduct contrary to Florida Statute § 800.04(6)(b). (R. 27-30). The charges were based on Appellant's actions toward two separate female children which will be referred to as "T.E." and "A.A.W." Count one was based on Appellant's conduct toward A.A.W which occurred on or about June 6, 2018. Count two was based on Appellant's conduct toward T.E. which occurred on one or more occasions between August 1, 2016 and December 31, 2017. On April 26, 2018, Appellant through counsel entered a plea of not guilty and proceeded to jury trial. (R. 26).

On January 31, 2019, the State filed a Notice of Intent to Use Evidence of Other Crimes, Wrongs, or Acts and Other Crimes, Wrongs, or Acts of Child Molestation of Appellant ("Williams Rule Evidence) pursuant to the pretrial requirements of Florida Statutes 90.404(2)(a). (R. 622-623). In its notice, the State sought to introduce evidence of Appellant's conduct toward "A.E," which occurred at or around September 1, 2010, when she was thirteen (13) years of age.

The State asserted the purpose of presenting the evidence was showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

A hearing to determine the admissibility of the William's rule evidence was held on March 26, 2019. Hearing testimony revealed the following:

A.A.W., testified that she was 10 years old at the time of the incident on January 6, 2018, and was 11 years old at the time of the hearing. (R. 435). Her parents left her at the barber shop sometimes, to play with the owner's daughters. On the day of the incident, she was playing in the shop with her sister, Appellant, and T.E.'s sister. They were squirting Appellant with water from spray bottles. Appellant said he needed someone on his team to protect him and asked her to sit on his lap. She sat on his thigh, and he moved her between his legs. She felt Appellant's private part against her. She believed it was outside of his pants because she would have felt his rough jeans between them otherwise. She stated his private felt soft. She was wearing leggings. Appellant was moving her up and down, with his private against her butt. (R. 446, 449-453). When the owner,

Ralph, came back in the shop, she jumped up, and when she turned back, she saw Appellant make a motion as if he was zipping up his pants. (R. 454-455). She ran outside with the girls. Appellant came out and asked them if they wanted to play hide and seek in a dark room, and they said no. She was spending the night at Ralph's, so she told her mother the next day when she got home. (R. 456-457). On cross-examination, A.A.W. testified that she did not know how many times she had seen Appellant before this incident. The other girls only came in the back room once to squirt them. She denied that Appellant was moving because he was playing and squirting the other girls. (R. 463).

T.E., testified that she was nine years old at the time of the hearing. (R. 472). Ralph was her father, and he owned the barber shop. Appellant worked there. (R. 476-477). The first incident she remembered; Appellant was in the bathroom with the door cracked open. He called her over and said he had a water balloon. He told her to put her hand through the door, and he put the water balloon in her hand, then he put his private part in her hand. (R. 480-482). She could tell the difference because the water in the balloon was hot,

and his private part was just room temperature. (R. 483). Appellant did not say anything to her. (R. 485). She could not see in. She did not tell anyone because she thought she would get in trouble. (R. 489). The next incident she remembered, Appellant took a water balloon and a spray bottle in and closed the door. He first had the door closed, then he opened it a crack. She heard Appellant spray from the bottle. She was watching a movie, and Appellant told her to come over. (R. 490-491). Appellant took her hand, and she pulled it away, and he pulled it back. She was able to break free. She believed Appellant had sprayed his private part to make it feel more like the water balloon. (R. 492, 495). She did not see Appellant spray himself, but she insisted she knew what he was doing. She did not touch Appellant that time and did not tell her father because nothing had happened that time. She went back to her movie. Her father was outside on the phone. (R. 497). T.E. also described an incident at home, where her father was asleep in his chair, and Appellant told her to sit on his lap. When she sat on his lap, he started rocking. She did not feel anything, and Appellant did not touch her with his hands. (R. 498-500).

The evidence which the State sought to admit was the testimony of A.E. She testified that she was 22 years old at the time of the hearing and was 13 years old at the time of the incident. (R. 409). Appellant was her father's best friend, and her parents brought her to the barber shop where Appellant worked frequently. (R. 411). On September 1, 2010, she was at the barber shop. Appellant put a towel over her face while he was washing her hair. He asked her to hold something, and Appellant put his penis in her hand. He had her stand up, and he bent her over with her head in the sink. Appellant unzipped his pants and pushed his penis against her butt. While holding her head in the sink with one hand in her hair, Appellant unzipped her pants with the other hand, and touched her genitals. While drying her hair, Appellant touched her breasts under her shirt. At all times, Appellant kept her vision obscured with a towel. (R. 412-414). A.E. testified that her father was in the shop, but they were behind a short wall and he would not have been able to see what happened. She went in the bathroom and called her mother. Her mother made up a family emergency and called her father to go home immediately. When they got home, her mother had already called the

police. A.E. stated she did not tell her father at the time, because he had just had a heart attack and the doctor had said anything that stressed him could kill him. She knew when Appellant had her stand up over the sink that something was up, because he had never done that before. (R. 414-416). She stated that Appellant was not wiping water off her when he touched her. Appellant did not say anything to her during the incident. (R. 423). On cross-examination, A.E. testified that she was brought to the barber shop every four to six weeks to get her hair relaxed, and other times, Appellant's wife would braid her hair. She believed that if her father had stood up and turned around, he could have seen what was happening. When Appellant pressed himself against her, she could feel the outline of his penis against her, and it did not feel like his jeans were in between them. It felt soft and squishy, like when he put it in her hand. (R. 424-426).

On April 4, 2019, the trial court issued a written order granting the State's motion to admit William's rule evidence pursuant to Florida Statutes §§90.404(2)(a) and 90.404(2)(b). In the order the trial court determined:

> In Williams v. State, 110 So. 2d 654,662 (Fla. 1959), the Florida Supreme Court held

that 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. The William's rule is limited to similar fact evidence. This rule is codified in Fla. Stat. §90.404(2)(a) (2006). Fla. Stat. §90.404(2)(b) provides that evidence of other acts of child molestation may be considered for any relevant matter.

Before considering whether to allow the prior act evidence, the Court must determine whether the prior act was proven by clear and convincing evidence. McLean v. State, 934 So. 2d 1248, 1262 (Fla. 2006). The Court finds that the prior act was proven by clear and convincing evidence. A.E. was unhesitant and specific about the details of this prior incident.

In order to determine whether this prior act is relevant, the Court must next conduct an analysis under Fla. Stat. §90.403 to determine if the probative value would be substantially outweighed by the danger of unfair prejudice. McLean provides several factors to be considered. First, the Court considers the similarity of the acts. 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.
>
> The Court finds that the prior act is relevant and sufficiently similar to the acts in this case to be admissible. Testimony regarding the prior act, and any defenses raised to it, would not confuse or mislead jurors, and there is minimal risk that the jurors would convict Defendant based solely on the prior act. The Court finds that the probative value of evidence of the prior act is not substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury.

(R.79-82).

A jury trial was held on May 7, 2019, through May 9, 2019. In addition to T.E., A.A.W and AE testimony was taken from the Ralph Evans the father of T.E. Angelina Washington the mother of A.A.W; and David Clark who was present at the barber shop when the events involving A.A.W occurred. Additionally, testimony was given by the investigating law enforcement officer James Langston and case

coordinator for the Child Protective Team (CPT) Yaimelit Sola who conducted forensic interviews with T.E. and A.A.W. The CPT forensic interviews were published as States Exhibit 1, 1R and 2. (T. 452-490 and 499-533).

Following trial, the jury returned a verdict of guilty as charged. (R. 97-98). On June 4, 2019, the trial court adjudicated Appellant guilty and sentenced him to a term of thirty (30) years imprisonment as a habitual felony offender (HFO) pursuant to Florida Statute §775.084(4)(a) in each count. His sentence in count two is to be served consecutive to count one. (R. 150-158). On June 13, 2019, Appellant filed a timely notice of appeal. (R. 145).

SUMMARY OF THE ARGUMENT

A.E.'s testimony was properly presented and did not become a feature of the trial. The evidence was correctly used by the State to show Appellant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, common scheme and modus operandi.

The record reflects after carefully reviewing the evidence under the Mclean factors, the trial court properly exercised its discretion by admitting the Williams Rule Evidence.

The State's closing argument properly commented on evidence presented during trial or was in response to Appellant's closing argument. As such, it did not constitute fundamental error.

Finally, Appellant received a fundamentally fair trial. His individual claims of error alleged are without merit. As such, he is unable to establish cumulative error occurred.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY LIMITED THE STATE'S USE OF COLLATERAL CRIME EVIDENCE DURING TRIAL? [RESTATED]

Appellant argues the trial court erred by allowing the State's use of collateral crime evidence to become a feature of the trial. The State respectfully disagrees.

The record shows A.E.'s testimony did not become a feature of the trial involving A.A.W and T.E. "Collateral crimes evidence becomes a feature of the trial 'when inquiry into the collateral crimes 'transcend[s] 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 1175, 1177 (Fla. 2d DCA 2009)(citing Conde v. State, 860 So. 2d 930, 945 (Fla. 2003)). See also Williams v. State, 117 So. 2d 473, 475–76 (Fla. 1960). "A similar offense becomes a feature instead of an incident of the trial on the charged offense where it can be said that the similar fact evidence has so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant's character or

propensity to commit crimes. Bush v. State, 690 So. 2d 670, 673 (Fla. 1st DCA 1997).

Florida law holds, however, that similar fact evidence will not be considered to be a feature of the case merely because a large amount of it comes before the jury. See Snowden v. State, 537 So. 2d 1383 (Fla. 3d DCA 1989). In fact, this Court in Green v. State, 228 So. 2d 397 (Fla. 2d DCA 1969), recognized the need for a limiting instruction on the use of Williams Rule Evidence to prevent it from becoming an impermissible feature of the trial:

> In itself the mere volume of testimony concerning the prior crime would not necessarily make it a 'feature' in the second case. However, when considered with the additional fact that no limiting instruction was given, the prior crime could well have become a 'feature instead of an incident' of the instant case in the jury's mind. They could not be expected to know for what limited purpose the evidence of the prior crime was admitted.

Id. at 399.

Here, the record shows the trial court properly gave the aforementioned limiting instruction in this trial. Defense counsel and Appellant agreed with the instruction and voiced no objection.

(T.536-537). Following this Court's recommendation in Green, the trial court here read the agreed upon William's Rule evidence instruction before A.E. testified and again prior to jury deliberations. (T. 543 & 727-728). Each time the State mentioned A.E.'s testimony it prefaced the evidence with reference to the limited use instruction. (T. 188, 682-683, 718-719). Moreover, defense counsel never objected or moved for mistrial during the State's opening and closing arguments or after the testimony of A.E. This further demonstrates the evidence did not become a feature of the trial.

The Snowden court also held that "where the defendant's trial strategy causes the similar fact evidence to outweigh the evidence directly relating to the crime charged, the disparity may be disregarded entirely." Id. at 1386. See also Sias v. State, 416 So. 2d 1213 (Fla. 3d DCA 1982). Here, even if this Court were to find more evidence of A.E.'s case was presented the trial, Appellant's strategy of attacking the victim's credibility, veracity, and authenticity caused the State to use the facts of A.E.'s case to show his tactics in attacking both victims in a signature manner. During its closing argument the defense argued extensively both T.E. and A.A.W. were

incredible due to their age and nature of their testimony. (T. 704-705; 708-714).

A.E.'s testimony was properly presented and did not become a feature of the trial. The evidence was correctly used by the State to show Appellant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, common scheme and modus operandi. This court should affirm Appellant's convictions and sentences.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY EXCERCISED ITS DISCRETION BY ADMITTING THE WILLIAM'S RULE EVIDENCE? [RESTATED].

Next, Appellant asserts the trial court abused its discretion by admitting the William's Rule evidence involving A.E. into the trial. He argues A.E.s testimony was irrelevant to any material fact at issue in his case. However, because the record reflects the trial court properly exercised its discretion by admitting the evidence, this court should affirm Appellant's convictions and sentences.

Standard of Review

The trial court's ruling regarding the admission of William's Rule evidence is reviewed for an abuse of discretion. Cadet v. State,

809 So. 2d 43, 46 (Fla. 4th DCA 2002); Kulling v. State, 827 So. 2d 311, 313-14 (Fla. 2d DCA 2002). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

Merits

Williams Rule is codified in § 90.404(2)(a), Fla. Stat. Ann., which states in relevant part:

> 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 is inadmissible when the evidence is relevant solely to prove bad character or propensity.

While the rule speaks in terms of "similar fact evidence", the Florida Supreme Court has made clear that relevant evidence of other crimes and bad acts is admissible even if not factually similar. Williams v. State, 621 So. 2d 413, 414 (Fla. 1993). There the Court provided:

> Although similarity is not a requirement for admission of other crime evidence, when the fact to be proven is, for example, identity or common plan or scheme it is generally the similarity between the charged offense and the other crime or act that gives the evidence probative value. Thus, evidence of other crimes, whether factually similar or dissimilar to the charged crime, is relevant to prove a matter of consequence other than bad character or propensity.

In its written order, the trial court properly recognized that the evidence was admissible under both Florida Statute 90.404(2)(a) and (b) which provides for a more relaxed standard of Williams Rule Evidence on child molestation cases. In McLean v. State, 934 So. 2d 1248 (Fla. 2006), the Supreme Court of Florida held the even the relaxed standard of Section 90.404(2)(b) does not violate the due process rights of defendant charged in child molestation cases "when used as a conduit for evidence that corroborates the victim's

testimony that the crime occurred rather than to prove the identity of the alleged perpetrator." Id. at 1251 (Fla. 2006). "The similarity of the previous episode of child molestation to the charged offense is the key consideration in admitting such evidence." Moore v. State, 943 So. 2d 296, 297 (Fla. 1st DCA 2006).

The First District Court of Appeal in Easterly v. State, 22 So. 3d 807 (Fla. 1st DCA 2009) discussed this further stating:

> The Legislature has adopted a relaxed standard of admissibility for similar fact evidence in child molestation cases. See § 90.404(2)(b), Florida Statutes (2007); McLean, 934 So.2d at 1258–59. Section 90.404(2)(b) states, "In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant." The Florida Supreme Court has explained that this provision "broadly provides that evidence of the defendant's commission of other acts of child molestation is admissible regardless of whether the charged and collateral offenses ... share any similarity. Id. at 814-815. (internal citations omitted).

See also Seavey v. State, 8 So. 3d 1175 (Fla. 2d DCA 2009) and Peralta-Morales v. State, 143 So. 3d 483 (Fla. 1st DCA 2014). Here, the trial court properly exercised its discretion in permitting this

evidence to be presented at trial and Appellant's due process rights were not violated. In its written order granting the State's motion, the trial court first found that the evidence was proven by clear and convincing evidence pursuant to Mclean. Moreover, the trial court found, "A.E. was unhesitant and specific about the details of this prior incident." (R. 82).

Next the court considered the issue of relevancy. The admissibility of evidence must be gauged by the principle of relevancy as any other evidence offered by either party. See Rivera v. State, 561 So.2d 536, 539 (Fla.1990). "Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla. Stat. Generally, all relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. §90.403 Fla. Stat.

In its analysis, the trial court properly considered the factors listed in Mclean which provides:

> In assessing whether the probative value of evidence of previous molestations is substantially outweighed by the danger of unfair prejudice, the trial court should evaluate:

> (1) the similarity of the prior acts to the act charged regarding the location of where the acts occurred, the age and gender of the victims, and the manner in which the acts were committed; (2) the closeness in time of the prior acts to the act charged; (3) the frequency of the prior acts; and (4) the presence or lack of intervening circumstances. This list is not exclusive. The trial courts should also consider other factors unique to the case.

McLean at1262 (Fla. 2006).

After considering the Mclean factors the court determined the William's rule evidence was relevant and the probative value was not outweighed by the prejudicial effect. The trial court found most of the abuse of all three victims occurred in the barber shop where Appellant was employed, when the owner or parent was outside or could not see what was happening in the other room. The acts were not close in time. However, the prior act did appear to negate any implication that the victims had a motive to lie or make up the abuse. A.E is unrelated and unknown to the two victims in this case. The trial court was unaware of the presence or lack of any intervening circumstances.

The trial court also found while Appellant's actions toward all three victims were not identical, Appellant seemed to tailor the acts

to the age and temperament of the victims. Additionally, the trial court determined portions of the acts to be similar such as, Appellant putting his penis in the hand of A.E. and T.E. Appellant pushed his unclothed penis against the clothed buttocks of A.E. and A.A.W. and Appellant had A.A.W. and T.E. sit on his lap over his penis.

After hearing the testimony and considering the Mclean factors the trial court correctly found A.E.'s testimony to be relevant and sufficiently similar to the acts in this case to be admissible. Moreover, the evidence regarding the prior act, and any defenses raised to it, would not have confused or misled jurors, and there was minimal risk that the jurors would convict Appellant based solely on the prior act. As such, the trial court properly determined that the probative value of evidence of the prior act was not substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury.

The trial court thoroughly examined the proffered evidence and did exactly what was required under current law. As argued earlier, this evidence was not made a feature of the trial and the trial court gave cautionary instructions to the jury both before A.E.'s testimony

and during the final charge. Under these circumstances the trial court properly exercised its discretion in admitting A.E.'s testimony. As such this court should affirm Appellant's convictions and sentences.

Harmless Error

Even if this Court were to find it error to admit the testimony of A.E. in this trial, it would be harmless. "The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). "The Florida Supreme Court has cautioned that the harmless error test "is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test"; instead, the "focus is on the effect of the error on the trier-of-fact". Summerall v. State, 171 So. 3d 150, 152 (Fla. 1st DCA 2015). Here, the trial court read the Williams Rule Evidence instruction agreed to by defense

counsel and appellant to the jury when necessary. (T. 536-537, 543 & 727-728). A.A.W and T.E. openly testified at trial as well as the investigating officer, parents of the victims and case coordinator for the Child Protective Team involved in the investigation. Appellant was able to challenge the credibility of the witnesses during cross examination. The jury was able to consider Appellant's defense. The jury was presented with ample evidence other than that from A.E.'s case allowing them to reach a guilty verdict.

ISSUE III

WHETHER THE STATE'S CLOSING ARGUMENT AMOUNTED TO FUNDEMENTAL ERROR? [RESTATED].

Next, Appellant argues the State improperly bolstered the credibility of T.E. and A.A.W during closing argument. He concedes this issue was not properly preserved during the trial below and is asking this court to review under a fundamental error analysis. However, the State's closing argument was proper and thus does not constitute fundamental error. Therefore, this Court should affirm Appellant's convictions and sentences.

Standard of Review

Appellant never raised an objection as to improper bolstering during the State's closing argument. To preserve error for appellate review, the general rule in Florida is a contemporaneous, specific objection must occur during trial at the time of the alleged error. See F.B. v. State, 852 So.2d 226, 229 (Fla. 2003). This gives the trial judge notice of the alleged error, so that it may be corrected at an early stage. See F.B., 852 So.2d at 229.

Therefore, Appellant is asking this Court to review under fundamental error analysis. Fundamental error is error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. See Battle v. State, 911 So. 2d 85 (Fla. 2005). "In its narrowest functional definition, 'fundamental error' describes an error that can be remedied on direct appeal, even though the appellant made no contemporaneous objection in the trial court and, thus, the trial judge had no opportunity to correct the error". Hughes v. State, 22 So. 3d 132, 135 (Fla. 2d DCA 2009).

Merits

The record indicates many of the statements made by the prosecution in its rebuttal case were proper as a matter of law and not enough to deprive Appellant of a fair trial. In Smith v. State, 866 So. 2d 51, 64 (Fla. 2004), the Florida Supreme Court provided, regarding these types of claims, the appellate court respects the vantage point of the trial court, being present in the courtroom, over its reading of a cold record. The purpose of closing argument is to "help the jury understand the issues by applying the evidence to the law," Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990), and to "review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). A prosecutor is the advocate for the State and "has the duty, not only to present evidence in support of the charge, but likewise the duty to advocate with all [her] talent, vigor and persuasion, the acceptance by the jury of such evidence." Robles v. State, 210 So. 2d 441, 442 (Fla. 1968). Therefore, any allegations of prosecutorial improprieties "must be viewed in the context of the

record as a whole to determine if a new trial is warranted." Sireci v. State, 587 So. 2d 450 (Fla. 1991), cert. denied, 503 U.S. 946 (1992).

In Sheridan v. State, 799 So. 2d 223 (Fla. 2d DCA 2001), this Court reiterated that the standard of review for prosecutorial comments is strict:

> In order to require a new trial, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise reached.

Id. at 225. (citing, Voorhees v. State, 699 So. 2d 602, 614 (Fla. 1997)).

As argued earlier, each time prior to mentioning A.E.'s testimony, the State referenced the limited use instruction. (T. 682-683, 718-719). During its closing argument, the State properly used the evidence in a manner which comported with Florida Statutes §90.404. Moreover, the record demonstrates that the State's rebuttal arguments were crafted responses to Appellant's statements in his closing remarks. A prosecutor's comments are not improper where they fall into the category of an invited response by the preceding

argument of defense counsel concerning the same subject. See Walls v. State, 926 So. 2d 1156, 1166 (Fla. 2006). Here, Appellant made the initial statement regarding T.E. and A.A.W's motivation to testify and attacked there veracity as a witness. This statement by Appellant was done to suggest they were not credible. (T. 704-705; 708-714). Afterwards, the State was permitted to refute that claim based on the evidence presented at trial and the Williams Rule Evidence demonstrating Appellant's plan, modus operandi, and his opportunity to touch T.E. and A.A.W in a similar manner as he did A.E. Because the prosecution's comments in rebuttal were concerning the same subject first argued by Appellant, no impropriety exists on this issue.

If anything, the record demonstrates Appellant "opened the door" to these responses by the State. "Opening the door" is an evidentiary concept that permits the admission of otherwise inadmissible testimony to qualify, explain, or limit previously admitted testimony or evidence". Hayward v. State, 59 So. 3d 303, 306 (Fla. 2d DCA 2011)(citing Overton v. State, 801 So. 2d 877, 900 (Fla. 2001)). "The normally inadmissible evidence is allowed when

fairness and the search for the truth require a fuller explication of evidence that otherwise would have been incomplete and misleading". Id. This concept is based on considerations of the most fundamental principle of the law: fairness. Id. The fact that none of these comments were objected to further demonstrates they were not enough to deprive Appellant of his rights.

Even if this issue were properly preserved by objection, the prosecution's comments about A.E.'s testimony does not reach the level of improper bolstering. "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." Spann v. State, 985 So. 2d 1059, 1067 (Fla. 2008). Appellant claims the prosecution's reference to A.E.'s testimony improperly bolstered the testimony T.E. and A.A.W. However, the law does not support his position.

The State's closing argument commented on evidence which was properly admitted during trial and was an appropriate response to Appellant's closing argument. The State's closing argument did not constitute improper bolstering therefore, it did not amount to

fundamental error. This court should affirm Appellant's convictions and sentences.

ISSUE IV

WHETHER APELLANT RECEIVED A FUNDEMENTALLY FAIR TRIAL? [RESTATED].

Lastly, Appellant argues that he was denied a fundamentally fair trial based on cumulative errors that occurred. However, where individual claims of error alleged are without merit, the claim of cumulative error also necessarily fails. Parker v. State, 904 So.2d 370, 380 (Fla.2005); see also Griffin v. State, 866 So.2d 1, 22 (Fla.2003). As discussed in the analysis of the individual issues above, the alleged errors are meritless. Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit.

Here, the trial court properly admitted the testimony of A.E. The trial court read the standard Williams Rule Evidence instruction to the jury when necessary. The evidence was not made a feature of the trial and the State's closing argument was proper. A.A.W and T.E. openly testified at trial as well as other law enforcement officers involved in the investigation. Appellant was able to challenge the

credibility of the witnesses during cross examination. The jury was able to consider Appellant's defense. The jury was presented with ample evidence other than that from A.E.'s case allowing them to reach a guilty verdict. As such, this court should affirm Appellant's convictions and sentences.

CONCLUSION

Based on the authorities and arguments presented herein, the State respectfully requests this Court to affirm Appellant's judgments and sentences.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Blain A. Goff
BLAIN A. GOFF
Assistant Attorney General
Florida Bar No. 0109467
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7900
Facsimile: (813) 281-5500
Blain.Goff@myfloridalegal.com
CrimAppTPA@myfloridalegal.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 15, 2021, I electronically filed the foregoing with the Clerk of the Court using the e-portal filing system, which will send a notice of electronic filing to the following: Keith Upson, Esq. at appealfilings@pd10.org, keith@upsonlawgroup.com and knelson@pd10.org.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla. R. App. P. 9.045(e), that the size and style of type used in this brief is 14-point Bookman Old Style font and that the word count in this brief is within the word-count limit in compliance with Fla. R. App. P. 9.045(b) and Fla. R. App. P. 9.210(a)(2)(B). This brief contains 5,656 words.

/s/ Blain A. Goff
COUNSEL FOR APPELLEE