IN THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

RICKY TOLBERT

Appellant.

DCA CASE NO. 2D19-2326
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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

The State's closing argument consisted exclusively of 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 State immediately went to the credibility of the State's witnesses: "And one of the biggest things the State touched on with all of you in jury selection was one witness* … [w]hat do you believe happened in that barbershop? … But you didn't hear from one witness, you heard from three, two of which are the crimes charged." (T. 682). [* During voir dire, the State repeatedly asked the venire whether they could convict based on one single credible witness. (T. 92; 93; 95; 96; 100).]

The State argued in closing that A.W.'s testimony regarding Mr. Tolbert's penis being flaccid was corroborated by the fact that A.E. also testified that years ago Mr. Tolbert's penis had been flaccid. "What did [A.E.] say when it happened to her? Squishy is the word she described when she was 13." (T. 685).

"What's [A.A.W.'s] motive? What does [A.A.W.] get out of this at nine-years-old?" (T. 686). *See Livingston v. State*, 682 So. 2d

591, 592 (Fla. 2d DCA 1996) ("Then the state argued, '[W]ho's got motive to lie? Does Detective Cooke's pay get better? No.' This is impermissible bolstering of the officer's testimony. *See Davis v. State*, 663 So.2d 1379 (Fla. 4th DCA 1995).")

Similarly, as to T.E.'s testimony about a towel on her face, the State argued Mr. Tolbert did so in order to "put his penis in her hand without her seeing what it was… [s]tarting to sound familiar to [A.E.] from eight years ago? *** Sounding familiar? That's his M.O. That's his thing. That's what he does." (T. 688-89).

No, it does not sound familiar, nor does it sound like an M.O. – it sounds like what the alleged events have in common is a penis and a child under sixteen, and there is absolutely nothing remarkable or unique whatsoever about those facts alone to legally justify the State's complete reliance on the uncharged acts to bolster the testimony of the victims of the acts that were charged.

In the context in which it was made, the argument, "what do you believe happened in that barbershop?" is the argument "who do you believe is telling the truth." And the State's closing argument was entirely that the jury should believe the two victims in this case because of the one witness, the irrelevant Williams Rule witness.2326

In closing argument, "an attorney is limited to assisting the jury in analyzing, evaluating, and applying the evidence… 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*.

Here the State did not analyze the evidence, did not evaluate the evidence, and did not apply the evidence, but instead argued that the jury could believe A.A.W. and T.E. because A.E. was the one credible witness, yet even then, only as to facts present in every L&L under sixteen charged in the State.

The State did not discuss the special Williams Rule instruction during closing or rebuttal, beyond telling the jury twice that the State was going to do so. (T. 682 and 698). The court did give the instruction.

Regardless, no cautionary instruction could cure the prosecutorial misconduct that occurred during closing: the State ensured A.E.'s testimony was the feature of the trial by arguing to the

jury that because of her testimony the alleged victims in this case must be telling the truth. (T. 682-687).

None of this was the State's rebuttal argument, the issue was never whether Mr. Tolbert "opened the door" (Answer Brief at 26), this all took place during the State's initial closing argument.

Such argument was not merely wholly improper, but it reached down into the validity of the trial itself to an extent that the conviction could not have been obtained otherwise. *Miller v. State*, 782 So. 2d 426, 432 (Fla. 2d DCA 2001).

Appellee argues, *inter alia*, that the Williams Rule evidence did not become a feature of the trial because the cautionary instruction was given (Answer at 12-13), because "defense counsel never objected or moved for mistrial during the State's opening and closing arguments or after the testimony of A.E." which "demonstrates the evidence did not become a feature of the trial" (Answer at 13), and the State was permitted to present more of the Williams Rule evidence at trial than evidence of the actual crimes alleged because, "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." (Answer at 13).

First, the Williams Rule evidence was (impermissibly) the foundation of the State's case at trial (*the* feature, not merely featured) – from jury selection through closing – for the reasons already contained in the Initial Brief and herein.

Second, counsel's failure to object means only that the issue was not preserved* at trial, it does not prove that the Williams Rule evidence was not a feature of the trial. [*At trial. Counsel vigorously contested any use of the Williams Rule evidence, as extensively discussed in the Initial Brief pages 23-31, and preserved the issue of whether the Williams Rule evidence was admissible at all.]

Third, Mr. Tolbert's Due Process right to have the State of Florida present sufficient evidence as to every element of every count alleged against him did not permit the State during its case in chief to abandon Due Process based on what he might or might not do in presenting a defense. Restated, the suggestion that Mr. Tolbert made the State violate Due Process to try him is patently absurd. See, *e.g.*, *State v. Rygwelski*, 899 So. 2d 498, 500 (Fla. 2d DCA 2005) (finding that a statute which relieves the State of its burden to prove an essential element of the offense violates the due process clauses of the federal and Florida Constitutions).

As noted in the Initial Brief and even the Answer recognizes, "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." Initial Brief at 16, Answer at 11, quoting *Seavey v. State*, 8 So. 2d 930, 945 (Fla. 2003), *emphasis added*.

As argued in the Initial Brief, here the collateral conduct alleged was never relevant. Initial Brief at 17; 23-31. The Answer's resuscitation of the *McLean* factors still does not overcome the fact that every single L&L under 16 charged will, by statutory necessity, require a minor under 16 and some form of proscribed contact. Every single L&L under 16 in Florida is not strikingly similar to each other, or legally similar to an extent to be relevant, solely because they all have that contact alleged upon a minor in 16 in common. If it were that simple, we would need neither Florida Statute 90.404(2)(a) nor *McLean* factors.

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 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 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).

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 17th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with Florida Rules of Appellate Procedure 9.045(b) and 9.210(2)(B) because the fonts herein are Arial 14-point and the total word count is only 1,866 total words.

S/ KEITH W. UPSON