

IN THE SUPREME COURT
THE STATE OF FLORIDA

ANN ELLIOTT BARBER,

Appellant
218

Case No. SC01-1007
5th DCA No: 5D99-

v.

STATE OF FLORIDA

Appellee.
_____ /

INITIAL BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

Note: References to the record are as follows: "R" is for record on appeal; "Tr" is for transcript of trial; "Appendix" references the Appendix filed by the appellant with the Fifth District Court of Appeal on October 8, 1999.

Ann Elliot Barber challenges her conviction for aggravated child abuse, which was procured by the improper admission of Williams Rule evidence. Conceded by the prosecution to be a circumstantial evidence case, it is Mrs. Barber's position the conviction was obtained by the State only because of the State's success in offering and featuring this evidence at trial.

Ms. Barber is the subject of two separate prosecutions for aggravated child abuse. Beginning in the summer of 1997 she worked at the First Baptist Church Day Care Center in Cocoa Florida. She had been employed at this same day care on previous occasions as well. Her duties beginning in summer 1997 included care for infants. Between Summer of 1997 and February 1998, there were no unusual health problems related to children in her care. In February 1998, Mrs. Barber began caring for Devin Thimlar. Specifically, she cared for Devin Thimlar on February 3, 4, 5, 10, and 11, 1998. In late January, 1998 and into February, 1998, the Defendant also cared for Alexis

Pierson. Specifically, Mrs. Barber cared for Alexis Pierson at the day care on January 26 and 30, 1998, and February 2, 6, 13, and 17, 1998. Both of these infants were hospitalized in February, 1998. Both had injuries arguably consistent with "shaken baby syndrome." However, the injuries were, in the words of the State's expert, Dr. John Tilelli, typical of any shaken baby case. (Tr. 1018). There was no evidence presented by the State suggesting the injuries fit some unusual pattern or were peculiar to these two children. Repeatedly throughout the trial, even after Dr. Tilelli's testimony, the State attempted to argue there was something peculiar about these particular injuries as compared to other shaken baby cases. (See, e.g. Tr. 1217). But there was no evidence to support this contention.

Before Devin Thimlar was ever brought to the First Baptist Church Day Care, he had a history of health problems. He had experienced repeated episodes of vomiting during the months leading up to his hospitalization. In fact, during the eight-day period beginning around Christmas 1997, Devin Thimlar vomited for eight (8) consecutive days before he was finally taken to a doctor. The State alleged in its amended information that Mrs. Barber injured Devin somewhere between February 5, and February 11, 1998. (R. 352). There was no purely medical

evidence adduced determining the injuries occurred during the time the child was in the care of Mrs. Barber, only speculation by the State based entirely on the history given by the mother, who had a poor recollection of her own child's medical history at trial. (See cross examination of Brenda Thimlar, Tr. 171-220, 231-232). Ms. Thimlar did concede that on November 24, 1997, Devin had been taken to the Emergency Room at Wuesthoff Hospital in Rockledge, Florida because of discomfort when he was laid on his back and vomiting. (Tr. 177). At that time, she gave personnel at the hospital additional medical history that the child had been crying incessantly for four solid days. (Tr. 178). She brought Devin to see Dr. Arnold for treatment on January 2, 1998. While her trial testimony was that Devin was "spitting up" during the week prior to the doctor visit, she could not remember whether she told Dr. Arnold Devin was "vomiting" or "spitting up." (Tr 182-3). She did not believe reviewing medical records of Dr. Arnold indicating she reported vomiting would refresh her memory as to what she told Dr. Arnold, even though she is an EMT and thus familiar with medical procedure. (Tr 183). Ms. Thimlar conceded that her testimony was inconsistent with medical records regarding doctor visits. (Tr 199). Ms. Thimlar testified she brought Devin for treatment at

Pediatrics of Brevard on Monday, February 9, 1998 because of vomiting. (Tr 205). Again, she would not confirm the medical record report of the history she gave doctors. (Tr 205). She could not recall what history she gave. (Tr 206). She then took Devin again for treatment at Pediatrics of Brevard on Wednesday, February 11, 1998. (Tr 206). She again could not recall what history she presented the physician with. (Tr 206). Generally, it was her position that Pediatrics of Brevard's medical records were not complete. (Tr 197-8). Mrs. Thimlar also testified that on February 6, 1998, she noted yellow rings around Devin's eyes. However, on cross examination, she conceded that the medical records from the February 6, 1998 visit were inconsistent with her testimony on this point. (Tr 221). She also conceded her testimony regarding crepitus (a popping sound in the back) being reported by her on February 6, 1998 and observed by medical personnel was not supported by the medical records. (Tr 189-199).

Dr. Tilelli also admitted he had at one time opined he could not medically date the injuries. (Tr. 904). Specifically, Tilelli testified that based on the x-rays, the radiographs only, the window for the injuries sustained by Devin was between January 1, 1998 and February 7, 1998. (Tr 904). Tilelli further conceded that this window would

include the time period when Mrs. Thimlar brought Devin for treatment after his spitting up/vomiting episodes in late 1997 and early 1998. (Tr 903-4). He further admitted he was relying on the history given by the mother for his opinion they happened while Devin was in day care. (Tr. 902-903, 904). The child had a history of "spitting up and fussiness" during the weeks prior to February 5, 1998. (Tr. 912). Without adding undue length to this recitation of fact, the Appellant would refer the court to the cross examination of Dr. Tilelli, where extensive questioning occurs regarding the contents of the various medical records reviewed by Dr. Tilelli, and the comparison's made with Ms. Thimlar's testimony. (Tr 902-954). Tilelli also testified it would concern him as a pediatrician that a parent did not seek medical attention for a child for a period of eight days with daily vomiting. (Tr 950). He further testified that it was a possible indicator of abuse, given the fact that some parents may have waited for the symptomology to resolve prior to seeking treatment. (Tr 950).

On February 2, 1998, Alexis Pierson stopped breathing while with Mrs. Barber at First Baptist Daycare. Mrs. Barber immediately got help from co-workers and EMT's. The infant was resuscitated and revived by Mrs. Barber, and

was taken to the Wuesthoff Hospital, where she was released shortly thereafter.

On February 17, 1998, Alexis was again taken to the hospital after being left at day care. She was subsequently found to have suffered injuries consistent with "shaken baby syndrome." There was no purely medical evidence presented indicating the injuries had to have occurred during a time period when the children were in the care of Mrs. Barber. As indicated elsewhere, the medical evidence makes it clear the injuries could have well been sustained long before the child ever came to be cared for by Mrs. Barber. Dr. Tilelli testified he could not pinpoint the date of her injuries based on medical evidence alone. (Tr 998). He was willing to opine on dates when presented with a lengthy hypothetical that relies on the accuracy of the history supplied by Alexis' mother, who had significant difficulty remembering her child's medical history as well. (See cross examination of Michelle Champaigne, Tr 525-531). Furthermore, the child had a history of congestion prior to ever coming into contact with Mrs. Barber. (Tr 526). Champaigne had left a device with Mrs. Barber at her first visit to assist with suctioning the child because of her congestion. (Tr 526-7). This problem continued through February 6, 1998 when

the breathing episode occurred. (Tr 526). Ms. Champaign testified on one hand that on February 7, 1998, she observed Alexis exhibiting signs of intense pain when being picked up, but does not recall whether she related that fact to her pediatrician Dr. O'Hern when she presented Alexis for treatment on February 7, 1998. She testifies to continuing to observe this discomfort on February 10, 1998, but again not reporting this fact to Dr. O'Hern. (Tr 528-529). She described the cry of pain when she picked her baby up as "unlike anything [her] daughter had ever done before in her life." (Tr 529), but did not report this fact to any physician. (Tr 530). Likewise, when she saw Dr. O'Hern again on February 15, 1998, she did not report this observation of pain. (Tr 530). It was the State's position at trial that these heretofore unreported incidents of pain were the result of rib injuries inflicted by the Defendant on the minor child.

Mrs. Barber was first tried for the alleged abuse of Alexis Pierson. At that trial, no William's rule evidence was used, and the result of the case was a hung jury. In the instant case, the State was permitted to present testimony with regard to injuries to both Devin Thimlar and Alexis Pierson. Devin Thimlar is the alleged victim in the conviction on appeal here.

On 27 May, 1998, Ann Barber was charged by Amended Information with two counts of aggravated child abuse of Devin Thimlar. (R. 352-353). On 22 July, 1998, the State filed the "State's Notice of Intent to Offer Evidence of Other Acts, and/or Section 90.404(2) Evidence. (R. 230-236). The notice referenced both prosecutions of Mrs. Barber. Included in the filing was notice of the State's intent to offer evidence of alleged abuse of Alexis Pierson in the instant case. Additionally, the state sought to admit a laundry list of other evidence they felt met the criteria for admission under 90.404. The Defendant moved to strike the notice of similar fact evidence. (R. 240-244).

On August 24, 1998, the Defendant's Motion to Strike the Williams rule notice was heard before the Honorable Tonya Rainwater, Circuit Court Judge. There was no evidentiary presentation by the State at this Hearing, only argument by counsel for the State and Defense. Mrs. Barber, through counsel, asked the court to reserve on the issue of the admissibility of evidence regarding Alexis Pierson. (Appendix, page 20-21). The court originally agreed to reserve ruling. (Appendix, page 20). However, the State requested the court rule it admissible, and Judge Rainwater determined to allow it into evidence, "at this

point." (Appendix, page 21). However, the court also indicated the evidence was admissible "unless something comes up during the trial to change my mind." (Appendix page 22). Judge Rainwater ultimately was not the trial judge however. Judge Rainwater's rulings are memorialized in the "Order Denying in Part, granting in Part Defendant's Motion to Strike State' notice of Intent to Offer Evidence of Other Acts, And/or section 90.404(2) Evidence." (R. 337-343). In its ruling, the court makes the following statement of law and fact:

"In order to introduce evidence of another crime not only must the requirements of Section 90.404(2)(a) be satisfied, but the state must also prove by clear and convincing evidence the collateral crime and a connection between the defendant and that crime." Chapman v. State, 417 So.2d 1028, 1030 (Fla. 3d DCA 1982), citing, State v. Norris, 168 So.2d 541 (Fla. 1964). **The Court finds that the State has met this requirement.** See, Chapman v. State, 417 So.2d 1029, 1031 (Fla. 3d DCA 1982). Unlike Audano v. State, 641 So.2d 1356 (Fla. 2d DCA 1994) and Denmark v. State, 646 So.2d 754 (Fla. 2d DCA 1994), **the State has charged the Defendant with the collateral crimes.**" [emphasis added]. (R. 341-2).

This finding of fact is therefore based on nothing more than the State's filing of charges against the Defendant. The filing of an information constitutes clear and

convincing evidence per se, under Judge Rainwater's analysis.

Likewise, the trial court makes other findings based on nothing more than the State's allegations in their Notice. The court found:

"The similarities between the two incidents are that both victims are infants, both injuries allegedly occurred while the victims were physically present at First Baptist Church of Cocoa's daycare, both injuries allegedly occurred while in the care of the Defendant, both victims allegedly were injured within the same time two-week time period, both victims allegedly suffered similar injuries, and both victims' alleged injuries occurred as a result of "Shaken Baby Syndrome." While the common points are not sufficiently unique or unusual when considered individually, they do establish a sufficiently unique pattern of criminal activity when considered together. Therefore, this similar fact evidence is admissible to prove identity, a material issue in this case." (R. 340).

Again, the court's soul source of "fact" is the State's "Notice." Based on nothing more than State's allegations in its charging documents and its notice, the court permitted the state to present evidence of injuries to Alexis Pierson, without further hearing or argument on admissibility. The Defendant sought to revisit these issues prior to the actual trial of this matter before the

Honorable Martin Budnick, Circuit Court Judge (Ret.). (Tr. 495-501). Judge Budnick took the position the issue was resolved by Judge Rainwater's Order and would therefore not be the subject of further argument. (Tr. 501). This despite Judge Rainwater's statement at the hearing that she was ruling the evidence admissible "unless something comes up during the trial to change [her] mind." (Appendix, page 22). The last state witness, Dr. John Tilelli, undermined the State's fundamental position when he testified there was nothing unique about the injuries sustained by these two children. (Tr. 1018-1019). Moreover, the Doctor testified that based on an examination of the x-rays and radiographs, the injuries to Devin Thimlar could only be determined to have occurred during the period from January 1, 1998 to February 7, 1998. (Tr. 904). The State's key medical witness, Dr. John Tilelli, while being cross-examined, had the following exchange with Mrs. Barber's counsel:

"Q (By Mr. Eisenmenger): Well, again, let me back up. Ignore for a moment the mother's report, let's assume the mother never took the baby out of day care, you no longer can consider that in your opinion.

A: (By Dr. Tilelli): Correct.

Q: Tell me when this injury occurred.

A: **I can't**

Q: So what it comes down to is your whole opinion as to when this injury

occurred hinges on the truthfulness of the mother's history that she took the child out of day care because of some episode that you feel is consistent with this loss of consciousness?

A: Yes"

(Trial Transcript in 5D99-218, page 930).

Mrs. Barber had no contact with Devin Thimlar from January 1, 1998 through February 3, 1998. She was in the day car with Devin on February 3, 4, 5, 10 and 11, 1998. By the time this testimony was admitted, the State had presented the entirety of their Williams rule evidence over objection.

After the State rested its case, the defendant renewed her objections to the admission of the Williams Rule evidence and argued it had become a feature of the trial. (Tr 1063). Judge Budnick again asserted the decision was governed by "the existing order." Id. The jury returned verdicts of guilty on both counts.

Mrs. Barber filed a motion for new trial, again setting forth her objections to the admission and excessive use of the Williams rule evidence. The motion was denied by Judge Budnick, who proceeded to sentence Mrs. Barber to nine years in prison, followed by probation. She is not eligible for an appellate bond.

Ms. Barber filed a timely appeal with the Florida Fifth

District Court of Appeal. In Barber v. State, 781 So.2d 425 (Fla. 5th DCA, 2001), the Appellant unsuccessfully contested the admission of *Williams* rule evidence in her trial on charges of child abuse against an infant who was in her care.

The Fifth District recited the issue on appeal and held as follows:

"Barber contends that because no clear and convincing evidence was presented prior to admission before the jury that the former offense was actually committed by her, the court erred by allowing the evidence. **We disagree. The State is only required to give notice of its intent to rely on Williams rule evidence pursuant to section 90.404(2)(b) Florida Statutes (1997).**" (emphasis added).

Barber appeals this holding.

The Appellant does not endorse the factual representations made by the Fifth District elsewhere in its decision, as she was not given the opportunity provided by law to contest the admissibility of the State's *Williams* rule allegations either by argument or by presentation of competing evidence. The appellant continues to seek a full and fair hearing on the facts, and has, when given that opportunity, prevailed. In State v. Barber, 783 So.2d 293 (Fla. 5th DCA 2001)(the subject of a separate grant of discretionary jurisdiction by this Honorable Court, SC01-

1006), the trial court conducted such a hearing where the evidence sought to be admitted involved the allegations upon which this conviction was based, and excluded the evidence. The court found the Appellant's evidence and argument so compelling that it found the "clear and convincing evidence does not suggest the Defendant was the perpetrator of the crime." The Fifth District, relying only on its decision in the instant case, reversed these factual determinations of the trial court and ruled the evidence admissible. State v. Barber, 783 So.2d 293 (Fla. 5th DCA 2001).

The Appellant sought review of the decision in the instant case, and on November 20, 2001, this Court accepted jurisdiction and ordered briefing on the merits.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's assertion there is no requirement the State produce clear and convincing evidence the *Williams* rule offense was committed by the Defendant prior to its admission constitutes a rejection of forty years of case law to the contrary in the State of Florida. That line of cases begins with this Court's decision in State v. Norris, 168 So.2d 541 (Fla. 1964), and continues with such decisions as Smith v. State, 700 So.2d 446 (Fla. 1st DCA 1997); State v. Audano, 641 So.2d 1356 (Fla. 2d DCA 1994); Dibble v. State, 347 So.2d 1096, Fla. 2d DCA 1977); Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982); and Smith v. State, 743 So.2d 141 (Fla. 4th DCA 1999). Likewise, the Fifth District's position that notice of intent to rely on *Williams* rule evidence is all that is required for admission of this evidence constitutes a similar rejection of these same decisions.

ARGUMENT: THIS COURT SHOULD MAINTAIN THE CURRENT STATUS OF THE LAW WHICH REQUIRES THE PARTY OFFERING WILLIAMS RULE EVIDENCE PROVE BY CLEAR AND CONVINCING EVIDENCE THE ALLEGED ACT WAS COMMITTED BY THE ACCUSED PRIOR TO ITS ADMISSION.

The Fifth District's decision asserts two propositions of law, both of which have been rejected by the other district courts of this State as well as by this court.

The Fifth District proposes there is no requirement the proponent of *Williams* rule evidence establish by clear and convincing evidence, prior to its admission, that the act constituting the proposed evidence was actually committed by the accused. The Fifth District's further proposes that mere notice alone is sufficient for admission of this highly prejudicial type of evidence. Specifically, the Fifth District stated:

"Barber contends that because no clear and convincing evidence was presented prior to admission before the jury that the former offense was actually committed by her, the court erred by allowing the evidence. **We disagree. The State is only required to give notice of its intent to rely on Williams rule evidence pursuant to section 90.404(2)(b) Florida Statutes (1997).**" (emphasis added).

The position asserted by the Fifth District constitutes an express and direct conflict with this Court's decision in State v. Norris, 168 So.2d 541 (Fla. 1964). In Norris,

this Court endorsed the proposition that "evidence of a collateral crime is inadmissible unless accompanied by **evidence** connecting the defendant therewith." Therefore, contrary to the Fifth District's assertion, there is clearly a predicate requirement of proof that goes beyond mere notice.

The holding in Norris has been followed by the Florida First District Court of Appeal in Smith v. State, 700 So.2d 446 (Fla. 1st DCA 1997) when that Court held "as a **condition precedent to admission** of the evidence the trial court was **required** to determine that there was **clear and convincing proof** that the appellant committed the prior abuse."

Similarly, the Florida Second District Court of Appeal, in State v. Audano, 641 So.2d 1356 (Fla. 2d DCA 1994), held "[b]efore evidence of a collateral crime can be admitted under the *Williams* Rule, there must be clear and convincing evidence that the former offense was actually committed by the defendant." In Dibble v. State, 347 So.2d 1096 (Fla. 2d DCA 1977), the Second District held that "prior to evidence of an independent crime being admissible, it is essential to show that the former crime was committed and committed by the person on trial."

The Third District also holds that as a condition

precedent to admission of *Williams* rule evidence the trial court must determine there was clear and convincing proof the defendant was the one who committed the alleged *Williams* rule act. Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982). In Malcolm, the Third District endorsed pre-admission review by the Court and stated "[e]vidence of 'collateral crimes' should be considered presumptively inadmissible and excluded unless the state can affirmatively establish its propriety." With regard to the argument the evidence should be admitted conditionally during trial, the Court stated: "[t]he adoption of a [this] procedure...results in the jury's hearing the clearly prejudicial evidence in question, subject to its being later 'stricken' with only an accompanying instruction -- of legendary ineffectiveness -- that it should be disregarded."

The Fourth District Court of Appeal has held, in Smith v. State, 743 So.2d 141 (Fla. 4th DCA 1999), that "[b]efore evidence of collateral crimes can be admitted under *Williams*, there must be clear and convincing evidence that the defendant committed the crime."

In contrast, the Fifth District's position is not only that *Williams* Rule evidence is presumptively admissible, it is in fact *per se* admissible upon supplying proper notice

to the defense, regardless of whether there is any proof the person accused committed the alleged similar crime. Until the Barber decision, there has never been any court in this State asserting such an extreme position. The Fifth District's position should be rejected by this Court as it is neither good law, nor good policy.

The prejudice suffered by the Defendant is obvious when one considers that when she was given an opportunity to contest admission of the similar fact evidence in the companion case, she prevailed. Permitting the *Williams* rule evidence regarding Alexis Pierson is fraught with the same factual problems as those that led Judge Jacobus to rule against the admissibility of the *Williams* rule evidence in the companion case. The purely medical evidence with regard to Alexis Pierson's injuries does not lead inexorably to the Defendant being the cause of the injuries. As with Mrs. Thimlar, Ms. Champaigne's testimony was in conflict with medical records regarding the same time periods. It was up to the trial judge to perform a gatekeeper function and rule on whether there was clear and convincing evidence Ms. Barber injured Alexis Pierson before admitting the proposed *Williams* rule evidence. The failure to do this was harmful error, as best evidenced by the ruling in the companion case. The Defendant is

entitled to a new trial, where the trial court discharges its obligations under the above referenced case law before admitting or declining to admit the *Williams* rule evidence.

CONCLUSION

Appellant, Ann Elliot Barber, prays this Honorable Court reverse the Appellant's conviction and order a new trial in this matter. Appellant would request this Court further order that prior to trial, a hearing be conducted where the State would be required to demonstrate by clear and convincing evidence that the proposed *Williams* rule acts were indeed committed by the Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Butterworth, Attorney General, State of Florida, c/o Ann Phillips, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118 this ___ day of December, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the requirements of Rule 9.210(a) have been complied with. This brief was computer generated, and a "Courier New 12-point font" was used.

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