IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

EDGAR COLLAZO,
Defendant-Appellant,

vs.

Case No.: 5D15-3772
L.T. Case No.: 2014-CF-11273

STATE OF FLORIDA,
Respondent-Appellee.
_____/

On Appeal To The Fifth District Court Of Appeal From The Circuit Court of the Ninth Judicial Circuit In And For Orange County, Florida

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APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant EDGAR COLLAZO will be referred to as "Mr. Collazo." Mr. Collazo was represented at trial by Joshua Adams, Esq., who will be referred to as "Trial Counsel." The State of Florida was represented by M. Ryan Williams, Esq., and Ronalda Stevens, Esq., and will be referred to as the "State." Mr. Collazo's trial was heard before the Hon. Robert J. Egan, who will be referred to as the "Trial Court." References to the Record on Appeal shall be as follows: ROA followed by the page number in the record. References to the Transcript of Trial, which is not sequentially numbered within the Record on Appeal, shall be as follows: T.T. X:Y, where X is the volume number of the trial transcript (I through VII) and Y is the page number.

STATEMENT OF JURISDICTION

Jurisdiction lies with this Court pursuant to Florida Rules of Appellate Procedure 9.030(b) and 9.141(b). Appellant was tried before a jury in the Ninth Judicial Circuit in and for Orange County. Venue is proper in this Court pursuant to Fla. Stat. § 35.043 because this Court maintains jurisdiction over appeals from the Ninth Judicial Circuit.

STATEMENT OF THE CASE

On August 19, 2014, Mr. Collazo was arrested and charged with one count of sexual battery with a deadly weapon, two counts of kidnapping, and one count of armed burglary of an occupied dwelling. *See* ROA 21. On September 21, 2014, he

pleaded not guilty and was denied bond. *Id.*, at 24. September 8, 2014, Mr. Collazo was charged by Information with an additional count of sexual battery with a deadly weapon, the two counts of kidnapping were enhanced to kidnapping with an intent to inflict bodily harm or to terrorize with a weapon, an additional count of armed burglary of a dwelling, and two additional counts of robbery with a deadly weapon. *Id.*, at 33-37.

The State sought to introduce at trial so-called *Williams* Rule evidence related to an assault that occurred two years earlier. A hearing was held February 6, 2015, on the motion. The Trial Court granted the motion to introduce the evidence over Defense objection. *See* ROA 384-86. The Defense also filed a motion to suppress statements Mr. Collazo made to detectives following his arrest. A hearing was held on the motion on April 6, 2015. *Id.*, at 406. The Trial Court granted the motion, in part, and denied the motion in part. *Id.*, at 432-34.

Mr. Collazo was convicted after a jury trial on July 9, 2015. *See* ROA 258-271. Trial Counsel filed a timely motion for new trial on July 20, 2015. *Id.*, at 298-99. The motion was never ruled upon by the Trial Court prior to sentencing.[1] Mr. Collazo was sentenced October 9, 2015, to life in prison without parole on Counts 1-4 of the information and concurrent terms of 37.9 years' incarceration on Counts

[1] This Court relinquished jurisdiction to the trial court for the purpose of considering and ruling upon the motion for new trial. No hearing was held. The Trial Court issued a short order denying the motion on March 11, 2016. *See* Supp. ROA 518.

5-8. *Id.*, at 344. A Notice of Appeal was filed timely October 26, 2015. *Id.*, at 358-59.

This appeal follows.

STATEMENT OF THE FACTS

A. *The Williams Rule Hearing*

Prior to trial, the State filed a notice of its intent to rely upon so-called Williams Rule evidence. *See* ROA 86. Specifically, the State sought to introduce evidence of another robbery and sexual assault that took place nearly two years earlier in 2010. *Id.* The motion was heard February 6, 2015. *Id.*, at 89. The State argued the June 1, 2012 incident and the September 25, 2010 incident were so similar that evidence of the sexual battery from 2010 would go directly to refute either a consent defense or an absence of mistake defense.[2] *Id.*, at 370.

According to the State, the factual similarities included the following: both victims lived in first floor apartments; both apartment complexes were located on Semoran Boulevard about five miles apart; both sexual assaults began with burglaries; both incidents took place in the early morning hours; in both cases, the alleged assailant demanded cash and a cell phone; both alleged assailants wore gloves and covered their faces; both alleged assailants used a knife to threaten the victims; both alleged assailants had a difficult time maintaining an erection; and in both cases the

[2] Neither defense was raised at trial.

alleged assailants placed a pillow over the head of the victim during the course of or just before the sexual battery itself. *See* ROA 370.

The Defense argued there were significant differences between the two events, most notably the timing between the two and the fact that the alleged assailants described by each of the victims was dramatically different – a Hispanic heavy set male standing roughly five feet eight inches tall in 2010 and a large black male in the 2012 incident standing four inches taller. Trial Counsel argued the incident in 2010 appeared to be a "crime of opportunity" and was not well-planned as opposed to the incident in 2012, where the assailants spent considerable time in the apartment before the assaults and appeared to be waiting for others to come. *See* ROA 377. Also different between the two incidents was the clothing the perpetrators allegedly were wearing – one wore a ski mask to cover his face and the other used a t-shirt pulled up over his face. *Id.*, at 378.

The Trial Court ruled the State had met its burden of proof to establish sufficient similarities to permit evidence of the 2010 incident to establish identity, a lack of mistake, common plan or scheme, and modus operandi.[3] *See* ROA at 385. The Trial Court found the two incidents occurred in similar locations, there was evidence

[3] The State never proffered these as reasons it was seeking to introduce the collateral crimes evidence. Interestingly, the Trial Court never said the evidence was relevant to prove lack of consent of absence of mistake, the reasons the State sought to introduce the 2010 incident.

of forced entry in both cases, both incidents took place in the early morning, there were demands for cell phones and money in both cases, the alleged assailants in both cases had difficulty maintaining an erection and in both cases a pillow was used "to silence them or prevent them from crying out." *Id.*, at 386.

B. The Defense Motion to Suppress

Following Mr. Collazo's arrest, he was interviewed by detectives. Mr. Collazo was read his *Miranda* warnings ten and one-half minutes into the recorded interview. *See* ROA at 409. During the interview, he made several statements asking for a lawyer, the first time about 20 minutes into the recorded interview. *Id.*, at 409. The interrogation continued despite these requests and so, prior to trial, the Defense filed a motion to suppress two specific statements that was heard April 6, 2015.

About twenty-two minutes into the interview, Mr. Collazo tells the detectives, "I would love for my lawyer to be here so he can tell me what's going on and I can talk to him so he can help me out." *See* ROA 413. Trial Counsel argued this statement was not only unequivocally a request for *a* lawyer but it was actually a request for *his* lawyer. *Id.*, at 414. At the time of his arrest, Mr. Collazo was represented by Trial Counsel in another case. *Id.*

Trial Counsel argued from this point forward, Mr. Collazo was repeatedly asking for his lawyer and the detectives continue to press ahead in the interrogation, trying to get Mr. Collazo to qualify his statements in a way the detectives could use

to justify continuing their interrogation. *See* ROA at 414. Despite these attempts, Mr. Collazo repeatedly rejects the invitation. *Id.* The second statement the Defense sought to suppress was made approximately sixty-one minutes into the interview. *Id.*, at 411. Mr. Collazo, in response to repeated questions from detectives, asks, "Can I get my lawyer to come in?" *Id.*, at 416. It was clear, Defense Counsel argued, Mr. Collazo "wants to speak with me and talk about the case before he answers any more questions. *Id.*, at 417.

The State argued a defendant is required to clearly state he wants a lawyer before police are required to stop interrogating and further, there is no obligation on police to ask any clarifying questions and can "rely on an equivocal or an ambiguous request." *See* ROA at 421-22. In this case, the State argued Mr. Collazo's statements were equivocal and lacked the clarity to satisfy the "state of the law" requiring a defendant to affirmatively state he wants a lawyer. *Id.*, at 429. "Once the defendant is read Miranda, it is on him and it's his burden to make it clear, I want my lawyer now, I want you to stop talking to me." *Id.*, at 430. Trial Counsel argued the law does not require the profession of a shibboleth, specific words that must be used. *Id.*, at 431-32.

The Trial ruled the first statement - "I would love for my lawyer to be here …" - was equivocal and that Mr. Collazo was engaged "in a bit of a cat and mouse" trying to find out information about the case against him. See ROA at 432. However,

the second statement, and the ones that followed, were unequivocal and anything said after the second statement was suppressed. *Id.*, at 434.

C. The State's Case-in-Chief

1. The 2012 Assault

Chezny Goble ("Ms. Goble") moved to Orlando from Portland, Oregon, in September 2011. *See* T.T. 3:355. She was on a cruise and met a number of people from Orlando and "kind of hit it off." *Id.* One of those people was Lauren Waag ("Ms. Waag"), with whom she kept in touch. *Id.*, at 356; 410. Ms. Waag was on the cruise celebrating her twenty-first birthday. *Id.*, at 410.

Ms. Waag told Ms. Goble she was looking for a roommate. Ms. Goble said she was interested in a change, and so drove from Oregon to Florida. *See* T.T. 3:410. When she arrived, she first moved in with Lauren and Lauren's brother, Stuart, in his apartment. *Id.*, at 356; 409. Soon after, Ms. Goble and Ms. Waag moved to the Auvers Village Apartments located off North Semoran Boulevard in Orlando. *Id.*, at 357; 411. They lived in a first floor, two-bedroom apartment there from September 2011 to June, 2012. *Id.*, at 411.

Both women had worked on the night of May 31, 2012, Ms. Waag coming home first and later Ms. Goble arriving. *See* T.T. 3:358; 412. The two spent some time in small talk about their days and watching some television before Ms. Goble

went to bed around 1 a.m. and Ms. Waag followed a short time later. *Id.*, at 359; 414; 415-16. Each went to bed wearing a t-shirt and underwear. *Id.*, at 360; 414.

Ms. Goble was sleeping and heard a rustling by her window and was awakened by the blinds moving. *See* T.T. 3:360. She testified the person who entered her room through the window told her to "shut the f@#* up. I'm going to kill you if you scream." *Id.* She said it was a male voice but the room was very dark and she could not see any clothing or anything else at that point. *Id.*, at 361.

Ms. Goble said the figure she saw was straddling the window obviously coming in and that she heard the window close shut. *See* T.T. 3:361. She did not move, did not scream, and complied with what she was told to do. *Id.* She said the male demanded her cell phone, an iPhone 4 or 4s, and told her to take out the SIM card. *Id.*, at 363. He also told her that she should stay quiet and "don't do anything stupid" that he "had friends outside." *Id.*, at 364. She said as she was sitting on her bed unrestrained, the male used the cell phone flashlight to search through her room and in her closet. *Id.*, at 364-65.

The male, Ms. Goble said, had yet to make any threats against her with a weapon. *See* T.T. 3:366. At one point during the search of her room, she said, the male stopped and said he was going to tie her up. *Id.*, at 366. Ms. Goble protested and the male repeated his demand that she "shut up" or he would "stab you, I'm going to kill you." *Id.*, at 366.

Ms. Goble said she sat down and the male used an iHome cord adapter that was plugged into the wall to tie her up with her hands behind her back. *See* T.T. 3:366-67. She said she felt the male was wearing leather gloves. *Id.*, at 367. After being tied up, she was told to lay on her back and not to move and "don't do anything stupid." *Id.*, at 367-68. The male, she said, still had her phone and walked around her room a little more before leaving her room through her bathroom. *Id.*, at 369. There is a door, she said, that leads from her bathroom into the hallway. *Id.*, at 362-63.

Ms. Goble said she heard nothing once the male left the bathroom and all she saw was a dark figure. *See* T.T. 3:369. She said she assumed the person went into the living room to see what was there. *Id.* She said the male would come back in and out of her bedroom to check to see that she was still tied up and was staying on her bed on her back where he left her. *Id.* She said this happened three or four times over a period of six or seven minutes just around 3 a.m. *Id.*, at 370. She said the male kept telling her that his friends were coming and that they were going to steal the television in the living room. *Id.*

Ms. Waag had a 13-year-old Jack Russell terrier at the time and the dog would sleep with her in her room. *See* T.T. 3:418-19. She said the dog was "pretty much blind and deaf." *Id.* Ms. Chezny said the male who entered her room asked if the dog

was going to bite him. *Id.*, at 365. The dog was not in Ms. Goble's room and she said the dog was not barking. *Id.*

Ms. Waag said she was asleep and woke to a male with a deep voice telling her to "shut the f@#* up." *See* T.T. 3:419. She said she assumed it was a male. *Id.* Her bedroom was pitch black and the bathroom light was not on. *Id.*, at 417. The male asked her about a MacBook computer that he indicated he knew she had. *Id.*, at 420. She also said she thought she had heard the voice before but could not recognize it. *Id.*

Ms. Goble said she heard Ms. Waag wake up. *See* T.T. 3:371. Ms. Waag said the male picked up her dog and put it into the bathroom and was walking around the apartment stealing things. *Id.*, at 420. The dog, she said, was not barking but was scratching at the door and whining. *Id.* The male said he was there to rob her and that he had "buddies" who were coming to take everything. *Id.*, at 421. He then asked where the computer was and took her out into the living room. She said the man wore a mask and was wearing gloves. *Id.*, at 421.

Ms. Waag kept her computer on the dining room table. *See* T.T. 3:372. Ms. Goble said she heard the two go into the living room and "heard voices" but was not sure how long they were out there. *Id.*, at 371-72. Ms. Waag said she heard nothing coming from Ms. Goble's room but said she thought there was someone there, which is why she was not saying anything. *Id.*, at 421-22. She said while in the living room,

she was focusing on a clock on the television cable box and said it was either 3:02 a.m. or 3:12 a.m. *Id.,* at 422.

She gave the male the money that was in her purse, about $200 that she had made at her restaurant job that night. *See* T.T. 3:422. She said she did not remember how long she was in the living room. *Id.,* at 423. Ms. Waag said the man tried to restrain her with a lanyard he had found and was "freaking out" because his friends were not there. *Id.,* at 421. She said the male then demanded she perform oral sex on him. *Id.,* at 424. Ms. Goble said she heard muffled voices and then Ms. Waag say "get your hands off me." *Id.,* at 372.

Ms. Waag said she kept pushing the male with her elbows and arms trying to get him away from her. *See* T.T. 3:424. She said the male was wearing baggy shorts and a baggy shirt and that he was a "big guy, fat." *Id.,* at 425. She said she could feel his stomach behind her as he put her into a chokehold and threw her to the ground. *Id.* She said she was repeatedly calling out to Ms. Goble yelling for help. *Id.,* at 426.

Ms. Goble said she heard Ms. Waag say repeatedly to take whatever he wanted and just not hurt them. *See* T.T. 3:375. Ms. Goble also said she heard Ms. Waag say "stop" repeatedly as she heard her crying. *Id.* Ms. Waag said the male kept demanding she perform oral sex on him and that it was either her or Ms. Goble. *Id.,* at 426. She said she thinks when she was in the chokehold and thrown to the ground that the male had placed a knife to her neck. *Id.,* at 427.

Ms. Waag said she does not remember going from the living room to her bedroom but Ms. Goble said she heard voices in the hallway and knew they had gone into Ms. Waag's room. *See* T.T. 3:427; 372. Ms. Waag said she was sitting on her bed and the male was standing over her. *Id.*, at 428. She said she could not remember if the male removed his penis from his pants. *Id.* She said she was yelling out for Ms. Goble to come and help but that she did not do anything to help. *Id.*

Ms. Waag said the male kept saying he was not leaving until he received oral sex from either her or Ms. Goble. Ms. Waag said she kept refusing and the male eventually put a pillow over her and she "freaked out and just did it." *See* T.T. 3:428-29. She said the male's penis did go inside her mouth but that she "wouldn't really do it" so the male then tried to have sex with her. *Id.*, at 429. She said she did not think the male's penis was erect at the time which was why he kept demanding she perform oral sex. *Id.* Ms. Goble said as she was listening to Ms. Waag saying "stop" so many times, she said she felt the male was abusing Ms. Waag in some way. *Id.*, at 376.

Ms. Goble said she got off her bed and went over to the window, still bound, and poked her head through the blinds but it was very dark and she saw no one. *See* T.T. 4:379. She said she heard Ms. Waag crying and saying "stop." *Id.*, at 380. Ms. Goble said she went into her bathroom, used her elbow to flip on the light, and poked her head around the corner and down the hall towards Ms. Waag's bedroom. *Id.* She

said she saw "a male figure" in Ms. Waag's bedroom wearing baggy shorts, a baggy t-shirt and gloves but could not see the color of his skin. *Id.* She said she could not really make out what he was doing. *Id.*

Ms. Waag said she saw the light turn on and the male walked away. *See* T.T. 3:429. Ms. Goble said the male came out of Ms. Waag's room adjusting his clothes and ran up to her and quickly shut off the light. *Id.*, at 381. The male, according to Ms. Goble, slammed his hand against the wall and told her she was "really starting to piss me off." *Id.* She said he then demanded she go back to her room and lay down on the bed and then he shut the bathroom door. *Id.*

The male apparently returned to Ms. Waag's room and Ms. Waag said the male went to her and moved her underwear to one side and penetrated her vagina but that it did not last very long and she could not say whether he ejaculated. *See* T.T. 3:430. She said the male was wearing a condom but did not see whether it had broken. *See* T.T. 4:447; 450-51. She said "all of a sudden he was like frantic again" and told her to go and "wash up." *See* T.T. 3:430. She said she heard him in the kitchen banging around and could hear him spraying down the bedroom – the furniture and the floor. *Id.*, at 430-31.

Ms. Goble said after the doors were closed, she was very scared but, because she believed he was hurting Ms. Waag and had been aggressive towards her, she started to wiggle her hands loose and then went to her window and opened it. *See*

T.T. 3:381. She said she thought about running for help but said she could not leave Ms. Waag "helpless." *Id.,* at 382. Ms. Goble said she sat back down on the bed with her hands behind her back to "look like I was still tied up" so that she could be "ready to defend herself if he returned to her room and tried anything on her. *Id.* She said she sat on her bed for a few minutes and then heard Ms. Waag's shower start running. *Id.*

Ms. Waag said she stood in the bathtub and turned on the water but just stood there and let the water run over her. *See* T.T. 3:431. She said she believed that not washing was the best chance for police to catch the perpetrator. *Id.* A short time later, the front door opened and then shut. *Id.,* at 431; 382. Ms. Waag said she ran to the door to lock it and then was "running around my house" trying to check on all the other locks. *Id.*, at 431. She said from the time she was awakened until the time the male left was between thirty and sixty minutes. *See* T.T. 4:449.

Ms. Goble said she called out to Ms. Waag and Ms. Waag called back to her. *See* T.T. 3:382. Ms. Waag then went to Ms. Goble's room and found her roommate with one hand tied up so she assisted in freeing Ms. Goble's one hand. *Id.*, at 432. Ms. Goble said when she was freed, Ms. Waag immediately said the male had raped her and that "we need to leave." *Id.*, at 382. Ms. Waag put on shorts but did not remove her underwear or take off the t-shirt she was wearing at the time. Ms. Goble

put on shorts and a shirt, grabbed her keys, Ms. Waag got her dog and her purse, and the two left the apartment. *Id.,* at 383; 432-33.

They got into Ms. Goble's car and, when Ms. Goble asked where they should go, Ms. Waag said to drive to her brother's house. *See* T.T. 3:383; 432. Ms. Waag's brother, Stuart, lived about ten minutes away and they arrived "around 4:00, 4:45, 4:30." *Id.*, at 384. Ms. Goble said they were banging on the door because they could not call him and that he finally answered the door a minute or two later. *Id.,* at 384. Ms. Waag said she had a key to her brother's house so she used the key to go inside where she went to his room and woke him up. *Id.,* at 433.

The girls told Stuart Waag the "whole story" and he called 911. *See* T.T. 3:384; 433. Mr. Waag's home was in East Orlando and he said he would see his sister often four to five times a week. *Id.*, at 345. He said she was "my best friend." *Id.* He said he was home asleep on June 1, 2012, around 4 a.m. when he was awakened by the sound of his sister coming into his home. *Id.,* at 346.

Mr. Waag said his sister and Ms. Goble were both very upset and "in a state of panic." *See* T.T. 3:348. He said he did not recall what his sister was wearing. *Id.* He said he was "in a bit of a panic myself" and so asked questions trying to find out what was going on. *Id.,* at 349. He said he initially called 911 and then handed the phone to Ms. Waag because he was having trouble getting any information from her

but then took the phone when she could not talk. *Id.* Law enforcement arrived fairly quickly and he provided a written statement. *Id.*, at 350.

Ms. Waag said she wrote out a statement while at her brother's house but could not recall if she was interviewed while there or in the police car while being returned to her apartment. *See* T.T. 3:433; 384. She told police she believed the male was black because of his dark skin. *See* T.T. 4:449. She said she could not recall seeing any tattoos. *Id.* She described the male as "very tall" roughly six feet, two inches. *Id.*, at 450. Ms. Goble told detectives the male was six feet tall but later said he was five feet, ten inches. *See* T.T. 3:400.

Following her interview with police immediately after the attack, Ms. Waag was taken for physical exam. *See* T.T. 3:434. She said a victim advocate met her at Safe House where she was able to change clothes. *Id.*, at 435. Investigators took the clothes she was wearing, performed a full body examination and took swabs from her mouth and vagina. *Id.* She was shown a photographic line-up and could not identify the male who attacked her despite being told by police that they had caught the person they believed was responsible and he was one of those present in the line-up. *Id.*, at 438; *see also* T.T. 4:453-54.

2. The Investigation

Orange County Sheriff's Office Sergeant Richard Mankewich oversees all investigations involving sex crimes. *See* T.T. 4:457-58. Generally, he said, when a

victim calls 911 to report a crime, the road patrol unit closest to the scene responds and completes initial interviews and then requests the sex crimes squad respond if appropriate. *Id.*, at 458. On June 1, 2012, at approximately 5 a.m., police responded to the Auvers Apartments for a report of an armed robbery and sexual battery. *Id.*, at 459. This was an "all call" situation because as Sgt. Mankewich explained, "so much needs to be done in a small amount of time and we need a large group of people to handle that." *Id.*, at 460.

Sgt. Mankewich said Detective Jason Levine was the "on call" detective at that time and took the initial call from the road patrol units. *See* T.T. 4:459. Detective Levine started interviewing the two victims. *Id.*, at 460. Sgt. Mankewich said each victim is interviewed separately "to make sure they're not getting together, talking about the case, talking about the story prior to talking to the detectives so everything is clean and separate and we get the initial outcry from the victim." *Id.*, at 461. When police arrived at the apartment, they started a canvass but there was no eyewitness to the incident and no one provided any information that was useful in the investigation. *Id.*, at 463.

Police issued subpoenas for phone records but "came up empty." *See* T.T. 4:471. A bloodhound was used to try to track a potential suspect but was unable to track anything or "provide anything of investigative use." *Id.*, at 465. Sgt. Mankewich did not recall any evidence of fingerprints on the window or any dirt

around the base of the window inside the apartment. *Id.*, at 473. There were no weapons found inside or outside and no condom was found although there was a wrapper located outside the apartment. *Id.*, at 474; 505; 508.

Alison Smolarek is a crime scene investigator with the Orange County Sheriff's Office. *See* T.T. 4:477. She was called to Ms. Waag's apartment at 8:11 a.m. and after being briefed, during which she was informed the victims did not know or were unsure if the attacker wore gloves (see Id., at 491), she photographed the apartment both inside and out. *Id.*, at 480-81. She said she did not recall seeing any debris or anything else on the interior of the apartment underneath the window. *Id.*, at 487-88.

There were some marks, CSI Smolarek said, "of some sort" on the window and she was able to recover some latent fingerprints from the window area. *See* T.T. 4:490. Additional latent prints were located on the nightstands inside Ms. Goble's bedroom. *Id.*, at 491-92. There were no latent prints found on the power cord that Ms. Goble said the attacked used to restrain her but there were latents found on a can of Febreeze. *Id.*, at 497; 499. There were six total latent prints found but she said she would not expect to find latent prints if a person was wearing gloves. *Id.*, at 510-11; 519. None of the latent prints matched Mr. Collazo, according to Orange County Sheriff's Office fingerprint examiner Marco Palacio. *Id.*, at 525.

The bedding from Ms. Waag's room was also tested and while there were several "areas of fluorescence" but were large and inconsistent with seminal stains. *See* T.T. 4:499-500. CSI Smolarek said there was no fluorescence testing done on any of Ms. Waag's clothing and CSI Smolarek said she had no contact with Ms. Waag throughout the investigation. *Id.*, at 500-01.

As of September, 2012, the investigation went inactive due to lack of suspects. *See* T.T. 4:471-472. In July, 2014, Sgt. Mankewich said there was a lead discovered in the 2012 case and that Mr. Collazo was a suspect. *Id.*, at 529. He said he met with both Ms. Goble and Ms. Waag to show a new photo line-up. *Id.* No black males were included, he said, because the suspect was Hispanic. *Id.*, at 530. Despite the lead, neither victim from the 2012 attack could identify Mr. Collazo. *Id.*, at 531-32. Despite there being no identification, Sgt. Mankewich said he sought a warrant to get a DNA sample from Mr. Collazo. *Id.*, at 532-33.

Julian White, a FDLE crime lab analyst, received buccal swabs represented to be from Mr. Collazo. See T.T. 4:557. Based upon a Cellmark Laboratory report from its testing performed on the t-shirt, underwear, and buccal swabs from Ms. Waag, three unknown profiles were identified. Id., at 561. She said there was evidence of sperm, but there was not enough information to create a complete DNA profile to which any comparisons could be made. Id., at 563. She said Mr. Collazo could not be included or excluded as a contributor to the partial DNA mixture taken from the

cervical swabs. *See* T.T. 4:565. She said DNA profile of the sperm sample from the t-shirt matched Collazo. *Id.*, at 567.

3. The Williams Rule Evidence

Michele Alvarado ("Ms. Alvarado") moved to Orlando in 2010 from Puerto Rico. *See* T.T. 5:601. She lived in a first floor apartment in the Bellagio Apartments on South Semoran Boulevard in Orlando. *Id.*, at 601. Her apartment had two bedrooms and one bathroom. *Id.*, at 602. Her bedroom had a sliding glass door that she said she never used and usually kept locked. *Id.*, at 603.

On September 25, 2010, Ms. Alvarado said she went to bed around 10 p.m. *See* T.T. 5:602. At the time, she was living with her father. *Id.*, at 603. She said he usually left for work around 5 a.m., "very early." *Id.*

Ms. Alvarado said she was awakened by a male holding a knife to her neck. *See* T.T. 5:604. She said she heard the male in a deep voice tell her to shut up. *Id.*, at 605. At the time, she said she was under the cover on her bed wearing a t-shirt and underwear. *Id.*, She said the male demanded money. *Id.*, at 606. She said the male was standing over her and said if she did not stay quiet he would hurt her. *Id.*

Ms. Alvarado told the male to take whatever he wanted and not hurt her. *See* T.T. 5:606. She said the male took her underwear off, removed his pants and then "started to touch me and rub his penis all around me in my vaginal area." *Id.*, at 606-

07. She said the whole time she was kicking and demanding he not hurt her. *Id.*, at 607. She said his penis touched her vagina. *Id.*

She said the male was "looking all around" and that she grabbed her purse and pulled it down on top of the bed and told the male to take everything. *See* T.T. 5:607. She said he took her cell phone and some credit cards. *Id.*, at 608. She said the whole time he was holding her with a knife. *Id.*

Ms. Alvarado said the male "couldn't get an erection" and was not wearing a condom. *See* T.T. 5:608. She said she asked him to wear one claiming she had AIDS, that she was pregnant, "all kinds of things," and that she had condoms in the kitchen. *Id.*, at 609. She said she was able to go to the kitchen as he was following her with the knife although this was a ruse to look for something else. *Id.* She said the male eventually figured that out and pushed her back into her room. *Id.*

Ms. Alvarado said her underwear was still off and "his pants were like half off." *See* T.T. 5:609. The male pushed her onto the bed and he climbed on top of her. *Id.*, at 609-10. She said he could not get an erection and "he even tried to choke me with a pillow." *Id.*, at 610. She said the male then got off of her and went to her bathroom where she said she heard "hard breathing so I guess he was masturbating." *Id.*

Ms. Alvarado said the male returned and tried to rape her, rubbing his penis "all over my anal area and just the tip went inside because he was not erected." *See*

T.T. 5:611. She said she was on her back. *Id.* She said the male was wearing a mask covering his face but that she could see his eyes. *Id.*, at 611; 622. She also said the male was wearing black cotton gloves. *Id.*, at 627. She said she was staring at his eyes and told him that she recognized him or had seen him before. *Id.*, at 612. She said she knew him as Jose. *Id.*

Ms. Alvarado said she was "stunned" and kept saying she knew the male and the male threatened to kill her. *See* T.T. 5:614. She said at some point he heard a noise, stopped the attack, and went to the living room. *Id.* She said he was looking through the windows and that was when she ran to the door and fled the apartment. *Id.*, at 614-15.

Ms. Alvarado was naked with just a shirt on. *See* T.T. 5:615. Javier Fuentes ("Mr. Fuentes") lived in an apartment in the Bellagio Apartments. *See* T.T. 4:581. He was out walking his dog when he saw Ms. Alvarado coming to him and asking for help. *Id.*, at 582; *see also* T.T. 5:615. Mr. Fuentes said he could not remember the time when this happened but did say it was daylight. *See* T.T. 4:582. Ms. Alvarado said she thought the attack happened around 6 a.m. and it was "mostly dark outside." *See* T.T. 5:623.

Mr. Fuentes said the woman was crying and "looked very scared." *See* T.T. 5:582. He said she was wearing a t-shirt and she was pulling it down to try to cover herself. *Id.* He said she was walking very fast. *Id.*, at 583. He told her to walk to his

apartment where he could call the police. *Id.* He did not see anyone in the area at the time and Ms. Alvarado did not describe her attacker to him. *Id.*, at 584.

Ms. Alvarado said police responded to Mr. Fuentes' apartment where she was interviewed and provided a statement. *See* T.T. 5:616. Mr. Fuentes said after police came and "were done" he offered Ms. Alvarado some shorts to put on. *See* T.T. 4:583-84. She was taken to the sexual assault treatment center to be examined. *See* T.T. 5:618.

Nancy Moskyok ("Ms. Moskyok") is a self-employed sexual assault nurse examiner who met Ms. Alvarado at the center on September 25, 2010. *See* T.T. 5:629-30; 632. She said she performed a "head-to-toe" exam to determine where evidence might be located and then to collect that evidence. *Id.*, at 630. She said she was looking for bruising, tears, or cuts and then performs an internal exam. *Id.*, at 631.

Ms. Moskyok said she was able to get a sexual assault kit, including collecting swabs. *See* T.T. 5:633. From her physical examination, she said she saw no trauma that indicated a sexual assault. *See* T.T. 6:637. She said she did observe some "redness in the vaginal area." *Id.* She said Ms. Alvarado complained of bruising on her knees but Ms. Moskyok said she could not see any bruising. *Id.*

The case went cold until Orlando Police Detective Lori Fiorino, assigned to Special Victims, interviewed Ms. Alvarado on October 14, 2014 based upon some

new information. *See* T.T. 5:643. Detective Fiorino said she saw no inconsistencies between Ms. Alvarado's statement about what happened given in 2010 right after the attack and her statement given in 2014 recalling the events of her attack. *Id.*, at 643.

Detective Fiorino showed Ms. Alvarado a photo line-up. *See* T.T. 6:644. She said when Ms. Alvarado saw the photo line-up "her demeanor changed, she immediately got emotional and had to look away." *Id.* One of the six photos in the line-up was of Mr. Collazo and Ms. Alvarado was able to identify him as the man who attacked her. *Id.*, at 618; 645.

Shawn Johnson is a crime laboratory analyst in the biology/DNA section. *See* T.T. 6:711. He reviewed an October 9, 2014 report that examined DNA from the swabs taken during Ms. Alvarado's exam in 2010 after she was attacked and the DNA profile obtained from Mr. Collazo following his arrest in 2014. *Id.*, at 715-16. He concluded that the partial DNA profile from the "sperm cell fraction of the anal swabs" taken from Ms. Alvarado in 2010 matched the DNA profile of Mr. Collazo. *Id.*, at 719.

4. Mr. Collazo's Arrest

Based upon the DNA analysis, Sgt. Mankewich swore out an arrest warrant for Mr. Collazo. *See* T.T. 6:729. Mr. Collazo was arrested and taken to the sheriff's office for questioning. *Id.* Mr. Collazo, during the interview, acknowledged living

with his girlfriend Blossom Canales "(Ms. Canales") but could not say when he lived there or the specific apartment. *Id.*, at 733.

Detectives, according to Sgt. Mankewich, "basically laid out the whole case to him and said there was DNA evidence. *See* T.T. 6:733. Mr. Collazo was shown pictures of both victims and said he recognized them from possibly attending Conway Middle School together. *Id.*, at 735. He vehemently denied ever having sex with either one of them. Sgt. Mankewich said Mr. Collazo, after being told his DNA was on the victim, could not offer an explanation why. *Id.*, at 740.

Following this testimony, the State rested. *See* T.T. 6:740.

D. The Defense Motion for Judgment of Acquittal

Trial Counsel moved for a judgment of acquittal based upon an argument that neither victim ever saw a weapon. *See* T.T. 6:742. Ms. Waag testified only that she felt a knife when her attacker was standing behind her. *Id.*, at 742-43. Trial Counsel argued the victim's subjective belief that a weapon was used is insufficient to sustain a conviction. *Id.*, at 743. This argument was repeated as a basis to dismiss all of the counts in the information that involved the use of, or threatened use of, a weapon. *Id.*, at 744-748.

Trial Counsel also argued that the kidnapping count related to Ms. Goble should be dismissed because there was no evidence she was confined with a specific intent to inflict harm or to terrorize her. *See* T.T. 6:744-45. Trial Counsel argued that

based on the testimony, the attacker tied Ms. Goble up and left her alone and that at most he might be guilty of a lesser included charge of false imprisonment. *Id.*, at 745. The same argument was made with respect to the kidnapping count related to Ms. Waag. *Id.*, at 745-46.

The State argued in response that Ms. Waag believed Mr. Collazo "had some type of weapon to her back and that she felt the knife pressed against her skin. *See* T.T. 6:749. Additionally, the State argued Ms. Waag testified that when her attacker put her in a chokehold, she felt the knife placed against her neck. *Id.*, at 750. Whether or not the victim could see the knife, the victim felt the presence of a weapon. *Id.*

The Trial Court ruled there was sufficient evidence to create at least a question of fact regarding the weapon and therefore a judgment of acquittal should be denied. *See* T.T. 6:750. The Trial Court also ruled that the kidnapping charges should go to the jury because the kidnapping "is not merely incidental to the sexual battery." *Id.*, at 756.

E. The Defense Case-in-Chief

Blossom Canales ("Ms. Canales") was Mr. Collazo's girlfriend on June 1, 2012. *See* T.T. 6:759. She was living in an apartment at the Auvers Village Apartments with Mr. Collazo and her two children. *Id.*, at 760. Mr. Collazo is the father of her five-year-old and had assumed the role of father to her oldest child. *Id.*

Usually, Ms. Canales said, she wakes up multiple times during the night to check on her children. *See* T.T. 6:761. She said she does it "just to be careful." *Id.* Normally, she goes to their room, checks on them, goes into the living room and kitchen, takes a peek outside and if everything is okay, she returns to bed. *Id.*

On June 1, 2012, she remembered waking up "pretty early" and had looked out the window and saw "tons of police cars outside." *See* T.T. 6:761. She said the complex was "basically blocked off." *Id.* She said she did not find out what had actually happened until she watched the news. *Id.*, at 762. She also remembered talking to Mr. Collazo about the news. *Id.* She said when she got up during the night, nothing was going on outside and when she went back to bed, Mr. Collazo was there with her. *Id.*, at 763.

Ms. Canales said she recalls telling Mr. Collazo she wanted to move from the apartment after this incident because she was scared. *See* T.T. 6:794. She also told police that first, she did not recall any specific recollection of the night of the attack, and also stated she did not specifically remembering getting up during the night. *Id.*, at 770. Later, she said she did remember getting up at 4 a.m. on the morning of June 1, 2012. *Id.*, at 780.

Ms. Canales admitted she had read the statements of both victims about what happened but did not recall when the victims said this happened. *See* T.T. 6:786-87. She also said she did not remember if she told Sgt. Mankewich that Mr. Collazo was

with her on June 1, 2012 but did say Mr. Collazo did not do what he was accused of and left crying. *Id.*, at 797; 802.

Mr. Collazo did not testify. *See* T.T. 6:811. The Defense then rested its case and there was no rebuttal from the State. *See* T.T. 7:821-822.

F. Renewed Motion for Judgment of Acquittal

Trial Counsel renewed the motion for judgment of acquittal based upon the same arguments it previously made about the weapon and also argued the Defense presented an alibi that was "completely inconsistent with the State's theory" and as a result, the jury could not convict. *Id.*, at 822. The Trial Court said there remained factual issues and therefore denied the renewed motion. *Id.*

SUMMARY OF THE ARGUMENT

The Trial Court erred as a matter of law when it permitted the State to introduce so-called Williams Rule evidence in its case-in-chief against Appellant. The State was allowed to introduce evidence of a 2010 assault in its case prosecuting alleged assaults that took place in 2012, for which Appellant was tried and ultimately convicted. However, there did not exist "identifiable points of similarity" which have some "special character" or are "so unusual as to point to the defendant." *See McLean v. State*, 934 So.2d 1248, 1255 (Fla. 2006).

The Trial Court abused its discretion in permitting the collateral crime evidence because the factual findings were not supported by the record evidence and

the similarities the Trial Court concluded existed between the 2010 and 2012 incidents were not unusual or of a special character to be relevant. Further, after erroneously admitting the Williams rule evidence, the Trial Court permitted the collateral crimes evidence to become a focus of the trial. The erroneous admission of evidence of the 2010 assault was "inherently prejudicial" to Appellant's right to a fair trial (*see Thomas v. State*, 599 So.2d 158, 162 (Fla. 1st DCA 1992); *see also Paul v. State*, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976)). This Court should vacate Appellant's conviction and sentence and remand this case to the Trial Court for a new trial. *See State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *see also Estes v. Texas*, 381 U.S. 532 (1965).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING SO-CALLED *WILLIAMS* RULE EVIDENCE TO BE PRESENTED TO THE JURY.

A. Standard of review

This Court reviews the Trial Court's admission of the *Williams* rule evidence for an abuse of discretion. *See LaMarca v. State*, 785 So.2d 1209, 1212 (Fla. 2001); *see also San Martin v. State*, 717 So.2d 462 (Fla. 1998).

B. Preservation

Prior to trial, the State filed a notice of its intent to introduce so-called Williams rule evidence pursuant to Fla. Stat. §90.404(2)(a). Following a hearing, the

Trial Court allowed the State to introduce the evidence over Defense objection. *See* ROA 384-86. At trial, Trial Counsel renewed its objection prior to the introduction of the testimony from the *Williams* rule witnesses. Finally, Trial Counsel's motion for new trial argued the Trial Court erred in permitting the introduction of the evidence. Thus, the issue is ripe for appellate review. *See Fike v. State,* 4 So.3d 734, 737 (Fla. 5th DCA 2009) citing *Harrell v. State,* 894 So.2d 935, 940 (Fla. 2005).

C. Argument on the Merits

1. Introduction

Trial courts are permitted to allow the introduction of evidence of collateral crimes if relevant to prove a material fact in issue. This is the so-called *Williams* rule. *See Williams v. State,* 621 So.2d 413 (Fla.1993), an offspring of the original *Williams* decision, found at 110 So.2d 654 (Fla.1959). The rule is codified at §90.404(2)(a), Fla. Stat. (2009) ("[S]imilar 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."). However, such evidence is "inadmissible when the evidence is relevant solely to prove bad character or propensity." *See Kopsho v. State,* 84 So.3d 204, 212 (Fla. 2012).

The Florida Supreme Court has held similar fact evidence is inherently prejudicial because it "creates the risk that a conviction will be based on the defendant's

bad character or propensity to commit crimes rather than on proof that he committed the charged offense. *See McLean*, 934 So.2d at 1255. Because the erroneous admission of evidence of collateral crimes is presumed harmful (*see Castro v. State*, 547 So.2d 111 (Fla. 2011)), before admitting *Williams* Rule evidence, the Trial Court must make four determinations: whether there is sufficient evidence that the defendant committed the uncharged crime; whether the evidence in the uncharged crime meets the similarity requirement necessary to be relevant; whether the uncharged crime is too remote, so as to diminish its relevance; and whether the prejudicial effect of the uncharged crime substantially outweighs its probative value. *See Carbonell v. State*, 47 So.3d 944, 946-47 (Fla. 3d DCA 2010) citing *Robertson v. State*, 829 So.2d 901, 907–08 (Fla. 2002).

To meet the similarity requirement, the *Williams* rule evidence must bear a "striking similarity to the charged offense" and must share with the charged offense "unique characteristics that give the *Williams* Rule evidence probative value with respect to the charged offense." *See Heuring v. State*, 513 So.2d 122, 124 (Fla. 1987) ("The charged and collateral offenses must be not only *strikingly similar*, but they must also share *some unique characteristic or combination of characteristics* which sets them apart from other offenses."), *quashed on other grounds*, 559 So.2d 207 (Fla.1990) (emphasis added).

2. The admitted *Williams* rule evidence lacked characteristics that were "strikingly similar" to the charged offenses and was not "so unusual" to meet the strict standard of relevance to permit its admission.

In the instant case, Appellant was charged with committing multiple crimes stemming a June 1, 2012 incident. At the time, the case went cold because there was no identifiable physical evidence and neither victim could identify the perpetrator. The State sought to introduce evidence from an assault that took place September 25, 2010 to refute either a consent or absence of mistake defense. A pre-trial hearing was held to determine if the collateral crime evidence was admissible in the trial against Appellant.

During the hearing, at which there was no testimony offered, the State relied upon the statements of the two victims in the 2012 incident and a statement from the 2010 victim describing her attack. The State argued there were sufficient similarities between the two attacks to meet the test for admissibility. Specifically, the State argued the following similarities existed:

- The incidents occurred twenty-one (21) months apart
- Both the 2012 victims and the 2010 victim lived in a first floor apartment in an apartment complex located on Semoran Boulevard in Orlando, about five miles apart
- Both sexual assaults began with burglaries to the apartments
- Both assaults took place in the early morning hours
- In both cases, the assailant demanded cash and cell phones
- In both cases, the assailant wore gloves and "either a mask or a shirt to conceal his appearance"

- In both cases, the assailant threatened the victims with a knife
- In both cases, the assailant "had a difficult time maintaining an erection"
- In both cases, the assailant placed a pillow over the head of the victim "during the course or just before the sexual battery took place"

See ROA 370.

Trial Counsel argued there was a significant difference between the two incidents, namely, the description given to police of the assailant. *See* ROA 378. Both victims in the 2012 incident described the attacker as a large, black male who stood taller than six feet while the victim in the 2010 incident described her attacker, who she said she recognized from seeing him about three days before the attack and was speaking Spanish, as a heavy-set Hispanic male standing roughly five feet, eight inches tall. *Id.*, at 378.

The Trial Court ruled the State could introduce the evidence to establish identity (which the State never argued it was trying to use the evidence to establish), lack of mistake (never proffered as a defense), common plan or scheme, and modus operandi (neither of which was ever argued by the State as a reason it wanted to introduce the evidence). Specifically, the Trial Court made the following findings of fact:

- Similar locations on Semoran Boulevard (less than five miles apart)
- There was a presumption that there was forced entry in both cases
- Both incidents took place in the early morning hours
- Demand for cell phones and money
- Either a mask of face covering
- Perpetrator wielded a knife
- Perpetrator in each had difficulty maintaining an erection
- Use of a pillow "to silence the victim or prevent them from crying out"

See ROA 385-86.

The Trial Court's findings of fact are not supported by the record. First, Ms. Goble testified she believed her window was open because she did not hear the glass break. In addition, crime scene technicians who examined the window testified there was no sign of forced entry. Ms. Alvarado, the victim in the 2010 incident, could not say how the perpetrator entered her apartment, a fact the Trial Court acknowledged. Based upon the clear evidence, the Trial Court cannot conclude there was forced entry in both incidents.

Second, the Trial Court fails to even acknowledge the striking dissimilar descriptions of the alleged attackers in each case. The victims in both described two perpetrators who could not be more different – a large black male standing taller than six feet compared with a heavy-set Hispanic male standing no taller than five feet, eight inches. Third, Ms. Waag and Ms. Goble described their attacker wearing leather gloves while Ms. Alvarado described her attacker wearing cloth or cotton gloves. Again, a fact the Trial Court ignores.

The Trial Court improperly conflates "difficulty maintaining an erection" with "failing to get an erection." Ms. Waag testified her attacker had difficulty maintaining an erection (despite the fact that he was wearing a condom) while Ms. Alvarado testified her attacker never had an erection and in fact, during the attack, left her to

go to the bathroom, presumably to masturbate, according to Ms. Alvarado, before returning and continuing the assault (she asked the attacker to put on a condom). Fourth, the Trial Court erroneously found the use of a pillow in both incidents was to silence the victims or keep them from crying out when there was no evidence this was the reason. Fifth, the two assaults took place more than twenty-one months apart, which the Trial Court briefly acknowledged but them dismissed as not relevant to the analysis.

Based upon the above, the Trial Court's findings of fact are not supported by the record evidence. Much of the issue with the Trial Court's findings are that they were based upon statements made by the victims to police and not an evaluation of the actual testimony the victims offered at trial. Further, the State told the Trial Court the purpose of admitting the collateral crime evidence was to counter a consent or mistake defense, neither of which was argued at trial. The State was able to prove lack of consent from its principle witnesses, Ms. Goble and Ms. Waag.

Notwithstanding its factual findings, none of the so-called similarities are more than "mere general similarities" and do not have "some special character" or are "so unusual as to point to the defendant." *See Wilbur v. State*, 64 So.3d 756 (Fla. 5th DCA 2011). There is no "sufficiently unique pattern of criminal activity" to justify admitting the 2010 incident evidence. *See Chandler v. State*, 442 So.2d 171, 173

(Fla. 1983). "Collateral crime evidence is not relevant and admissible merely because it involves the same type of offense." *See Peek v. State*, 488 So.2d 52, 55 (Fla. 1986).

The Trial Court's ruling identifies as reasons to introduce the evidence as identity or proof of common plan or scheme, or mode of operation. Each is a proper reason to admit collateral crime evidence provided it is relevant and can pass the strict standard of relevance required. *See Smith v. State*, 743 So.2d 141, 142. (Fla. 4th DCA 1999). "The most common basis of proving the identity of the person who committed the crime in question is from evidence that collateral crimes were committed by the use of a distinctive modus operandi which was the same as that used in the crime in question." *Id.* Using modus operandi to establish identity requires both the similarity between the offenses "and the unusual nature of the factual situations being compared." *See Drake v. State*, 400 So.2d 1217, 1219 (Fla. 1981).

In this case, the similarities were simply general and there was nothing unusual about the incidents "to render the similar facts legally relevant." *See Drake*, 400 So.2d at 1219. For example, there is nothing unusual or of a special character that a would-be thief would demand cash and cell phones during a robbery. There is nothing unusual or of a special character about an assailant using a mask or shirt to conceal his identity. Ms. Alvarado first stated her attacker used a shirt to cover his face and later, at trial, said her attacker was wearing a mask.

There is nothing unusual or of a special character that the victims lived in a ground floor apartment or that the apartment complexes happened to be located not within the same block or same neighborhood but rather five miles apart on a major north-south roadway upon which there are literally dozens of such apartment complexes. Finally, there is nothing unusual or of a special character that the alleged attackers used a knife as a weapon.

There was no evidence the knife used was anything more than a simple knife because none of the victims saw the knife or were able to provide any kind of description such as the knife having a particular type of blade or an unusual handle. Even if, arguendo, there was any such evidence, it is not so unusual or of a special character that an assailant would use a weapon to subdue a victim.

There was no evidence that there was any forced entry in either incident. Ms. Goble said she believed her bedroom window, through which her attacker entered the apartment, was unlocked because she did not hear any glass break. Ms. Alvarado testified she did not know how her attacker entered her apartment. Even if, arguendo, there was any such evidence, it is not so unusual or of a special character that a home invasion would involve forced entry.

There was testimony from Ms. Waag that her attacker was wearing a condom but appeared to be having a difficult time *maintaining an erection* during the assault. Ms. Alvarado testified her attacker *could not get an erection* during her assault. She

testified her attacker could not get erect which was why he was forcing her to perform oral sex on him. When that failed, her attacker stopped the assault, went to the bathroom where she heard "heavy breathing" that she assumed meant her attacker was masturbating, and then returned to continue the assault. Her attacker still was not erect.

There was no testimony or evidence offered to suggest these dissimilar circumstances were so unusual or of a special character to allow the introduction of the collateral crime evidence. Certainly, at the very least, the circumstances must be more than generally similar. Additionally, where there is only one or two points of general similarity, it is still not relevant because they don't "pervade the compared factual situations. *See Wilbur*, 64 So.3d at 756.

Here, there was nothing "unique or distinctive about the incidents which would make them admissible under *Williams*." *See Smith*, 743 So.2d at 143. Here, the *Williams* rule evidence did not bear a "striking similarity to the charged offense" and thus not relevant. *See Heuring,* 513 So.2d at 124. It was error for the Trial Court to admit evidence from the 2010 incident.

3. The improperly admitted *Williams* rule evidence was permitted improperly to become a major aspect and focus of the trial.

Collateral crime evidence becomes an impermissible feature of the trial when inquiry into the 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." *See Durousseau v. State*, 55 So.3d 534, 551 (Fla. 2010) citing *Williams*, 117 So.2d at 475. Allowing the collateral crime evidence to become an overwhelming feature of the trial is reversible error. *See Bush v. State*, 690 So.2d 670, 673 (Fla. 1st DCA 1997).

The State's case-in-chief fairly can be characterized as a trial within a trial. Appellant went to trial accused of various crimes related to a 2012 incident involving two victims. One of the victims, Ms. Waag, was sexually assaulted. The victims, Ms. Waag and Ms. Goble, could not identify their attacker. Each described him as a large black male standing at least six feet tall. The detective in charge of the investigation said the case went cold about three months later because there was no suspect.

After the State presented the testimony of the victims and several witnesses detailing the investigation that turned up no suspects or evidence to make an arrest, the State proceeded to put on a series of witnesses related to the 2010 incident involving the assault of Ms. Alvarado. She testified extensively at trial, relaying at different points testimony that varied from her prior statements to police. The State placed before the jury four additional *Williams* rule witnesses, all in sequence and all designed to prosecute the 2010 assault before the jury charged only with considering the 2012 assault.

Here, the introduction of the *Williams* rule evidence was for no other reason other than to demonstrate the bad character of the Appellant. It became a feature of the trial in order to bolster the State's otherwise weak case against Appellant for the 2012 assaults for which he stood trial. The State introduced the evidence so the jury could convict Appellant for the 2010 assault and not for the crimes for which he stood trial. The State went far beyond offering relevant evidence to support its stated purpose for introducing the evidence. The *Williams* rule evidence became a focus of the trial within a trial and the Trial Court erred in permitting this to take place. Reversal is required.

4. The improperly admitted *Williams* rule evidence was more prejudicial than probative.

As with any other relevant evidence, evidence of a prior bad act is inadmissible if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." *See McLean*, 934 So.2d at 1255-56; *see also* §90.403, Fla. Stat. (2005); *Williams*, 621 So.2d at 415.

Before admitting collateral crime evidence, the Trial Court *must make four determinations*: whether there is sufficient evidence that defendant committed the collateral crime; whether the collateral crime meets the similarity requirements necessary to be relevant; whether the collateral crime is too remote, so as to diminish its

relevance; and *whether the prejudicial effect of the collateral crime substantially outweighs its probative value*. *See Peterson v. State*, 2 So.3d 146, 153 (Fla. 2009) (emphasis added); *see also Robertson*, 829 So.2d at 907–08. Similarity between the charged crime and the collateral offense "is a critical consideration" for the Trial Court's probative value versus prejudice analysis. *See McLean*, 934 So.2d at 1259. "The trial courts are gatekeepers in ensuring that evidence of prior acts … are not so prejudicial that the defendant is convicted based on the prior sexual misconduct." *Id.*

Trial Counsel argued that even if the so-called *Williams* rule evidence was relevant, the Trial Court still had to make a determination that its probative value substantially outweighed its prejudicial effect. *See* ROA 379. The evidence of the 2010 assault, he argued, was so prejudicial that it would be difficult to say "the prejudicial effect would be outweighed by the probative value to the State." *Id.*, at 380.

The Trial Court never made a determination on the record required by Peterson. The Trial Court's only consideration was its similarity analysis. See ROA 386. However, the similarity between the 2012 charged offenses and the 2010 collateral crime is highly questionable as noted above. There was no characteristic between the two events that was so unique or of a special nature to make the 2010 assault facts relevant.

The Supreme Court has stated that the less similar the prior acts, the less relevant they become and as a result, there is less likelihood they should be admitted. *See McLean*, 934 So.2d at 1259. And where the similarities between the charged crime and the collateral crime diverge, there is a far greater chance the probative value "will be substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." *Id.*; *see also* §90.403.

The Trial Court ignored the critical probative value versus prejudicial effect analysis before deciding on "general similarity" grounds that the 2010 collateral crime the State sought to introduce was relevant to some material issue in prosecuting the 2012 charged crimes against Appellant. In this case, the Trial Court erred in admitting evidence of the 2010 assault because the probative value to the State was far outweighed by the prejudice to the Appellant. It was error to admit the so-called *Williams* rule evidence and this Court should reverse.

CONCLUSION

Based upon the foregoing, this Court should vacate the Judgment and Conviction of the Trial Court, remand this matter with instructions to enter an order dismissing the case, or in the alternative, for a new trial, and for such other and further relief as this Honorable Court shall deem just, fair, and equitable.

DATED this 9th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email this 9th day of June, 2016, to the Attorney General's Office in the State of Florida.

/s/ *Mark K. McCulloch*
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Mark K. McCulloch*
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