

# FLORIDA LAW WEEKLY SEX CRIMES EDITION BY DENNIS NICEWANDER

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Mendez v. State, 31 Fla. L. Weekly D1793 (Fla. 5<sup>th</sup> DCA 2007):

State offered clear and convincing evidence of prior incident of child molestation by defendant, so as to support admission of evidence of the incident as collateral crime evidence, in trial for **sexual** battery on a victim less than 12 years of age, and lewd and lascivious molestation; although prior victim could not identify defendant, he was able to identify his unique hat and stated that defendant always wore the hat and was the only person in remote location with such a hat, and another witness observed defendant leaving bunkhouse of camp on night in question and remain gone for unusually long period of time, and defendant's explanation was not credible.

Probative value of collateral crime evidence involving prior incident of child molestation by defendant outweighed danger of unfair prejudice, in trial for **sexual** battery on a victim less than 12 years of age, and lewd and lascivious molestation; defendant had a similar relationship with both victims, he gained employment that gave him access to young victims, he was a counselor to each and had custodial authority over them at the time of the offenses, the incidents were only two to three years apart, and both occurred in the victims' abodes.

Discussion: The court gave a concise summary of the procedures to consider when determining the admissibility of evidence pursuant to 90.404(2)(b):

*In McLean, our high court confronted a challenge to this statute on due process grounds. In upholding the constitutionality of the statute, the court adopted several standards to ensure that the use of this type of evidence does not infringe upon the due process rights of an accused. First, the court required that the evidence of the collateral crime be proven by clear and convincing evidence. Second, the court required that the trial court balance the probative value of the evidence against the danger of unfair prejudice, pursuant to section 90.403, Florida Statutes. Third, the court cautioned that the collateral crime evidence must not become a “feature” of the trial. Finally, the court required that, upon request, the jury be instructed as to the limited purpose for which the evidence may be considered.*

Peterson v. State, 31 Fla. L. Weekly D1780 (Fla. 4<sup>th</sup> DCA 2007):

There was no evidence of actual victim injury presented at the original sentencing hearing, and in fact, the charge was reduced to attempted sexual battery rather than sexual battery. Therefore, we find it was error for the trial court to add forty points for victim injury.