IN THE SUPREME COURT OF FLORIDA

MARK FRANKLIN BARRENTINE,

Petitioner,

vs. CASE NO. 70,446

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WILLIAM A. HATCH
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, was the defendant in the trial court and the appellant in the First District Court of Appeal. He will be referred to as petitioner in this brief. Respondent, was the prosecutor in the trial court and the appellee in the First District Court of Appeal. He will be referred to as respondent or the state in this brief. A one volume record on appeal will be referred to as "R", followed by the appropriate page number in parentheses. A two volume transcript will be referred to as "T". Attached hereto as an appendix is the opinion of the first district.

STATEMENT OF THE CASE AND FACTS

Respondent hereby adopts petitioner's statement of the case and facts as accurate for the limited purpose of review of the issue before this court.

SUMMARY OF ARGUMENT

Respondent argues that the decision of the lower tribunal in the instant case is correct, because the First District has correctly followed Lerma in limiting its construction to sexual battery cases. The lower tribunal is correct in holding that phychological or emotional trauma is not an inherent component of lewd assault under §800.04, Fla. Stat. and thus can be used as a reason for departure.

In the alternative respondent argues that both extraordinary circumstance and discernable physical manifestation not normally inherent in the crime of lewd assault are evident and justify departure.

ARGUMENT

ISSUE

THE LOWER TRIBUNAL WAS CORRECT IN HOLDING THAT EMOTIONAL TRAUMA WAS NOT INHERENT IN LEWD AND LASCIVIOUS ASSAULT ON A CHILD AND SO COULD BE USED AS A REASON FOR DEPARTURE.

The sole issue before this court is whether the decision in the lower tribunal in the instant case is inconsistent with this court's ruling in Lerma v. State, 497 So.2d 736 (Fla. 1986) that "emotional hardship can never constitute a clear and convincing reason to depart in a sexual battery case because nearly all sexual battery cases inflict emotional hardship on the victims" Lerma at 739.

In the instant case, petitioner was convicted of lewd and lascivious assault or act upon or in the presence of a child under §800.04, Fla. Stat. (R 62).[1]

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[1] Section 800.04 reads, in pertinent part:

> **800.04 Lewd, Lascivious, or Indecent Assault or Act Upon or In Presence of Child. . .** Any person who:
>
> **(1)** handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner. . . or
>
> **(3)** knowingly commits any lewd or lascivious act in presence of any child under the age of 16 years without committing the crime of sexual battery

In Lerma this court's decision was limited in part to an analysis of whether phychological trauma was inherent in the crime of sexual battery. Petitioner now argues that Lerma be applied to other crimes not addressed in that decision "which, like sexual battery, always cause emotional trauma". (Petitioner's brief at p. 5).

In the instant case, the lower tribunal has correctly distinguished between sexual battery cases prosecuted under §794.011(1)(h), Fla. Stat. and §800.04 supra, relying on their reasoning enunciated in Knox v. State, 498 So.2d 534, 535 (Fla. 1st DCA 1986).

In Knox the district court considered whether to extend the Lerma rationale and hold that emotional trauma is inherent in child abuse cases. The court noted that every sexual battery involved the:

> "oral, anal, or vaginal penatration by, or union with, the sexual organ of another or the anal or vaginal penatration of another by any other object. . ." §794.011(1)(h), Fla. Stat.

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footnote 1 cont.

> is guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

The court further noted that until a few years ago, rape was a capital offense in Florida.

In Knox the district court posed a hypothetical to illustrate how it is possible under the aggravated child abuse statute for an 18 year old to commit an act on a 17 year old youth which would qualify as child abuse under §827.03(1)(a). The hypothetical assumed that an 18 year old intentionally touches a 17 year old against his will by use of a deadly weapon. The district court observed that such an act would technically be aggravated child abuse under the statute and that "one can engage in conduct which constitutes aggravated child abuse, but which is, at least by comparison with sexual battery, relatively minor". Knox at 535.

The district court's hypothetical in Knox also suggests the obvious fact that many 17 year olds under these circumstances would suffer no phychological trauma at all. They might be mad or offended and punch the 18 year old in the nose but would suffer no phychological trauma. Nevertheless, the 17 year old has been the victim of aggravated child abuse under the law. It is obvious that the first district was correct in holding in Knox that emotional trauma is not inherent in aggravated child abuse.

The first district relies on its reasoning in Knox for holding that this court's ruling in Lerma does not extent to lewd and lascivious assault on a child under §800.04, Fla. Stat.

Their reasoning suggests that there are clear and distinguishing factors between the sexual battery statute, 794.011, Fla. Stat. and §800.04, Fla. Stat. involved in the instant case. The most obvious difference is that a person may violate §800.04 by committing a lewd or lascivious act in the presence of a child under 16, whereas sexual battery requires "oral, anal, or vaginal penatration by, or union with the sex organs of another or anal or vaginal penatration of another by any other object". . . §794.011(1)(h), Fla. Stat.

It is therefore reasonable to assume, as this court did in Lerma, that sexual battery almost always involves emotional trauma because of the physical trauma which necessarily accompanies that crime. Lewd and lascivious assault on a child under §800.04, however, may involve no physical violation, but, merely the committing of a lewd act involving no victim contact. Worling v. State, 484 So.2d 94 (Fla. 5th DCA 1986). Whether an act constitutes a "lewd and lascivious" act is clearly a subjective determination depending on the changing mores of society and the eye of the beholder. It can not be defined, but must be considered on a case by case basis. Egal v. State, 469 So.2d 196 (Fla. 2d DCA 1985). An act considered lewd and lascivious in one generation may not be considered so in the next and the circumstances surrounding the act must be determined in each case. For instance, nudity in a nudist colony would not be

considered lewd, but, in the middle of a shopping mall, a different conclusion would probably be reached.

In the instant case, petitioner's claim that all victims of lewd assault under §800.04, Fla. Stat. suffer phychological damage is specious; a group of street-smart sizable and heterosexual 15 year old boys might well laugh at a young female prostitute who disrobed herself and committed lewd acts for their amusement. There are many possible hypotheticals which would illustrate that phychological trauma is not an inherent component of §800.04, Fla. Stat., for that crime, may be charged and proved- as it was without objection in the instant case-either by showing that the defendant lewdly assaulted the victim or by showing that the defendant performed a lewd act in the victim's presence. A lewd act might cause phychological trauma in some children while in others, the same act would be deemed amusing or even completely misunderstood by a child of very tender years. Thus, it can not be said that phychological trauma is an inherent component of lewd assaults or acts committed under §800.04, Fla. Stat.

Petitioner argues that Connell v. State, 502 So.2d 1272 (Fla. 2d DCA 1987) recognized that Lerma also applies to lewd assaults. In fact, the defendant in Connell was convicted of both sexual battery and lewd assault and the decision does not distinguish between the two in applying Lerma. However, the

second district has specifically adopted the first district's reasoning in Knox and quotes approvingly from the first district's holding in that case that Lerma is limited to sexual battery cases. Zordan by and through Zordan v. Page, 500 So.2d 608, 611-612 (Fla. 2d DCA 1987).

Since phychological trauma can not reasonably be considered an inherent component of crimes committed under §800.04, Fla. Stat. "emotional hardship on the victim may. . . support departure," Hankey v. State, 485 So.2d 827, 828 (Fla. 1986), if the victim fear and resulting creation of phychological trauma is [not]. . . an inherent component of the crime" for which the defendant stands convicted, State v. Cote, 487 So.2d 1039 (Fla. 1986).

Should this Court find that psychological trauma is a component of the crime of lewd assault as Petitioner argues respondent argues that extraordinary circumstances and discernable physical manifestations of the victim resulting from psychological trauma justify departure in the instant case. State v. Rosseau, 509 So.2d 281 (Fla. 1987). In Rosseau this Court stated that trauma which usually and ordinarily results from being the victim of a crime is inherent in the crime and cannot be used for departure. However, when the victim trauma results from extraordinary circumstances clearly not inherent in the crime or when the victim has a discernable physical

manifestation resulting from the trauma it may constitute grounds for departure. Rosseau, at 284.

In the instant case the fact that the 14 year old victim had been subjected to a homosexual attact was "all over the school". (T 379). His schoolmates called him names and treated him strange and he has lost most of his friends and girlfriends. (T 378-379). The victim has been suspended from school three times since the incident and has run away from home and no longer wants to live in his home. (T 377, 380). The victim's mother testified that her son had been a "very lovable kid" but now he has trouble showing emotion and is very moody. Certain words like "gay" bring tears to his eyes. The victims' parents are seeking counseling for him because he is "just a different person." (T 377).

Respondent argues that the impact of this homosexual assault on this adolescent boy and the devastating impact it has had on his life from the cruel reaction of his peers meets the extraordinary circumstance criteria of State v. Rosseau.

It would be hard to overestimate the impact on this 14 year old boy who is called "a queer" by his schoolmates as a direct result of this crime. In addition the physical manifestation criteria resulting from this boy's trauma is also met under State v. Rosseau. The victim's whole personality and behavior has changed. (T 396-381). The testimony of the victim and his mother

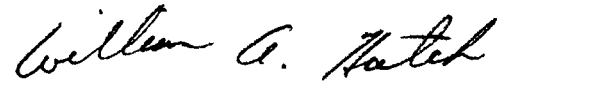
reveal that extraordinary circumstances clearly not inherent in the crime exists in the instant case. Most victims of a lewd assault would receive the sympathy they deserve from understanding friends to help soothe whatever psychological trauma the victim might suffer. In other cases the crime might not become public knowledge to avoid possible victim embarrassment. In the instant case the homosexual assault is "all over the school" of a 14 year old boy with devastating effects on his life. As a result the victim has suffered in a way perhaps only adolescents can suffer when shut out and ridiculed by friends. There extraordinary circumstances and the discernable physical manifestations resulting from the victim's trauma are not usual and inherent results from lewd assault. Thus departure is justified based on psychological trauma.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this court hold that emotional trauma can serve as a valid reason for departure in a lewd assault sentence, and affirm petitioner's sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



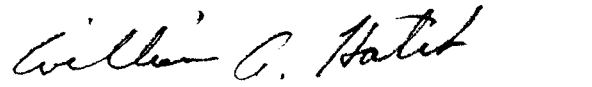
WILLIAM A. HATCH
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 22 day of October, 1987.



WILLIAM A. HATCH
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT