Filing # 55313214 E-Filed 04/19/2017 03:25:53 PM

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC16-1426
	)	
RONNIE J. KNIGHTON,	)	
	)	
Respondent.	)	
	)	
_____	)	

RECEIVED, 04/19/2017 03:28:26 PM, Clerk, Supreme Court

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS. I

AUTHORITIES CITED. ii

PRELIMINARY STATEMENT. 1

STATEMENT OF THE CASE AND FACTS. 2

SUMMARY OF THE ARGUMENT. 3

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN THIS PROSECUTION FOR LEWD OR LASCIVIOUS BATTERY WHEN IT DENIED MR. KNIGHTON'S REQUEST THAT THE JURY BE INSTRUCTED ON THE PERMISSIVE LESSER INCLUDED OFFENSE OF UNNATURAL AND LASCIVIOUS ACT. 4

Standard of review. 5

Where sexual intercourse is not involved, unnatural act is a lesser offense of lewd or lascivious battery. 6

Sexual intercourse between an adult and a child is "unnatural." 8

Harris v. State *does not rest on valid legal analysis*. 11

CONCLUSION. 14

CERTIFICATE OF FONT SIZE.. 14

CERTIFICATE OF SERVICE. 15

AUTHORITIES CITED

CASES PAGE

Funiciello v. State, 179 So.3d 388
(Fla. 5th DCA 2015). 7, 9, 10, 12

Harris v. State, 742 So.2d 835
(Fla. 2d DCA 1999). 11-13

Horn v. State, 120 So. 3d 1
(Fla. 1st DCA 2012). 7, 12 13

Jones v. State, 640 So.2d 1084
(Fla. 1994). 10

Kelley v. State, 204 So.3d 37
(Fla. 1st DCA 2016). 8, 9-10

Khianthalat v. State, 974 So.2d 359
(Fla. 2008). 5-6

Knighton v. State, 193 So.3d 115
(Fla. 4th DCA 2016). 10

Leveille v. State, 927 So.2d 1008
(Fla. 4th DCA 2006). 7, 12

Sanders v. State, 944 So.2d 203
(Fla. 2006). 5

Schuster v. State, 17 So.3d 304
(Fla. 4th DCA 2009). 7

Sherrer v. State, 898 So. 2d 260
(Fla. 1st DCA 2005). 7, 12

State v. Espinosa, 686 So.2d 1345
(Fla. 1996). 5

State v. Herr, 97 Idaho 783
554 P.2d 961
(1976). 10

Williams v. State, 627 So. 2d 1279
(Fla. 1st DCA 1993). 8, 13

Wong v. State, 42 Fla. L. Weekly S250
(Fla. March 2, 2017). 6-8, 12

FLORIDA STATUTES

Section 800.02. . . . . .6, 11, 12, 13

Section 800.04. . . . . .8, 11, 12, 13

Section 800.04(1)(a). 11

Section 800.04(2). 10

Section 800.04(3) (1997). 11

Section 800.04(4). 6, 11

OTHER AUTHORITY

Fla. Standard Jury Instructions in Criminal Cases 11.10. 8

Fla. Standard Jury Instructions in Criminal Cases 11.8. 9

PRELIMINARY STATEMENT

Petitioner was the Appellee in the Fourth District Court of Appeal and the prosecution in the lower tribunal. Respondent, Ronnie J. Knighton, was the respondent and the defendant, respectively. In the brief, the parties will be referred to by name.

The following symbols will be used:

"R"	Record on appeal, followed by the appropriate volume and page numbers

STATEMENT OF THE CASE AND FACTS

Mr. Knighton was convicted of one count of lewd or lascivious battery based on allegations that he had sexual intercourse with the minor victim. On direct appeal, the Fourth District Court of Appeal reversed his conviction on the grounds that the trial court reversibly erred when it refused to instruct the jury on the permissive lesser included offense of committing an unnatural and lascivious act. The prosecution had objected to Mr. Knighton's request for the instruction on the grounds that "there is nothing 'unnatural' about traditional penile-vaginal intercourse," even where it is between a child and an adult. The appellate court identified the questions surrounding this issue as:

> (1) whether Knighton committed an unnatural and lascivious act; and (2) if so, whether the offense of unnatural and lascivious act is a permissive lesser included offense to lewd or lascivious battery.

The District Court answered both these questions affirmatively and ordered that Mr. Knighton be given a new trial. The District Court denied the State's motion for rehearing and/or rehearing en banc on June 30, 2016, and denied the State's motion to stay or recall the mandate. The State timely noticed its intent to seek review in this Court on August 1, 2016.

SUMMARY OF THE ARGUMENT

This Court has already held that unnatural and lascivious act is a permissive lesser included offense of lewd or lascivious battery in cases which do not involve sexual intercourse. There is nothing "natural" about penile-vaginal intercourse between an adult and a child. Therefore, unnatural or lascivious act is also a permissive lesser included offense of lewd or lascivious battery where sexual intercourse is alleged. This conclusion has already been reached by the First, Fourth, and Fifth District Courts of Appeal.

In the sole *contra* decision on this issue, the Second District Court of Appeal recognized that only **adult** male and female sexual intercourse was rightly deemed not "unnatural." The Court nevertheless found that unnatural and lascivious act applied to different factual situations than those which would support a prosecution for lewd or lascivious battery. This reasoning has already been rejected by this Court and is inconsistent with the law which applies to the giving of instructions on lesser included offenses.

The Fourth District Court of Appeal therefore correctly decided that unnatural and lascivious act is a permissive lesser included offense of lewd or lascivious battery, and the trial court in the instant case committed reversible error when it refused to give the instruction at Mr. Knighton's request.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN THIS PROSECUTION FOR LEWD OR LASCIVIOUS BATTERY WHEN IT DENIED MR. KNIGHTON'S REQUEST THAT THE JURY BE INSTRUCTED ON THE PERMISSIVE LESSER INCLUDED OFFENSE OF UNNATURAL AND LASCIVIOUS ACT.

Mr. Knighton was convicted of one count of lewd or lascivious battery based on allegations that he had sexual intercourse with the minor victim. Specifically, the information alleged that he

> did unlawfully engage in sexual activity with [victim], a person of 12 years of age or older but less than 16 years of age by causing his penis to penetrate and/or have union with [victim's] vagina. . .

(R3/92).

At the conclusion of his trial, his request that the jury be instructed on the lesser permitted offense of unnatural and lascivious act (R7/528) was denied (R7/531), as was his request for an instruction on the lesser offense of battery (R7/532). Mr. Knighton was convicted as charged.

On direct appeal, the Fourth District Court of Appeal correctly reversed Mr. Knighton's conviction based on its conclusion that the refusal to instruct the jury as requested by Mr. Knighton constituted reversible error. The State agrees that this issue was preserved for review. Initial brief on the merits at 4.

Standard of review

A trial court's decision on whether to give a requested jury instruction on a permissive lesser offense is generally reviewed for an abuse of discretion. *See State v. Espinosa*, 686 So.2d 1345, 1347 (Fla. 1996) ("[T]he giving of an instruction on a lesser offense is a matter of discretion for the trial judge, who must determine whether the charging document and evidence at trial support the giving of the instruction on the lesser offense as a permissive lesser-included offense.").

However, where the facts are undisputed and the legal determination to be made on appeal is whether an offense is a permissive lesser included offense to the crime charged, the standard of review is de novo. *See Khianthalat v. State*, 974 So.2d 359, 360 (Fla. 2008) (whether the defendant was entitled to a jury instruction as a permissive lesser included offense was a matter involving a legal determination based upon undisputed facts and, therefore, the standard of review was de novo).

"A permissive lesser included offense exists when the two offenses appear to be separate on the face of the statutes, but the facts alleged in the accusatory pleadings are such that the lesser included offense cannot help but be perpetrated once the greater offense has been." *Sanders v. State*, 944 So.2d 203, 206 (Fla. 2006) (quotation marks, brackets, and citation omitted). "Upon request, a trial judge must give a jury instruction on a permissive lesser included offense if the following two

conditions are met: (1) the indictment or information must allege all the statutory elements of the permissive lesser included offense; and (2) there must be some evidence adduced at trial establishing all of these elements." *Khianthalat*, 974 So.2d at 361 (citations and quotation marks omitted).

> *Where sexual intercourse is not involved, unnatural or lascivious act is a lesser offense of lewd or lascivious battery.*
>
> Section 800.02, Fla. Stat. provides:
>
> > A person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree. . . . A mother's breastfeeding of her baby does not under any circumstances violate this section.

Mr. Knighton maintains that this offense is a permissive lesser included offense of the crime with which Mr. Knighton was charged, lewd or lascivious battery, which is defined in Section 800.04(4), Fla. Stat.:

> A person commits lewd or lascivious battery when he or she:
>
> 1. Engages in a sexual activity with a person 12 years of age or older but less than 16 years of age. . . .

In *Wong v. State*, 42 Fla. L. Weekly S250 (Fla. March 2, 2017), this Court recently reviewed a case where the defendant was charged with lewd or lascivious molestation in that he "did intentionally touch in a lewd or lascivious manner the genitals and/or genital area" of three victims and with lewd or lascivious battery by

placing the victim's penis in his mouth. Thus, in each count it was alleged that the defendant made oral and skin contact with the victim.

This Court held that these allegations were sufficient to allege all the elements of unnatural and lascivious act. And there was evidence – the testimony of the witnesses – to support those allegations. This Court therefore concluded that committing an unnatural act was a permissive lesser offense of the offenses charged, recognizing that this conclusion was one which had been consistently reached by the courts of this State, citing *Funiciello v. State*, 179 S o.3d 388 (Fla. 5th DCA 2015); *Horn v. State*, 120 So.3d 1 (Fla. 1st DCA 2012); *Sherrer v. State*, 898 So.2d 260 (Fla. 1st DCA 2005); *Schuster v. State*, 17 So.3d 304 (Fla. 4th DCA 2009); *Leveille v. State*, 927 So.2d 1008 (Fla. 4th DCA 2006). As a result, unnatural and lascivious act is listed as a category two permissive lesser included offense of both lewd or lascivious molestation and lewd or lascivious battery in the Florida Standard Jury Instructions in Criminal Cases 11.10.

Consequently, *Wong* has unequivocally answered the following questions raised in this case: (1) in cases not involving penile-vaginal intercourse, unnatural or lascivious act is a permissive lesser included offense of lewd and lascivious battery; and (2) in cases not involving penile-vaginal intercourse, an information which alleges specific sexual activity where there is evidence supporting those allegations

is sufficient to support the giving of an instruction on the lesser offense of unnatural and lascivious act.

The arguments made by the State challenging the sufficiency of the charging document to allege the elements of an unnatural act, initial brief on the merits at 6-10, have thus already been decided adversely to the State by this Court in *Wong*. *See also Kelley v. State*, 204 So.3d 37 at n. 1 (Fla. 1st DCA 2016) ("We are not persuaded by the State's insistence that the word "unnatural" must explicitly appear in an information or the act is not unnatural. . . ."); *Williams v. State*, 627 So.2d 1279 (Fla. 1st DCA 1993) (information which alleged that defendant forced victim to touch his penis and masturbating in front of victim sufficiently alleged elements of unnatural and lascivious act).

Sexual intercourse between an adult and a child is "unnatural."

Wong specifically left open for resolution in another case the situation now presented: whether unnatural and lascivious act is a proper lesser included offense of lewd or lascivious battery where the behavior underlying the Section 800.04 prosecution was penile-vaginal sexual intercourse between a child and an adult. Nevertheless, it is clear that the rationale of the cases *Wong* cited with approval did not exclude such crimes from their scope.

Thus, in *Funiciello v. State*, 179 So.3d 388, the defendant had been charged with two counts of lewd or lascivious battery, one of which alleged that the defendant digitally penetrated and the second of which alleged the adult male's **penile union or penetration with the female child victim's vagina**. 179 So.3d at 390. The Fifth District Court of Appeal noted that "unnatural" is defined in the Florida Standard Jury Instructions in Criminal Cases 11.8 as "not in accordance with nature or with normal feelings or behavior." 179 So.3d at 390. With this definition in mind, the Court had no trouble deciding that

> the trial court reversibly erred in refusing to issue an instruction on the lesser-included offense of unnatural and lascivious act because digital penetration **and sexual intercourse between an adult perpetrator and a child victim constitute unnatural and lascivious acts** in that such conduct is not in accordance with nature or with normal feelings and are lustful acts performed with sensual intent on the part of the defendant.

179 So.3d at 391 (emphasis added).

The First District Court of Appeal has likewise recently expressly adopted this position. In *Kelley v. State*, 204 So.3d at 38, involving allegations of "**intercourse**, oral sex, and touching" (emphasis added), it held:

> Adults having lascivious sexual interaction with children is simply not natural or in accord with normal feelings or behavior.

Kelley cited the decision of the Fourth District Court in the instant case with approval. *Knighton v. State*, 193 So.3d 115, 117 (Fla. 4th DCA 2016), as well as the decision of the Fifth District Court of Appeal in *Funiciello*, 179 So.3d 388. *Cf. State v. Herr*, 97 Idaho 783, 788, 554 P.2d 961, 966 (1976) ("Under the Idaho statute, whether the conduct is an orthodox from of sexual gratification or a more exotic form is irrelevant. However 'natural' intercourse may be in certain contexts, we hold that when it is done with a child under sixteen. . . it constitutes conduct proscribed by the statute and punishable as such").

It is hard to argue against this conclusion. Certainly, while sexual intercourse between an adult male and female is undoubtedly completely normal, sexual intercourse between an adult and a child cannot be. For this reason, while adult intercourse is entirely legal so long as it is consensual on both sides, a child's consent is expressly not a defense to such a charge. Section 800.04(2), Fla. Stat. ("Neither the victim's lack of chastity nor the victim's consent is a defense to the crimes proscribed by this section"); *Jones v. State*, 640 So.2d 1084 (Fla. 1994) (State's compelling interest in protecting children outweighed minor's right to privacy, and statute prohibiting child from consenting to sexual conduct with an adult is not unconstitutional).

Moreover, Section 800.04 includes lewd or lascivious battery, the crime in the instant case, which is defined as "engaging in sexual activity with a person 12 years of age or older but less than 16 years of age," Section 800.04(4), Fla. Stat., where "sexual activity" is defined as ""the oral, anal, or **vaginal penetration by, or union with, the sexual organ of another**. . .", Section 800.04(1)(a), Fla. Stat. (emphasis added) – i.e., sexual intercourse, including penile-vaginal sexual intercourse. The fact that a child cannot consent to such intercourse represents a legal recognition that such intercourse between an adult and a child is "unnatural" and therefore unlawful.

Consequently, there is simply no logical or legal reason for excluding sexual intercourse between an adult and a child from the list of conduct which is rightly viewed as "unnatural," and all but one of the district courts which have addressed this question have so held.

Harris v. State *does not rest on valid legal analysis.*

Standing in solitary opposition to this authority is *Harris v. State*, 742 So.2d 835 (Fla. 2d DCA 1999), which upheld the refusal to instruct the jury on unnatural and lascivious act where the defendant was charged with violating Section 800.04(3), Fla. Stat. (1997), by committing an act defined as sexual battery upon a child under the age of sixteen years. *Harris* considered the history of Section 800.02, proscribing "unnatural and lascivious acts," which

> indicates that it has been applied to homosexual acts, bestiality, digital sex, and oral sex – anything other than **adult** male and female sexual intercourse.

742 So.2d at 838 (emphasis added).

Despite this recognition that only **adult** male and female sexual intercourse was rightly excluded from "unnaturalness" for purposes of Section 800.02, the Second District Court went on to affirm the denial of the instruction on the lesser included offense solely on the basis that

> the legislature must have intended for section 800.02 [unnatural and lascivious act] to be applied to different factual situations than would fall under section 800.04 [lewd or lascivious battery]. The term "unnatural" in 800.02 distinguishes 800.02 from 800.04, and implies something more than what is covered by 800.04.

Id. at 838.

This analysis has, however, been rejected by this Court in *Wong*: the types of sexual activity which *Wong* agreed would support an instruction on the lesser offense of unnatural and lascivious act (digital penetration [*Funiciello*]; touching the victim's breasts [*Horn*]; touching [*Sherrer*]; penetration of child's vagina with an object [*Leveille*]) were all covered by Section 800.04, but nevertheless also supported an instruction on Section 800.02. The fact that the defendant could not have committed the lesser offense of unnatural and lascivious act without also committing the greater

offense of lewd, lascivious, or indecent assault does not justify the refusal to instruction the lesser offense when supported by the information and the proof. *Williams v. State*, 627 So.2d at 1281; *Horn*, 120 So.3d at 2.

The basis for the decision in *Harris* is therefore inconsistent with established law related to the giving of an instruction on a lesser included offense and with cases interpreting the relationship between Section 800.04 and Section 800.02. Perhaps for this reason, *Harris* has not been cited by any court in this state for the proposition on which the State relies.

Accordingly, because sexual intercourse between an adult and a child is unnatural, unnatural and lascivious act is a permissive lesser included offense of lewd or lascivious battery committed by an adult male having penile-vaginal sexual intercourse with a child, as the Fourth District Court of Appeal correctly decided in the instant case. Because the trial court erroneously refused to instruct the jury on this lesser included offense, Mr. Knighton's conviction must be reversed and this cause remanded for a new trial.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Knighton requests that this Court AFFIRM the decision of the Fourth District Court of Appeal in this case.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically provided to this Court and furnished to Jeanine M. Germanowicz, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by e-mail at CrimAppWPB@myfloridalegal.com this 19th day of APRIL, 2017.

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