IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RONNIE J. KNIGHTON,

Respondent.

Case No. SC16-1426

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FOURTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

PAMELA JO BONDI
ATTORNEY GENERAL

CELIA A. TERENZIO
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 656879

JEANINE GERMANOWICZ
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0019607

Office of the Attorney General
1515 N. Flagler Drive, Ste. 900
West Palm Beach, FL 33401
Primary E-Mail:
CrimAppWPB@myfloridalegal.com
(561)837-5016
(561)837-5108

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

PAGE#

TABLE OF CITATIONS

AUTHORITIES CITED **PAGE#**

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the appellee in the Fourth District Court of Appeal (hereinafter the Fourth District) and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Knighton, the appellant in the Fourth District and the defendant in the trial court, will be referenced in this brief as Respondent or by proper name.

STATEMENT OF THE CASE AND FACTS

In the opinion at issue, the appellate court reversed Respondent Ronnie Knighton's conviction for lewd or lascivious battery, ruling that the trial court had erred by denying Respondent's request to give a jury instruction on a lesser included offense. Petitioner sought the discretionary jurisdiction of this Court to review the opinion of the appellate court. This Court accepted jurisdiction and ordered briefing on the merits.

The pertinent history and facts are set out in the decision of the lower tribunal which is included in the appendix to this brief. It also can be found at Knighton v. State, 193 So. 3d 115 (Fla. 4th DCA 2016).

In this case, the State charged Respondent with lewd or lascivious battery by penile penetration with the child victim's vagina after the child victim became pregnant with Respondent's

child. At trial, the defense requested the jury be instructed on the offense of "unnatural and lascivious act" as a lesser included offense of the charged crime of lewd or lascivious battery. The State objected, asserting the instruction was not warranted as traditional penile-vaginal intercourse did not qualify as an unnatural act. The trial court agreed.

On appeal, the Fourth District acknowledged the case of Harris v. State, 742 So. 2d 835 (Fla. 2d DCA 1999), which held that an adult male defendant who engaged in vaginal sexual intercourse with a female child was not entitled to an instruction on the lesser of unnatural and lascivious act. The Fourth District noted that the Second District had reasoned, in Harris, that the legislature intended Section 800.02, Florida Statutes, governing unnatural and lascivious act, to be applied to different factual situations than would fall under Section 800.04, Florida Statutes, governing lewd or lascivious battery. The Fourth District specifically noted that the Second District said that "[t]he term 'unnatural' in 800.02 distinguishes 800.02 from 800.04, and implies something more than what is covered by 800.04." Knighton, 193 So. 3d at 117, quoting Harris, 742 So. 2d at 838.

The Fourth District went on to note that the Fifth District "revisited the exact same issue" in Funicello v. State, 179 So. 3d 388 (Fla. 5th DCA 2015). Knighton, 193 So. 3d at 117, but reached a different result. The Fourth District decided to adopt the

reasoning of the Fifth District in Funicello and hold that sexual intercourse between an adult and a child qualified as an "unnatural and lascivious" act. Id. The Fourth District relied on Funicello to further hold that "the offense of unnatural and lascivious act was a permissible lesser included offense to lewd or lascivious battery." Knighton, 193 So. 3d at 117. That being so, the Fourth District ruled that the trial court erred in not giving an instruction on the offense of unnatural and lascivious act in the instant case, and the court reversed and remanded for further proceedings. Id. This Court then accepted jurisdiction to review the decision of the Fourth District.

SUMMARY OF ARGUMENT

Under the facts and circumstances of the instant case, where Respondent engaged in garden variety vaginal sexual intercourse with the victim, the offense of unnatural and lascivious act did not qualify as a permissive lesser included offense of the charged crime: lewd or lascivious battery. Therefore, Petitioner was not entitled to an instruction on the offense of unnatural and lascivious act. The appellate court's opinion ruling otherwise must be quashed by this Court and Respondent's conviction and sentence reinstated.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE AN INSTRUCTION ON UNNATURAL AND LASCIVIOUS ACTS AND THE FOURTH DISTRICT'S OPINION TO THE CONTRARY MUST BE QUASHED.

Respondent, who was charged with lewd or lascivious battery, requested an instruction on the permissive lesser included offense of unnatural and lascivious acts. (R7 528) The trial court declined to give it based on the facts and circumstances of this case, which involved garden variety vaginal sex. The District Court of Appeal of Florida, Fourth District (hereinafter the Fourth District), ruled that the trial court had erred and reversed Respondent's conviction and remanded for further proceedings in the trial court. The Fourth District held that the instruction should have been given because, in the opinion of the appellate court, vaginal sex between an adult and a child qualified as an "unnatural" act. Despite the opinion of the Fourth District, the trial court did not err in declining to give the requested instruction. Therefore, the Fourth District's opinion must be reversed and Respondent's conviction and sentence must be reinstated.

A. Preservation.

This issue appears to have been preserved by a request for an instruction on the lesser included offense of unnatural and lascivious act during the charge conference. (R7 528)

B. The Standard of Appellate Review.

Trial courts are generally accorded broad discretion in formulating jury instructions. See Westerheide v. State,

> 767 So.2d 637, 656 (Fla. 5th DCA 2000), rev. granted, 786 So.2d 1192 (Fla.2001) (citing Reyka v. Halifax Hosp. Dist., 657 So.2d 967 (Fla. 5th DCA 1995)). The standard of review to be applied to a decision to give or withhold a jury instruction is an abuse of discretion. See id. (citing Barton Protective Servs., Inc. v. Faber, 745 So.2d 968 (Fla. 4th DCA 1999)).

Barbour v. Brinker Florida, Inc., 801 So. 2d 953, 959 (Fla. 5th DCA 2001).

C. The Merits.

In this case, Respondent was charged with lewd or lascivious battery, in violation of Section 800.04(4)(a), Florida Statutes, for impregnating the child victim. (R2 99) Florida Standard Jury Instructions in Criminal Cases 11.10(a) pertaining to Lewd or Lascivious Battery lists the offense of unnatural and lascivious act as a category two permissive lesser included offense of lewd or lascivious battery. At trial, Respondent requested the jury be instructed on this permissive lesser included offense. The trial court declined.

Respondent asserted on appeal that the trial court erred in not instructing the jury on the permissive lesser included offense of unnatural and lascivious act. The Fourth District agreed and reversed Respondent's conviction and sentence and remanded for further proceedings. Knighton v. State, 193 So. 3d 115 (Fla. 4th DCA 2016). The Fourth District erred in doing so. The instruction was not appropriate based on the information, the charged crime in question, and the evidence provided at trial. Therefore,

Respondent's claim was meritless and should have been rejected by the appellate court. It should now be rejected by this Court.

The trial court was correct in declining to give the requested permissive lesser instruction; the charging document in this case did not support the giving of the instruction.

Petitioner was charged with lewd or lascivious battery pursuant to Section 800.04(4)(a), Florida Statutes. (R2 99) The information alleged that Respondent "did unlawfully engage in sexual activity with [], a person 12 years or age or older but less than 16 years of age by causing his penis to penetrate and/or have union with [the victim's] vagina, contrary to Florida Statute 800.04(4)(a)." (R2 99)

The offense of lewd or lascivious battery is proscribed by Section 800.04(4), Florida Statutes, which states that a person commits lewd or lascivious battery by 1. engaging in sexual activity with a person 12 years of age or older but less than 16 years of age; or 2. encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity. "Sexual activity" is defined in Section 800.04(1)(a), Florida Statutes, as: "the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical

purpose." Clearly, Appellant was charged by information under sub-subsection 1 of the statute: engaging in sexual activity.

The standard jury instruction for lewd or lascivious battery (engaging in sexual activity) reads:

> To prove the crime of Lewd or Lascivious Battery, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. (Victim) was twelve years of age or older, but under the age of sixteen years.
>
> 2. (Defendant)
>
> a. [committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]
>
> b. [committed an act [upon] [with] (victim) in which the [anus] [vagina] of [(victim)] [(defendant)] was penetrated by an object.] The definition of "an object" includes a finger.
>
> *Definition.*
>
> "Union" means contact.

Fla. Std. Jury Instr. (Crim) 11.10(a).

The offense of unnatural and lascivious act is proscribed by Section 800.02, Florida Statutes, which states that "[a] person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree... ." The standard jury instruction for this lesser offense reads:

> To prove the crime of Committing an Unnatural and Lascivious Act, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. (Defendant) (copy from charge) with (person named in charge).

2. The act was unnatural and lascivious.

Definitions.

"Unnatural" means not in accordance with nature or with normal feelings or behavior.

"Lascivious" means a wicked, lustful or unchaste, licentious, or sensual intent on the part of the person doing an act.

Fla. Std. Jury Instr. (Crim) 11.8.

Notably, the term "unnatural" is separately defined from the term "lascivious." This makes it clear that they are two separate elements of the crime of unnatural and lascivious act. It is the "unnatural" element in the crime of unnatural and lascivious act that makes this a crime distinct from the crime of lewd or lascivious battery.

When a permissive lesser included offense instruction is requested, the trial court must determine if the charging document and the evidence would support a conviction for the lesser offense, and give the instruction if they do. See, e.g., Belser v. State, 854 So. 2d 223, 224 (Fla. 1st DCA 2003). Notably, in order for an offense to properly be considered a permissive lesser offense on which the jury can be instructed, the information must specifically charge each element of the lesser included offense. "[T]he indictment or information must allege all the statutory elements of the permissive lesser included offense;" if it does not, the

defendant is not entitled to such an instruction. Khianthalat v. State, 974 So. 2d 359, 361 (Fla. 2008), quoting, Jones v. State, 666 So. 2d 960, 964 (Fla. 3d DCA 1996) (citing Brown v. State, 206 So. 2d 377, 383 (Fla. 1968)).

Here, the information did not allege all the statutory elements of the lesser included offense on which Respondent requested the judge instruct the jury. Specifically, the information did not allege that Respondent committed an "unnatural act" or "an act not in accordance with nature or with normal feelings or behavior." (R2 99) See Fla. Std. Jury Instr. (Crim) 11.8 pertaining to unnatural and lascivious acts. The information merely alleged that Respondent "did unlawfully engage in sexual activity with [], a person 12 years or age or older but less than 16 years of age by causing his penis to penetrate and/or have union with []'s vagina, contrary to Florida Statute 800.04(4)(a)." (R2 99) Therefore, the State submits that Respondent was not entitled to an instruction on the lesser included of unnatural act.

The case law in this area has not directly addressed the issue of whether "unnatural act" needs to be **specifically alleged** in order to permit an instruction on this lesser. It is true that in Funicello v. State, 179 So. 3d 388 (Fla. 5th DCA 2015), and Williams v. State, 627 So. 2d 1279 (Fla. 1st DCA 1993), the facts given show that the informations in those cases did not **specifically allege** the "unnatural act" element, but the courts nonetheless found the

defendant entitled to a permissive lesser included offense instruction on unnatural and lascivious act. Notably, however, neither court squarely addressed the issue; rather, they glossed over it. Even if they had sufficiently addressed the issue in these opinions, however, these opinions would fall afoul of this Court's opinions in Khianthalat and other like cases which require that the information must **specifically allege** all of the elements of the lesser before the defendant is entitled to such an instruction. Based on the foregoing, the State submits the trial court was correct in rejecting Respondent's request for an instruction on the permissive lesser of unnatural and lascivious act. This Court must quash the decision of the Fourth District and direct that the trial court's decision be upheld.

The trial court was correct in declining to give the requested permissive lesser instruction; the evidence in the case did not meet the definition of unnatural.

There is a second and separate reason that this Court must quash the decision of the Fourth District and uphold the decision of the trial court. That is because the evidence in this case, showing garden variety vaginal sex, did not meet the definition of the word "unnatural."

As both the instruction and the case law make clear, the crime of unnatural and lascivious act applies to **out of the ordinary sexual acts** such as bestiality, and not to the garden variety sexual act of a penis penetrating a vagina. See, Harris v. State,

742 So. 2d 835 (Fla. 2d DCA 1999). See also, Mohr v. State, 370 So. 2d 17, 18 (Fla. 1st DCA 1979) (Melvin, J., dissenting) ("[T]he appellate decisions upholding the facial constitutionality of the statute have done so on the theory that the conduct proscribed by the statute is oral or anal sex."). The State submits that the reason that unnatural and lascivious act is considered a permissive lesser of lewd or lascivious battery is mostly because of sub-subsection 800.04(4)(a)**(2)**, which mentions, among other things, "sadomasochistic abuse" and "bestiality." But Appellant was charged under sub-subsection 800.04(4)(a)**(1)**, which refers only to garden variety sexual activity (the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object). See § 800.04(4)(a), Fla. Stat..

Thus, in Harris, 742 So. 2d at 838, the Second District noted that "the history of section 800.02 which proscribes 'unnatural and lascivious acts' indicates that it has been applied to homosexual acts, bestiality, digital sex, and oral sex – anything other than adult male and female sexual intercourse." Id., citing to Franklin v. State, 257 So. 2d 21 (Fla. 1971); Button v. State, 641 So. 2d 106 (Fla. 2d DCA 1994); McGahee v. State, 561 So. 2d 333 (Fla. 1st DCA 1990); Mohammed v. State, 561 So. 2d 384 (Fla. 1st DCA 1990).

The Second District further noted that "the term 'unnatural' is defined generally as 'violating natural law; inconsistent with an individual pattern or custom; deviating from a behavioral, ethical, or social norm.' The jury instructions for section 800.02 define 'unnatural' as 'not in accordance with nature or with normal feelings or behavior.'" Id. In addition, the court noted that **"[t]he term "unnatural" in 800.02 distinguishes 800.02 from 800.04 and implies something more than what is covered by 800.04."** Id. (emphasis added)

Ultimately, the Harris court found that Harris, an adult male defendant was not entitled to an instruction on unnatural and lascivious acts given that he had been charged with placing his penis in union with the child victim's vagina. In other words, the Harris court found that it was the act itself that was important in determining whether it was "unnatural," and not the fact that the perpetrator was an adult and the victim a child.

As the Harris court properly recognized, traditional vaginal intercourse between an adult and a child (over 12) was already proscribed by Section 800.04. As the Harris court further properly recognized, **"[t]he term "unnatural" in 800.02 distinguishes 800.02 from 800.04 and implies something more than what is covered by 800.04."** Id. (emphasis added) It would be nonsensical to interpret the law otherwise. Were this Court to endorse the Fourth District's interpretation of the law, an adult defendant in one case might be

convicted of a second degree felony for engaging in vaginal sex with a child victim while the same adult defendant in another case might be convicted only of a second degree misdemeanor for engaging in the very same vaginal sex with the very same child victim.

The legislature clearly did not intend two different statutes to proscribe exactly the same act of vaginal sex between an adult and a child, especially where both crimes have exactly the same elements but two different penalties apply. As the Second District stated,

> Since we must interpret statutes so as to give a logical and orderly meaning to all sections, we must conclude that the legislature intended for section 800.02 to be applied to different factual situations than would fall under section 800.04.

Harris, 742 So. 2d at 838. Therefore, just as the Harris court recognized, the term "unnatural" in Section 800.02, must imply something about the sexual act more than what is addressed by Section 800.04. If it did not, there would be no need for Section 800.02 to exist.

Interestingly, the Fourth District's decision seems contrary to their own statements in Conforti v. State, 800 So. 2d 350 (Fla. 4th DCA 2001), where the court recognized that these sexual offenses were designed to be **separate**. In Conforti, the court held that the probationer did not violate Section 800.02 by masturbating in his vehicle in a public park because he performed the act in a solitary fashion, not, as required by the statute, "with another person."

In so doing, the Fourth District acknowledged that "[t]he legislature seems to have implicitly recognized that section 800.02 would not be applicable to behavior such as this by designing other statutory provisions within chapter 800 to cover it [such as Section 800.04, Florida Statutes, which prohibits masturbating in front of a child less than 16 years of age]." Conforti, 800 So. 2d at 351.

One must keep in mind that unnatural and lascivious act has for years been considered only a **permissive** lesser of lewd or lascivious battery as seen in the table of lesser included offenses for Section 800.04.[1] That means that the elements are **not** considered identical and that unnatural and lascivious act is not a **necessarily** included lesser. One must also keep in mind also that the term "unnatural" is the distinguishing element that makes lewd or lascivious battery and unnatural and lascivious act two separate crimes. If one does so, one recognizes that applying the term "unnatural" to any sexual act between an adult and a child (as the Fourth District does) means that someone who commits a

[1] The State acknowledges that the Supreme Court Committee on Standard Jury Instructions in Criminal Cases has reacted to case law such as Knighton and Funicello v. State, 179 So. 3d 388, 390-91 (Fla. 5th DCA 2015) by proposing (via a 7 to three vote) placing unnatural and lascivious act in the category one section of the lesser included offenses table. See In Re: Standard Jury Instructions in Criminal Cases Report 2016-07 (August 9, 2016). But that does **not** resolve the underlying issue of what the term "unnatural" really means, and whether the legislature intended to have two separate crimes or only one.

lewd or lascivious sexual battery (where the perpetrator is an adult and the child is a victim) is **always** going to be committing an unnatural and lascivious act. But, unnatural and lascivious act is a permissive lesser, not a necessarily included lesser. More importantly, the two crimes clearly were not intended to be identical; they were specifically created and placed in two separate statutes. Accepting the Fourth District's reasoning means that the two crimes must be considered **identical** in every way except for the penalty; one is a misdemeanor and the other a felony. It also means that one crime subsumes the other. This is a nonsensical interpretation of legislative intent. The Harris opinion is the better reasoned one.

It is true that the Fourth District, in the instant case, referenced and relied upon the Fifth District's recent opinion in Funicello v. State, 179 So. 3d 388, 390-91 (Fla. 5th DCA 2015). In that case, the Fifth District held that an adult defendant charged with lewd or lascivious battery on a child, in violation of Section 800.04, Florida Statutes, was entitled to a lesser included offense jury instruction on the offense of unnatural and lascivious act as proscribed by Section 800.02, Florida Statutes. In so holding, the Fifth District stated that "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 or behavior

and are lustful acts performed with sensual intent on the part of the defendant." Funicello, 179 So. 3d at 391.

The Fourth District acknowledged both Harris and Funicello in the opinion at bar, but decided to reject the reasoning of the Second District and "adopt" the reasoning of the Fifth District in Funicello. Knighton, 193 So. 2d at 117. Thus, like the Fifth District, but in contrast with the Second District, the Fourth District held: "(1) sexual intercourse between an adult and child constitutes an unnatural and lascivious act; and (2) the offense of unnatural and lascivious act is a permissible lesser-included offense to lewd or lascivious battery." Id.

Despite the decisions of the Fifth District and Fourth District to the contrary, the reasoning of the Second District in Harris remains apt. While penile penetration of a vagina is indeed a lewd or lascivious act, it is not an "unnatural" act based on the history and wording of Section 800.02. Further, the act(s) at issue in the instant case did not involve "something more" than what is prohibited by Section 800.04. Accordingly, just as in Harris, the trial court did not err in denying the requested lesser included instruction because it did not apply under the circumstances of this case involving penile penetration of the vagina.

Respondent's reliance below upon other cases such as Sherrer v. State, 898 So. 2d 260 (Fla. 1st DCA 2005), was misplaced. While the Sherrer case certainly stands for the proposition that the

offense of committing unnatural and lascivious acts remains a permissive lesser included offense of lewd or lascivious molestation, that case does not mandate reversal in the instant case. This is because the Sherrer opinion includes no facts whatsoever to establish how the First District concluded that the instruction in Sherrer was supported by the evidence, such that the trial court erred in not giving the instruction. Significantly, it is impossible to determine how the facts in Sherrer compare with the facts in the instant case; most notably, the fact that Respondent's penis penetrated the victim's vagina. Therefore, Sherrer, and the other cases cited by Respondent below, shed no light on whether error occurred in the instant case.

Under the totality of the circumstances, there was no error in not giving the instruction. This Court should quash the decision of the Fourth District in the instant case, and affirm Respondent's conviction and sentence.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court QUASH the decision of the Fourth District and reinstate Respondent's conviction and sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to counsel for Respondent Tatjana Ostapoff, Esquire, on February 20, 2017, by uploading it to the Florida Supreme Court's e-filing portal and

selecting the option of e-serving Tatjana Ostapoff, Assistant Public Defender, at tostapof@pd15.state.fl.us, jcwalsh@pd15.state.fl.us, and appeals@pd15.state.fl.us.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Celia A. Terenzio
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 656879

/s/ Jeanine Germanowicz
By: JEANINE GERMANOWICZ
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0019607
Attorney for Petitioner, State of Fla.
Office of the Attorney General
1515 N. Flagler Drive, Ste. 900
West Palm Beach, FL 33401
Primary E-Mail:
CrimAppWPB@myfloridalegal.com
(561)837-5016
(561)837-5108

AG#: L16-1-10197