

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

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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

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, No. 4D13-4630, __ So. 3d __, 41 Fla. L. Weekly D1244, 2016 WL 2003343 (Fla. May 25, 2016).

In the aforementioned opinion, the appellate court reversed Respondent Ronnie Knighton's conviction for lewd or lascivious battery, finding that the trial court had erred by denying the defendant's request to give a jury instruction on a lesser included offense. In this case, the State charged Appellant with lewd or lascivious battery by penile penetration with the child victim's vagina after the child victim became pregnant with Appellant'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 a defendant 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, 2016 WL 2003343 at *1, 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, 2016 WL 2003343 at *2. 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, 2016 WL 2003343 at *2. 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, and the court reversed and remanded for further proceedings. Id.

SUMMARY OF ARGUMENT

The Fourth District's opinion in the instant case is in conflict with the opinion of the Second District in Harris v. State, 742 So. 2d 835 (Fla. 2d DCA 1999), on the same point of law: whether a defendant charged with lewd or lascivious battery is entitled to an instruction on the offense of unnatural and lascivious act as a lesser included offense. Therefore, there is jurisdiction, and this Court should accept this case.

ARGUMENT

THE FOURTH DISTRICT'S OPINION IN THE INSTANT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE OPINION OF THE SECOND DISTRICT IN HARRIS V. STATE, 742 SO. 2D 835 (FLA. 2D DCA 1999).

Petitioner contends that this Court has jurisdiction pursuant to Article V, §3(b)(3), of the Florida Constitution, which parallels Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). The Constitution provides: "The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So.2d 974 (Fla. 2002). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So.2d at 1359.

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. In the instant case, the defendant requested an instruction on unnatural and lascivious act and the trial court rejected it. Knighton v. State, No. 4D13-4630, ___ So. 3d ___, 41 Fla. L. Weekly D1244, 2016 WL 2003343 (Fla. May 25, 2016). The Fourth District held in the instant case that the trial court erred in doing so. Id.

The decision issued by the Fourth District at bar is in "express and direct" conflict with the opinion of the Second District in Harris v. State, 742 So. 2d 835 (Fla. 2d DCA 1999), on the same point of law: whether a defendant charged with a lewd or lascivious battery pursuant to Section 800.04, Florida Statutes, is entitled to a lesser included offense instruction on unnatural and lascivious act as proscribed by Section 800.02, Florida Statutes.

The Second District held, in Harris, that an adult defendant charged with lewd or lascivious battery on a child under the age of sixteen in violation of Section 800.04, Florida Statutes, was not entitled to a lesser included offense instruction on unnatural and lascivious act as proscribed by Section 800.02, Florida Statutes. Harris, 742 So. 2d at 838. Specifically, the Second District stated in Harris 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.'" Harris, 742 So. 2d at 838 (citation omitted). The Second District further stated "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." Harris, 742 So 2d. at

838. Ultimately, the Harris court found that the adult male defendant was not entitled to an instruction on unnatural and lascivious acts given that he had been charged only with placing his penis in union with the child victim's vagina.

In contrast, the Fifth District, in Funicello v. State, 179 So. 3d 388, 390-91 (Fla. 5th DCA 2015), 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, 2016 WL 2003343 at *2. 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.

Significantly, the Fourth District described the issue in Harris and Funicello as "the exact same issue." Knighton, 2016 WL 2003343 at *2. Although the Fourth District did not certify conflict, the Fourth District and Fifth District's holdings are clearly on all fours with each other and are clearly in direct conflict with the holdings of the Second District.

In sum, there is express and direct conflict, and this Court should exercise its jurisdiction and accept this case.

CONCLUSION

Based on the foregoing reason, the State respectfully requests this Honorable Court accept jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on August 11, 2016: Tatjana Ostapoff, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 Third Street, West Palm Beach, FL 33401 at tostapof@pd15.state.fl.us, alefler@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.

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