

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC16-1426

RONNIE J. KNIGHTON,

Respondent.

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

REPLY BRIEF OF PETITIONER ON MERITS

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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 State continues to rely on the statement of the case and facts set forth in the State's initial brief on the merits. However, the State would note again that the pertinent history and facts are set out in the decision of the lower tribunal which is included in the appendix to this brief. The decision also can be found at Knighton v. State, 193 So. 3d 115 (Fla. 4<sup>th</sup> DCA 2016).

### **SUMMARY OF ARGUMENT**

As the State argued in the initial brief on the merits, under the facts and circumstances of the instant case, where Respondent engaged in regular or ordinary penile-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. First, the information did not charge that Petitioner committed an unnatural act. Second, the

facts of this case, involving regular or ordinary penile-vaginal sexual intercourse, did not support such an instruction. Therefore, Petitioner was not entitled to an instruction on the offense of unnatural and lascivious act.

Although this Court issued Wong v. State, 212 So. 3d 351 (Fla. 2017), after the State filed the initial brief on the merits in the instant case, the Wong case does not satisfactorily resolve the legal issues raised in this matter. First, this Court's opinion in the Wong case does not sufficiently address or resolve the problem presented by the fact that the charging document does not charge the elements of this lesser included offense. Second, the Wong opinion, with all due respect to this Court, does not logically resolve the legal quandary created by the appellate court in the instant case; rather, the Wong opinion creates an absurd and embarrassing result for our legal system.

This Court should recede from Wong and this Court should quash the appellate court's opinion in the instant case and reinstate Respondent's conviction and sentence.

#### **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.**

The State continues to rely on the arguments set forth in the State's initial brief on the merits, some of which the State reiterates herein for the sake of clarity or emphasis, but the

State will specifically address Wong v. State, 212 So. 3d 351 (Fla. 2017), which was issued by this Court after the State filed the initial brief on the merits in the instant case.

As previously explained in the initial brief, in this case, after impregnating the child victim, Respondent was charged with lewd or lascivious battery, in violation of Section 800.04(4)(a), Florida Statutes. (R2 99) At trial, Respondent requested the jury be instructed on the category two permissive lesser included offense of unnatural and lascivious act which is proscribed by Section 800.02, Florida Statutes. 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. 4<sup>th</sup> 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.**

The offense of unnatural and lascivious act, on which Respondent requested a lesser included instruction, 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 a crime under Section 800.02 distinct from the crime of lewd or lascivious battery under Section 800.04(4)(a).

The information in this case charging Respondent with lewd or lascivious battery 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) Notably, the information in this case did not expressly charge Respondent with committing an unnatural act.

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. 1<sup>st</sup> DCA 2003). Significantly, 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. **This Court has clearly and repeatedly stated that "the indictment or information must allege all the statutory elements of the permissive lesser included offense" and that, 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 because it was not charged in the information.

**The State reiterates that 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. 5<sup>th</sup> DCA 2015), and Williams v. State, 627 So. 2d 1279 (Fla. 1<sup>st</sup> 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 this issue; rather, they glossed over it.**

This Court's opinion in Wong v. State, 212 So. 3d 351 (Fla. 2017), does little to resolve the matter because it also glosses over the charging document issue. It should be noted that the State's main argument in the Wong case was that defense counsel

had not adequately preserved the request for such an instruction. The State did not argue in its brief in Wong that the defendant was not entitled to the instruction because the elements of the lesser crime were not charged in the charging document. Therefore, this Court was not squarely presented in Wong with the charging deficiency issue raised herein and, understandably, did not squarely address it therein.

Even if Wong, Funicello, and Williams, could somehow be construed as having sufficiently and squarely addressed the charging deficiency by finding that there was no charging deficiency, these opinions would be in error. That is, these opinions would fall afoul of this Court's prior 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.** It is clear from the Wong opinion that the information in Wong did not **specifically, allege that Wong committed an "unnatural act" or "an act not in accordance with nature or with normal feelings or behavior."** Therefore, with all due respect to this Court, any suggestion in Wong that the lesser included offense requested by the defendant was charged in the information is erroneous.

This Court seems to have sidestepped the charging issue by simply assuming, without real analysis, that the information adequately charged the elements of Section 800.02 simply because

it set forth facts showing that there was sexual activity between an adult and a child (or children). In this Court's mind it appears, any sexual activity between an adult and a child is automatically "unnatural." Therefore, an information which alleged facts showing sexual activity between an adult and a child, was apparently sufficient to charge the "unnatural" element of Section 800.02, a conclusion which, the State asserts, is erroneous.

Certainly, it might be satisfying to automatically classify all sexual contact between an adult and a child as "unnatural." But, while sexual activity between an adult and a child could indeed be considered socially unnatural pursuant to today's social mores, the real question is whether it is **legally** unnatural pursuant to the legislature's intent in keeping both Section 800.02 and Section 800.04, Florida Statutes, on the books.

If this Court were to extend the distinction it has apparently made in the Wong case to the facts of the instant case, to the effect that **every** sexual act with a child under the age of 16 becomes "unnatural," then it would become apparent that Section 800.04(4) (a) and Section 800.02 have become **exactly the same crime except for the penalty**; one is a felony and one is a misdemeanor. This is nonsensical; the legislature would not have passed two separate laws criminalizing exactly the same conduct with the same elements but giving it two different penalties. But in this situation, because of this Court's interpretation of the term

"unnatural" in Wong, the result is that Section 800.02 and Section 800.04(4)(a) are now the same crime, with each having the same elements as the other; neither is truly a lesser of the other.

The Second District's reasoning and conclusion in Harris v. State, 742 So. 2d 835 (Fla. 2d DCA 1999), that Section 800.02, in using the word "unnatural" meant something **more or different** than what is **generally** contemplated by Section 800.04, is more logical. Again, if it did not, there would be no need for Section 800.02 to exist. Sexual contact involving bestiality is the most obvious situation in which Section 800.02 might remain a permissive lesser of Section 800.04.

This Court would potentially invite the ironic and absurd result that a defense counsel could convince the jury (who does not know the penalties attributable to the crimes) to convict their adult client of a misdemeanor (instead of a felony) on the kneejerk grounds that Section 800.02 talks about "unnatural" acts and Section 800.04(4)(a) does not.

There is another decision that was previously issued by this Court of which Wong seems to run afoul. In Holton v. State, 573 So. 2d 284 (Fla. 1990), the defendant sodomized the adult victim by inserting a bottle into the victim's anus. At trial, the defendant asked for an instruction on Section 800.02 as a lesser included offense of Sexual Battery with Great Force. This Court affirmed the trial court's decision not to give the instruction.

Notably, in so doing, this Court stated that Section 800.02 is not a necessarily included lesser of sexual battery. In other words, this Court did not think that sodomizing an adult victim with a bottle qualified as unnatural. Why does this Court consider sodomizing an adult victim with a bottle "natural" but having sexual contact with a consenting minor "unnatural?"

In this vein, it is worth noting that there are certain circumstances in which it is legal for an adult to have sex with a minor, such as when an eighteen-year old adult marries a sixteen-year old minor; is this to be considered "unnatural" as well? Also, there are situations in which two teenaged minors have consensual sex with each other; is this to be considered "unnatural" as well? Is an adult mother breastfeeding her minor child to be considered an "unnatural" act as well (even if the statute specifically exempts this "unnatural" act from prosecution)?

In today's social climate, it is readily apparent that the historical purpose of Section 800.02 is somewhat outmoded today and it has been mostly, if not wholly, replaced by Section 800.04. Section 800.02 should be left for truly unusual and unnatural acts such as acts involving bestiality or sadomasochistic abuse; it should not pertain to regular or ordinary sexual acts between human beings such as vaginal sex, oral sex, or the touching of the genitals which are governed by Section 800.04.

But, this Court need not even go there. The best way out of this predicament is for this Court to simply recede from Wong and follow even older precedents such as Khianthalat which require a trial judge to look to both the charging document and the evidence. This means that, unless the State has expressly charged in the information that the defendant's act is "unnatural" or "an act not in accordance with nature or with normal feelings or behavior," Section 800.02 is not a lesser included offense. This is the simple and unambiguous bright line solution to the problem set forth herein.

Based on the foregoing argument herein, as well as the arguments previously made in the initial brief, the State reiterates again that 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 not only recede from Wong, it must quash the decision of the Fourth District in the instant case and direct that the trial court's decision be upheld.

#### **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 June 15, 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](mailto:tostapof@pd15.state.fl.us), [jcwalsh@pd15.state.fl.us](mailto:jcwalsh@pd15.state.fl.us), and [appeals@pd15.state.fl.us](mailto: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,  
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