IN THE SUPREME COURT OF FLORIDA

REGGIE EUGENE ALLEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC20-1053
1D19-1315

ON DISCRETIONARY REVIEW
OF THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner Allen, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PIB" will designate Petitioner's Initial Merits Brief. That symbol is followed by the appropriate page number. The record on appeal will be referenced by “R” followed by the volume and page number. The trial transcript will be referenced by the letter “T” followed by any pertinent volume number and page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is an appeal from Allen v. State, 298 So. 3d 704 (Fla. 1st DCA 2020). The First District Court of Appeal certified the following question:

> IS THE SCHEDULE OF LESSER INCLUDED OFFENSES PROMULGATED BY THE FLORIDA SUPREME COURT IN 2018 IN ERROR IN CLASSIFYING SEXUAL BATTERY (§ 794.011(5)) AS A NECESSARILY LESSER INCLUDED OFFENSE OF CAPITAL SEXUAL BATTERY (§ 794.011(2)(A), FLA. STAT. (2018))?

This Court accepted jurisdiction. Allen v. State, SC20-1053, 2020 WL 4590313 (Fla. Aug. 11, 2020).

The State accepts Petitioner's statement of the case and facts subject to the following supplementations and corrections:

At trial, T.W. testified that she was born on March 25, 2001. (T. 42) No evidence to the contrary was offered at trial. T.W. turned 12 years old on March 25, 2013.

Counts I and III of the second amended information stated:

> Reggie Eugene Allen on or between March 25, 2010 and March 24, 2012, in the County of Bay and State of Florida, Reggie Eugene Allen, a person eighteen years of age or older, did unlawfully commit sexual battery upon [T.W.], a person less than twelve years of age, by defendants mouth having union with [T.W]'s vagina, contrary to Florida Statute 794.011(2)(a).
>
> Reggie Eugene Allen on or between March 25, 2012 and March 24, 2014, in the County of Bay and State of Florida, Reggie Eugene Allen, a person eighteen years of age or older, did unlawfully commit sexual battery upon [T.W.], a person less than twelve years of age, by defendants mouth having union with [T.W]'s vagina, contrary to Florida Statute 794.011(2)(a).

(R. 77).

For Count I the trial judge provided to the jury instructions on the lesser included offenses of Lewd or Lascivious Battery and Battery. (R. 85-87). For Count III the trial judge provided the jury instructions on Sexual Battery,

Lewd or Lascivious Battery and Battery as lesser included offenses. (R. 92-95).

SUMMARY OF ARGUMENT

This Court should answer the First District's certified question in the affirmative; Sexual Battery (§ 794.011(5)) is not a necessarily lesser included offense of Capital Sexual Battery (§ 794.011(2)(a)). Capital Sexual Battery and Sexual Battery each have their own age element that are mutually exclusive of each other. Therefore Sexual Battery fails the Sanders element test as its statutory elements are not always subsumed into the elements of Capital Sexual Battery. In cases covering only a time period when a victim was under 12 years old, a jury instruction on sexual battery would present the jury with a crime it was legally impossible for the defendant to commit. Capital Sexual Battery and Sexual Battery are different from other crimes involving an aggravating age element. In other crimes with an aggravating age element, the lesser included offense does not have include an age element. Age is also different from crimes involving monetary value or weight of a substance. For both monetary value and weight, the total or final value is made up of the sum of the lesser parts. Therefore, while it is true that the person possesses or stole the ultimate amount, it is also a true statement to say they possessed or stole any amount less than the final value. For example, a person who has stolen 10,000 dollars is also guilty of stealing 5,000 dollars or 10 dollars. Age, however, can only be a single value at any given time.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON SEXUAL BATTERY AS A CATEGORY ONE NECESSARILY INCLUDED LESSER OFFENSE OF CAPITAL SEXUAL BATTERY, AND THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE POSITIVE AS IT IS LEGALLY IMPOSSIBLE TO COMMIT CAPITAL SEXUAL BATTERY OF A PERSON LESS THAN 12 YEARS OF AGE AND SEXUAL BATTERY OF A PERSON 12 YEARS OF AGE OR OLDER AGAINST THE SAME VICTIM AT THE SAME TIME.

STANDARD OF REVIEW

A trial court's decision on the giving or withholding of a proposed jury instruction is reviewed under the abuse of discretion standard of review. On appeal, the trial court's ruling on a jury instruction is presumed correct. Appellant has the burden to demonstrate reversible error in the lower court's refusal to give the requested instruction. Each party has the right to have the court instruct the jury on the law applicable to the evidence under the issues presented. A trial court's mere failure to give a requested instruction, if erroneous, does not constitute per se reversible error. Langston v. State, 789 So.2d 1024, 1026 (Fla. 1st DCA 2001) (internal citations and quotations omitted).

JURISDICTION

This Court has jurisdiction based on the question certified by the First District Court of Appeals. See Article V, § 3(b)(4).

IS THE SCHEDULE OF LESSER INCLUDED OFFENSES PROMULGATED BY THE FLORIDA SUPREME COURT IN 2018 IN ERROR IN CLASSIFYING SEXUAL BATTERY (§ 794.011(5)) AS A NECESSARILY LESSER INCLUDED OFFENSE OF CAPITAL SEXUAL BATTERY (§ 794.011(2)(A), FLA. STAT. (2018))?

MERITS

Petitioner argues that Sexual Battery (Section 794.011(5)) is a necessarily lesser included offense of Capital Sexual Battery (Section 794.011(2)(a)). Respondent respectfully disagrees. Because each offense contains a mutually exclusive age element, holding that sexual battery as a necessary lesser included offense of capital sexual battery would result in situations where the jury would be provided with instructions on a crime is was legally impossible for the defendant to have committed.

Proper Version of Section 794.011(5), Florida Statutes

Respondent does not dispute that the version of Section 794.011(5) in effect at the time of the underlying offensives is the proper version to evaluate Petitioner's case. See Heath v. State, 532 So.2d 9, 10 (Fla. 1st DCA 1988) ("[I]t is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted ...."). However, using the older version or current version of the statute does not change the analysis that

sexual battery of a person 12 years or older is not a necessarily lesser included offense of capital sexual battery of a person less than 12 years of age. Section 794.011(2), Florida Statutes.

First DCA's Certified Question

Regardless of the version of Section 794.011(5) used, this Court should affirmatively answer the First District's certified question. Because the age of a victim is a fixed quantity at a given point in time, it is legally and factually impossible for sexual battery (§ 794.011(5), Fla. Stat.) to be a lesser included offense of capital sexual battery (§ 794.011(2)(a), Fla. Stat.) when the age of the victim is known, as was in the instant case in Count I, and the time period covered by the charge ends before the victim's 12th birthday.

"Lesser included offenses fall into two categories: necessary and permissive. Necessarily lesser included offenses are those offenses in which the statutory elements of the lesser included offense are **always subsumed** within those of the charged offense." Sanders v. State, 944 So.2d 203, 206 (Fla.2006) (emphasis added). Necessarily lesser included offenses are designated Category 1 offenses, whereas permissive lesser included offenses are designated Category 2 offenses. See In re the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 596 (Fla.1981); I.T. v. State, 694 So.2d 720, 723 n. 7 (Fla.1997); State v.

Weller, 590 So.2d 923, 925 (Fla.1991).

Although sexual battery is included in the schedule of lesser included offenses as a necessarily lesser included offense, its inclusion does not preclude the trial court from contesting the legal correctness of the instructions. Williams v. State, 957 So. 2d 595, 599 (Fla. 2007) ("However, the Schedule of Lesser Included Offenses included in the Florida Standard Jury Instructions is not the final authority on lesser included offenses."); In re Standard Jury Instructions in Criminal Cases--Instructions 7.8, 7.8(a), 11.1--11.6(a), 190 So. 3d 1055, 1056 (Fla. 2016) (In authorizing the publication and use of these instructions, we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions.)

The elements of Capital Sexual Battery are:

1. Defendant committed an act upon victim in which the sexual organ of victim had union with the mouth of defendant.

2. At the time of the offense, victim was less than 12 years of age.

3. At the time of the offense, defendant was 18 years of age or older.

Fla. Std. Jury Inst. 11.1.

The elements of the requested sexual battery instruction are:

1. Defendant committed an act upon victim in which the sexual organ of victim had union with the mouth of defendant.

2. Defendant's act was committed without the consent of victim.

3. At the time of the offense, victim was 12 years of age or older [but younger than 18 years of age].

4. At the time of the offense, defendant was 18 years of age or older.

Fla. Std. Jury Inst. 11.4.

This case is a prime example of why Sexual Battery should be considered a permissive lesser included offense of Capital Sexual Battery instead of a necessary lesser included offense. The date range covered in Count I of Petitioner's case ended on March 24, 2012. The victim in the case was born on March 25, 2001. While the dates of the alleged offenses were in dispute, the age of the victim was not. The conduct covered by Count I ended while the victim was still 10 years old. The age elements of the two offenses are mutually exclusive. Capital Sexual Battery requires the victim to be younger than 12 years old. Both the pre- and post-2014 Sexual Battery statutes require the victim to be 12 years or older. Sexual Battery is therefore not always subsumed into Capital Sexual Battery because a victim cannot be simultaneously both younger than 12 and 12 or older on the same date in question. See Sanders, 944 So.2d at 206. Here, where the date range of the charge ended before the victim turned 12 years old, it was also factually and legally impossible for the

Petitioner to violate the elements of Sexual Battery.

If the requested Sexual Battery instruction had been given and Petitioner found guilty, the finding would have been necessarily not true. The victim's age is an essential element of the offense and the uncontested evidence showed she was under 12 years of age in the time period covered by Count I. The Petitioner's position essentially argues that it is per se reversable error not to provide an instruction for a factually impossible offense.

This interpretation is also in line with this Court's reasoning in State v. Wimberly. In Wimberly, this Court affirmatively answered the following certified question:

> If the evidence at trial is sufficient to convict of a necessarily lesser included offense, and the same evidence also incontrovertibly shows that the necessarily lesser included offense could not have been committed without also committing the greater charged offense, does rule 3.510(b), Florida Rules of Criminal Procedure, require the trial judge to instruct the jury of the necessarily lesser included offense?

State v. Wimberly, 498 So. 2d 929, 930 (Fla. 1986). In the instant case, the evidence was not sufficient to convict the Petitioner of Sexual Battery on Count I because it was factually impossible for a victim born on March 25, 2001 to be 12 years old or older between March 25, 2010 and March 24, 2012. If a crime is factually impossible for the defendant to commit as charged, it cannot be said that the offense is as a

matter of law a necessarily included offense under Rule 3.510, Florida Rules of Criminal Procedure.

Petitioner states that Sexual Battery is a necessary lesser included offense of Capital Sexual Battery because the age of the victim is binary. (PIB. 21). Petitioner's argument is that if the State proved the sexual assault but failed to prove that the victim was younger than 12 years old at the time of the offense then the State has only proved Sexual Battery. Petitioner equates this to the relationship between battery on a person sixty-five years and older and the necessary lesser included offense of battery. (PIB. 22-23). This is an incorrect comparison. Battery has no age element. Therefore, when a defendant commits battery on a person 65 years and older the defendant has **always** satisfied the elements of simple battery. This is also true of the stalking and fraudulent use of personal identification examples provided by Petitioner. (PIB. 23). In each, age is an additional aggravating element in the greater offense that is not present in the lesser included offense. Whereas Capital Sexual Battery and Sexual Battery both have their own mutually exclusive age element. A defendant can only violate one of the two offenses on the same date against the same the victim. Thus, the elements of Sexual Battery are not always subsumed into the elements of Capital Sexual Battery.

Petitioner's comparison to possession of a specific weight of marijuana and

later to value stolen in a theft case also fall short as an accurate comparison. (PIB. 23-24, 30-31). Both weight and monetary worth are values that are made up of and include the smaller values of each. For example, if a person has 25 grams of a marijuana, it is also a true statement that the person has 20 grams, 15 grams, 10 grams, or 5 grams of marijuana. The same is true of a monetary worth. A person who steals ten thousand dollars is also guilty of stealing five thousand dollars, three thousand dollars, or ten dollars. Age is a different value because a person can only be a single age at any given point in time. If a person is 16 years old, it is not true that they are also 12, 10, or 5 years old. If a defendant commits a single sexual assault against a 16-year-old victim, they are not also guilty of committing a sexual assault against a 10-year-old and vice-versa.

Count III of Petitioner's case is a good example of why Sexual Battery is a permissive lesser included offense of sexual battery. "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, 944 at 206. (internal citation omitted). In Count III, the charged date range was between March 25, 2012 and March 24, 2014. During this time, the victim was between 11 and 13 years old. At Petitioner's trial there was some

inconsistency in the testimony about when and where the victim lived and when and where specific criminal acts of the Petitioner took place. As the charge covered a period when the victim was both younger than 12 and 12 and older, it was up to the jury to determine if and when the criminal conduct occurred. If the conduct occurred over the time period as the fact in Count III alleged, then the accused would have violated both statutes. In this case, it was correct for the trial judge to provide the Sexual Battery instruction as a permissive lesser included offense of Capital Sexual Battery.

This would also be true of a case in which the exact age of the victim was unknown. Again it would be up to the fact finder to determine if the offense occurred and what the age of the victim was during the offense. In that case, it would be appropriate to provide Sexual Battery as a permissive lesser included offense. However, as in the instant case, when the age of the victim is known and the dates charges only include the time before the victim turned 12, it would be ridiculous to include a factually and legally impossible charge in the jury instructions as a necessarily included lesser offense. Adopting the Petitioner's argument to forego the Sanders elements test (PIB. 37) would result in the potential of the jury being instructed on a crime it was legally impossible for a defendant to have committed.

Petitioner argues that the evidence concerning the age of the victim in his case

gave rise to potential reasonable doubt to if she was over or under 12 years old in Count I. (PIB. 41-45). This is a gross misunderstanding of the evidence. While it is true that the witness testimony was in conflict about when and where the victim lived at a specific time; the victim's birthday was not in doubt. She was born on March 25, 2001. It was impossible for her to be over 12 years old during the time period charged in Count I. If the jury did not believe the Petitioner sexually assaulted the victim before she turned 12, they would have acquitted him of Count I, not possibly found him guilty of sexual battery of a victim age 12 or older, a crime he factually could not have committed against the victim before March 25, 2013. Therefore, the judge did not abuse his discretion in refusing the Petitioner's request to instruct the jury on Sexual Battery for Count I.

Harmless Error

As a final alternative, any failure to instruct the jury on Sexual Battery for Count I was harmless error. Pursuant to this Court's holding in Knight v. State, any failure to instruct on a lesser included offense was harmless because the jury convicted Appellant of the highest charged offense. (R. 112-113) In Knight, this Court held that a defendant is not entitled to an opportunity for a jury pardon. Knight v. State, 286 So. 3d 147, 153–54 (Fla. 2019); see also Dean v. State, 230 So. 3d 420, 426 (Fla. 2017) (Failure to give a requested instruction on a necessarily lesser-

included offense is harmless where the evidence supports the charged offense. Justice Polston, concurring.)

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the decision of the First District Court of Appeal.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically via the Florida Courts E-Filling Portal on December 16, 2020 and was serviced the same day via the E-Filling Portal on Assistant Public Defender Victor Holder, Esq., victor.holder@flpd2.com.

Respectfully submitted, served and certified,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in 14-point Times New Roman and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

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