

IN THE SUPREME COURT OF FLORIDA

REGGIE EUGENE ALLEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. SC20-1053
(First DCA No. 1D19-1315)

ON DISCRETIONARY REVIEW OF THE DECISION OF THE FIRST
DISTRICT COURT OF APPEAL

INITIAL MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE

Allen¹ was charged by second amended information with two counts of sexual battery of a child less than twelve years of age (capital sexual battery), one count of lewd or lascivious exhibition, and one count of sexual battery of a person twelve years of age or older (R 77)². The same victim was alleged in each count (R 77). In Count I, the only count challenged on appeal, Allen was charged with capital sexual battery on a victim less than twelve years of age with the offense allegedly occurring sometime between March 25, 2010, and March 24, 2012 (R 77). Allen was tried by jury and convicted as charged (R 112-13). Allen was sentenced to life in prison for the two capital sexual battery offenses and concurrent prison terms in the remaining two counts (R 77).

On appeal, Allen raised one issue in the First District Court of Appeal: whether the trial court committed reversible error in Count I by failing to instruct the jury on the necessarily included lesser offense of sexual battery. The First District issued a written opinion in which it affirmed Allen's conviction in Count I

1 Reggie Allen was the defendant in the trial court and will be referred to in this brief as either "Petitioner," "Defendant," or by his proper name.

2 The record will be referred to as "R" followed by the appropriate page number, all in parentheses.

and certified a question of great public importance. Allen v. State, 298 So. 3d 704

(Fla. 1st DCA 2020). The First District 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))?

Allen at 707. Allen petitioned this Court for discretionary review of the First District's decision.

STATEMENT OF THE FACTS

At trial, the alleged victim, T.W., testified that she knew Reggie Eugene Allen her entire life (T 43)³. At the time of trial she testified that she was seventeen years old and that her date of birth was March 25, 2001 (T 42). She testified that Allen was her mother's ex-boyfriend and had previously lived in the same home with them (T 43). She testified that they got along well until "he started touching me" (T 43). T.W. testified that Allen began "touching" her when she was nine years old and stopped when she was fourteen years old (T 43). She testified that Allen and her mother shared a bedroom in the home, that she had her own bedroom, and that her uncle, Derrick, had his own bedroom (T 44).

She testified that one night when she was nine years old she and Allen were in the living room watching the television show "Law & Order" (T 45). T.W. testified that she was lying on the floor wearing a two-piece cheetah-print pajama set (T 45). She testified that the lights were off in the room (T 45). T.W. testified that she asked Allen why older men preyed upon little kids (T 45). She testified that in response Allen started kissing her and rubbing her body (T 45-46). T.W. testified that Allen then picked her up from the ground, put her on the couch,

3 The trial transcript will be referred to as "T" followed by the appropriate page number, all in parentheses.

rubbed her chest, and touched her vagina with his fingers (T 46-47). She testified that Allen then pulled her pants down and put his mouth on her vagina (T 47). She testified that he told her to “just lay down and relax” and that she would like it (T 47). T.W. testified that Allen then performed oral sex on her (T 47). She testified that Allen then pulled down his pants and began “jacking off” (T 47). T.W. testified that by “jacking off” she meant that Allen rubbed his penis with his hand (T 47). She testified that Allen did this until he ejaculated and “white stuff” came out and went on the floor (T 47-48). She testified that Allen cleaned it up and told her not to tell her mother (T 48).

T.W. testified that when she was eleven years old she and her family moved into Aztec Apartments (T 48) She testified that on the day they moved into the apartments Allen again performed oral sex on her (T 48-49). T.W. testified that while they were moving boxes into the apartment, she went upstairs with Allen to put some things in her bedroom (T 48-49). She testified that her uncle remained downstairs (T 48-49). T.W. testified that while they were upstairs, Allen told her to lay down so that he could perform oral sex on her (T 49). She testified that she asked him “why” and began shaking and crying (T 49). T.W. testified that Allen asked her why she was crying and said that he was “not doing anything to [her]” (T 49). She testified that she told Allen that she was scared, to which he replied, “Why are you scared – it’s not like I’m hurting you” (T 49). She testified that she

laid on the carpeted floor with the bedroom door open while Allen performed oral sex on her (T 49-50). She testified that Allen placed his mouth on her vagina (T 54). T.W. testified that her mother was at their old residence when this incident occurred (T 49). She testified that the incident did not last long because they had to get more things out of the truck (T 49-50).

T.W. testified that the last event of a sexual nature that she could remember occurred when she was thirteen years old (T 50). She testified that she was living on Sims Avenue when the incident occurred and not in the Aztec Apartments (T 50). T.W. testified that she was in her room laying down in her bed when Allen walked in, closed the door, and pulled down her pants (T 50-51). T.W. testified that Allen placed his mouth on her vagina and performed oral sex on her (T 52). She testified that her mother walked into the room and Allen threw a blanket over T.W. and pretended that he had been “play-fighting” with her (T 51).

T.W. testified that she believed Allen had performed oral sex on her by placing his mouth on her vagina more than twenty times between when she was nine years old and when she was fourteen years old (T 52). T.W. testified that she did not remember the month, season, weather, or time of year in which the age nine incident took place (T 60-61). She testified that she could not recall any details about Allen’s penis (T 62-63, 71). She testified that she did not remember the month, season, weather, or time of year in which the Aztec moving day

incident took place (T 61). T.W. testified that she did not remember the month, season, weather, or time of year in which the age thirteen incident at the Sims Avenue residence took place (T 62). She testified that the first sexual incident happened when she was nine years old when she lived “at Williams” (T 55). When asked about a prior statement she gave to “Ms. Sandy Behrens” from the Child Advocacy Center, T.W. testified that she had told Ms. Behrens that the first sexual incident had occurred when she lived at Aztec Apartments (T 55). When asked if she previously had stated to Ms. Behrens that the sexual incidents happened first at Aztec Apartments from age nine through ten, then at Williams from age eleven through twelve, and then at Sims Avenue from age thirteen to fourteen, she testified that she had mixed up Williams and Aztec (T 55). She testified that the sexual incidents occurred from nine through age ten at Williams and then from age eleven through twelve at Aztec (T 55). T.W. testified that she had previously stated under oath at her deposition that she had moved to Aztec when she was ten, though she testified at trial that she had moved there when she was eleven (T 59-60).

T.W. testified that when she was eleven years old she told her mother that Allen had been touching her (T 63). She testified that her mother confronted Allen and Allen denied it (T 63-64). She testified that she also told her half-brother, Chartravius Wilkerson (T 64). She testified that Wilkerson lived with his

grandmother (T 64). T.W. testified that she was close with her half-brother and hung out with him all the time, which T.W.'s mother did not like because T.W.'s mother thought he was a bad influence for T.W. (T 64-65). T.W. testified that her relationship with Wilkerson caused a rift between T.W. and her mother (T 65-67). T.W. testified that she had a big argument with her mother in which her mother threatened to send T.W. to a children's home and T.W. threatened to run away and live with Wilkerson (T 66-67). She testified that at some point police arrived and she told them about Allen's actions (T 66-67).

Chartravius Wilkerson testified that he is T.W.'s half-brother and that he met her in 2016 (T 73). He testified that while they were hanging out one night, T.W. told him that Allen touched her genitals and breasts and that the touching started when she was nine years old and lasted until she was fourteen years old (T 74-75). Wilkerson testified that in October of 2017, T.W. ran away from her home and came to his house (T 76-77). He testified that the police came to his house looking for T.W. and he encouraged T.W. to tell them about what Allen had done (T 76-77).

Tiffany Carswell, T.W.'s mother, testified that Allen is her ex-boyfriend (T 104). She testified that Allen moved in with her at Edgewood Apartments and that he stayed with her through her move to Aztec Apartments in 2010 (T 104). Carswell testified that T.W. was ten or eleven when they started living at Aztec

Apartments (T 104). She testified that T.W. was approximately nine years old at Edgewood (T 105). Carswell testified that Allen helped the family move their belongings into the apartment at Aztec, that she was present all day, and that there was never a period of time where Allen and T.W. were upstairs alone for any period of time (T 106). She testified that they moved to Williams in 2014 and that T.W. would have been about fifteen or sixteen years old (T 106). She testified that she moved to Sims in 2015 and then to Bob Sykes three years later (T 107-08). She testified that T.W. was sixteen when T.W. lived at Sims (T 108). She testified that T.W. made allegations to her about Allen when they lived at Sims and T.W. was thirteen or fourteen at the time (T 108). Carswell testified that she and Allen agreed that it would be best for him to move out and he did (T 108-09). She testified that around a year later he moved back in with them when they lived at Bob Sykes (T 109-110). Carswell testified that she was not sure about the dates she lived at the various apartment locations and she could be wrong about the dates (T 113-14).

Carswell testified that she and T.W. began arguing over T.W.'s relationship with her half-brother (T 110). Carswell testified that the relationship between T.W. and Wilkerson seemed more like a boyfriend and girlfriend than a brother and sister (T 110). The arguments about Wilkerson occurred frequently (T 111). She testified that on October 12, 2017, she and T.W. were arguing about Wilkerson

because Wilkerson was at the house with T.W. alone and he was not supposed to be (T 112). She testified that when Allen got home and tried to get into the house it took T.W. a suspiciously long time to come to the door (T 111-112). Allen told Carswell about it, and Carswell confronted T.W. about it when Carswell got home (T 111-112). T.W. threatened to run away (T 111-112). She threatened to send T.W. to a children's home (T 112).

Allen testified that he never performed oral sex on T.W., never rubbed her vagina, never masturbated in her presence, and he did not commit any of the offenses he was accused of (T 148-49, 158). He testified that he moved in with Carswell at Williams in October of 2009 (T 144). He testified that there was no television in the living room at the Williams residence or the Aztec residence and that he did not watch "Law & Order" when he lived at the Williams residence or the Aztec residence (T 145, 149-50). He testified that he was in a car accident on November 27, 2009, Carswell broke up with him two days later, and he moved out of the Williams residence soon after (T 144). Allen testified that in September of 2010 he helped Carswell move into the Aztec apartment (T 146). He testified that Carswell's brother, Derrick, helped him move their belongings into the Aztec apartment (T 146). Allen testified that Carswell and T.W. were at the residence on Williams, the residence they were moving out of, packing dishes, silverware, and other things (T 146-47). Allen testified that T.W. was never with him alone at the

Aztec apartment on moving day (T 147-48). Allen testified that in 2012 they moved to the Sims residence (T 150). Allen testified that the residences at Williams and at Sims did not have a second floor (T 150). He testified that when they were living at Sims in 2013 he became aware of allegations made by T.W. against him (T 150-54). He moved out of the residence after that (T 153). Allen testified that six or seven months later he began dating Carswell again and hanging out with her at the Sims residence (T 154-56). He testified that in 2015 they moved to Bob Sykes together (T 156).

SUMMARY OF THE ARGUMENT

This Court should not answer the First District's certified question in its present form because the certified question and the First District's opinion rely on the 2018 version of the sexual battery statute, which is not the version of the statute that was in effect at the time of the offense at issue in Petitioner's appeal. The appropriate version of the statute in effect at the time of the offense was the version of the sexual battery statute in effect between March of 2010 and March of 2012, the dates of the charged offense in Count I. This version of the sexual battery statute differs substantively from the 2018 version of the statute due to a 2014 statutory amendment. The 2018 version of the sexual battery statute has no relevance to this case. This Court should instead address whether the offense of sexual battery as defined by the statute in effect at the time of the offense is a category one necessarily included lesser offense to capital sexual battery of a victim less than twelve years of age.

This Court should hold that the offense of sexual battery, prior to the 2014 amendment to the statute, was a category one necessarily included lesser offense of capital sexual battery. As a result, the trial court was required by Rule 3.510 of the Florida Rules of Criminal Procedure and this Court's precedent to grant

Petitioner's request to instruct the jury on the offense of sexual battery. The trial court's failure to do so was per se reversible error.

If this Court addresses the First District's certified question as presently written, this Court should find that sexual battery as defined by the 2018 statute is still a necessarily included lesser offense of capital sexual battery.

If this Court determines that pre-2014 sexual battery was a category two permissive lesser included offense of capital battery then it should still find reversible error in Petitioner's case because a rational jury could have concluded based on the evidence that the age of the victim at the time of the offense alleged in Count I was not proved beyond a reasonable doubt.

Finally, if this Court concludes that pre-2014 sexual battery was not a category one or category two lesser included offense of capital sexual battery on a victim less than twelve, then this Court should still find that the trial court committed reversible error by failing to instruct the jury on second-degree felony sexual battery. Rule 3.490 of the Florida Rules of Criminal Procedure required that the trial court instruct the jury on sexual battery as a lesser degree of the offense of capital sexual battery.

ARGUMENT

The trial court erred by denying Petitioner's request to instruct the jury on the category one necessarily included lesser offense of sexual battery in Count I.

Preservation: Petitioner preserved this issue by requesting in Count I that the trial court instruct the jury on sexual battery as a category one necessarily included lesser offense of the charged offense of capital sexual battery on a victim less than twelve years of age (T 24-25, 119-20). Petitioner's trial counsel specifically requested the lesser offense of sexual battery on a victim twelve years of age or older but less than eighteen years of age pursuant to section 794.011(5)(a), Florida Statutes (T 25). Petitioner's trial counsel, the prosecutor, and the trial court were all referring to the wrong version of the sexual battery statute at section 794.011(5)(a). The version of the sexual battery statute contemplated by the parties and the trial court was not the version in effect at the time of the offense in Count I. The proper versions were the 2009 through 2011 versions of section 794.011(5), which were the versions in effect during the charged date range in Count I of March 25, 2010, through March 24, 2012 (R 77). These versions were substantively different than the post-2014⁴ version of section 794.011(5). The trial court's denial of

⁴ The sexual battery statute was amended in 2014 to divide the offense of sexual battery on a person twelve or older into two different victim age classifications: (1)

Petitioner's requested lesser should still be treated as preserved for appellate review because even if Petitioner had asked for the lesser of sexual battery under the correct version of the sexual battery statute, the trial court would have denied Petitioner's request for the same reasons it denied the request for the incorrect version of sexual battery as the lesser: the trial court believed it had discretion to determine whether or not to give the lesser based on the evidence adduced at trial and ruled that there was no evidence to support sexual battery as a lesser in Petitioner's case (T 131). See Bailey v. State, 224 So. 2d 296, 297 (Fla. 1969) (Where the trial court announced its intention not to give the requested instructions, the defense attorney was not required to object further or "pursue a completely useless course when the judge had announced in advance that it would be fruitless"); Bell v. State, 338 So. 2d 1328, 1329 (Fla. 2d DCA 1976). Here, though Petitioner's trial attorney referred to the wrong version of the sexual battery statute when he requested an instruction on sexual battery as a necessarily included lesser offense, the trial court made clear that it was not going to give an instruction on any lesser that did not have an evidentiary basis and that it felt an evidentiary basis was lacking for any sexual battery offense other than capital sexual battery of

older than twelve years of age but younger than eighteen years of age and (2) eighteen years of age or older. §794.011(5)(a) and (b), Fla. Stat. (2014).

a victim less than twelve years of age (T 131). The trial court ruled that there was no evidence that the victim was anything other than younger than twelve years of age at the time of the offense. So, even if Petitioner's trial counsel had referred to the proper version of the sexual battery statute while requesting an instruction on the lesser of sexual battery, the trial court still would have denied the request because the trial court ruled there was no evidence that the victim was twelve or older. The trial court's refusal to instruct on sexual battery as a necessarily included lesser offense was inevitable in this case given the trial court's comments in response to the defense request. Any further request by Petitioner's trial counsel, even with the proper version of the sexual battery statute, would have been fruitless. Petitioner's trial counsel was not required to pursue a completely useless course by again requesting the offense of sexual battery be given as a lesser included offense, whether or not it was the correct version of the statute or not. The trial court made clear that it was not going to instruct the jury regarding the lesser of sexual battery on a victim twelve years of age or older.

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." Truett v. State, 105 So.3d 656, 658 (Fla. 1st DCA 2013). However, "[t]he trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense." State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986). "Once the

judge determines that the offense is a necessarily lesser included offense, an instruction must be given.” Id. Whether an offense is a necessarily included offense of the charged offense is a pure question of law reviewed de novo. See Walton v. State, 208 So. 3d 60, 64 (Fla. 2016).

Merits: Petitioner was charged in Count I with capital sexual battery of a person less than twelve years of age in violation of section 794.011(2)(a), Florida Statutes (R 77). The offense in Count I was alleged to have occurred between the dates of March 25, 2010, and March 24, 2012 (R 77). Prior to trial and again during the trial Petitioner requested that the jury be instructed on the offense of sexual battery⁵ as a category one necessarily included lesser offense of capital sexual battery of a victim less than twelve years of age (T 24, 119-20). The trial court denied the request finding that it had the authority to decide what offenses qualified as necessarily lesser included offenses based on the facts at trial (T 131). On appeal to the First District, Petitioner raised the issue of the trial court’s denial of the requested instruction of sexual battery as a necessarily included lesser offense to capital sexual battery and argued that the denial was per se reversible error. The First District held that the trial court did not err by denying the

⁵ Prior to trial, Petitioner’s trial counsel requested the lesser included offense of sexual battery of a victim twelve or older but less than eighteen years of age at section 794.011(5)(a), Florida Statutes (T 25). During the trial, Petitioner’s trial counsel referred to the requested lesser only as “sexual battery” (T 120).

requested lesser offense because sexual battery is not a necessarily included lesser offense of capital sexual battery. The First District wrote:

On its face, the offense of sexual battery cannot constitute a necessarily lesser included offense of capital sexual battery. ‘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). In the present case, the statutory elements of sexual battery are not always subsumed within the elements of capital sexual battery. *See id.* Sexual battery requires the victim be between twelve and eighteen years of age whereas capital sexual battery requires the victim be less than twelve years of age. §§794.01(2)(a),(5), Fla. Stat. Therefore, under the definition of a necessarily lesser included offense set forth in *Sanders*, sexual battery is not a necessarily lesser included offense to capital sexual battery as the elements regarding the age of the victim from the lesser offense are not always subsumed within those of the charged offense of capital sexual battery. *See Lowery v. State*, 276 So. 3d 381, 392 (citing *Sanders*, 944 So. 2d at 206). Accordingly, the trial court did not err by failing to give the requested instruction because sexual battery is not a necessarily lesser included offense to capital sexual battery.

Allen v. State, 298 So. 3d 704, 707 (Fla. 1st DCA 2020). The First District then certified the following question to this Court:

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))?

Allen at 707.

A. The Proper Version of Section 794.011(5):

Petitioner's trial counsel, the prosecutor, and the trial court all referred to the 2018 version of the sexual battery statute at section 794.011(5) when discussing the propriety of sexual battery as a lesser included offense to capital sexual battery. The First District also used the 2018 version of section 794.011(5) in its lesser included analysis. The First District referred to the 2018 version of the schedule of lesser included offenses in its certified question. Allen at 707. The 2018 version of section 794.011(5) makes the sexual battery of a victim twelve year of age or older but younger than eighteen years of age a first-degree felony and the sexual battery of a victim eighteen years of age or older a second-degree felony. §794.011(5)(a),(b), Fla. Stat. (2018). However, the offense in Count I in this case was alleged to have occurred between March 25, 2010, and March 24, 2012 (R 77). It is firmly established law that the statutes in effect at the time of the commission of the crime control as to the offenses for which a defendant can be convicted. State v. Smith, 547 So. 2d 613, 616 (Fla. 1989); Huckaba v. State, 260 So. 3d 377, 381 (Fla. 1st DCA 2018). The 2009, 2010, and 2011 versions of section 794.011(5) were in effect during the time period when the offense in Count

I allegedly occurred. These versions of section 794.011(5) defined sexual battery as being committed against a victim twelve or older:

A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree...

§794.011(5), Fla. Stat. (2009-2011). It is this version of section 794.011(5), in effect at the time of the offense in Count I, that must be considered in determining whether sexual battery was a necessarily included lesser offense of capital sexual battery in Petitioner's case. The 2018 version of section 794.011(5) was not in effect at the time the charged offense in Count I allegedly occurred and is, therefore, of no relevance to Petitioner's case on appeal.

B. The First District's Certified Question:

Given the First District's mistaken reliance⁶ on the 2018 version of the sexual battery statute and the 2018 version of the schedule of lesser included offenses in rendering its opinion and certifying the question of great public importance to this Court and the fact that the 2018 version of the sexual battery

⁶ The First District was not alone in the mistake, as Petitioner's trial counsel, the prosecutor, the trial court, and both Petitioner's attorney and the State's attorney during the proceedings in the First District all relied on the 2018 version of the sexual battery statute.

statute has no relevance to Petitioner's offense or appeal, this Court should decline to answer the certified question in its current form. An opinion issued by this Court in this case as to whether the current statutory version of sexual battery is a lesser included offense of capital sexual battery would be an advisory opinion because the current version of the sexual battery statute was not in effect at the time of Petitioner's alleged offense and therefore presents no case or controversy ripe for a decision. See In re Connors, 332 So. 2d 336 (Fla. 1976) (Hatchett, J. dissenting) ("There is no provision under Florida law, however, for 'declaratory appeals.' Even where a case is certified to this Court by a District Court of Appeal as presenting a question of great public interest, the Court will refrain from deciding the merits if the question is not squarely posed by the certified case (citation omitted). Similarly, questions certified for appellate review pursuant to Rule 4.6, Florida Appellate Rules, 1962 Revision, go unanswered unless they are 'determinative of the cause.'").

However, this Court can address whether the offense of sexual battery, prior to 2014, was a category one necessarily included offense because that is the actual controversy in this case. This Court possesses the inherent authority to reframe or rephrase the certified question and then address the reframed question. In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995) (reframing the certified question where the district court misquoted the statute at issue); Citizens Property

Ins. Corp. v. San Perdido Ass'n, Inc., 104 So. 3d 344 (Fla. 2012) (rephrasing certified question where the question was too broad); Gretna Racing, LLC v. Fla. Dept. of Business and Prof. Regulation, 225 So. 3d 759, 764 (Fla. 2017).

C. Pre-2014 Sexual Battery as Necessarily Included Lesser Offense:

This Court should find that sexual battery, as defined by the statutes in effect at the time of Petitioner's alleged offense, was a category one necessarily included lesser offense of capital sexual battery. From 2010 through 2012, the only statutory difference between the elements of capital sexual battery and sexual battery was the age of the victim. A defendant committed capital sexual battery when the victim of the sexual battery was younger than twelve years of age. §794.011(2)(a), Fla. Stat. (2009-2011). A defendant committed second-degree felony sexual battery when the victim was twelve or older. §794.011(5), Fla. Stat. (2009-2011). There was no upper age limit for the offense of sexual battery during those years. Prior to the 2014 statutory amendment, when a capital sexual battery was alleged and the State had proved all of the elements of capital sexual battery except for the age of the victim, the default lesser offense the State had proved was second-degree felony sexual battery because the victim must be either younger than twelve years of age or twelve years of age and older. The age of the victim is binary. The State either proved the higher offense of capital sexual battery by

proving that the victim was younger than twelve years of age at the time of the sexual battery, or the State failed to prove that the victim was younger than twelve years of age and instead proved only the second-degree felony of sexual battery against a victim twelve years of age or older. Capital sexual battery is the aggravated form of the sexual battery offense found at section 794.011(5), and the aggravating fact is the status of the victim as less than twelve years old. Where capital sexual battery has been charged and the act of a sexual battery has been proven, a jury must either find that the victim is younger than twelve years of age or twelve years of age or older because there is no other option. Where the State has failed to prove the aggravating fact that the victim of the sexual battery was younger than twelve years of age, the default alternative is to properly convict the defendant of the lesser second-degree felony sexual battery of a victim twelve years of age or older.

The version of sexual battery in effect prior to the 2014 statutory amendment has the same relationship to its higher offense (capital sexual battery) that many other category one necessarily included lesser offenses have to their higher offenses, where the only difference between the higher offense and its necessarily included lesser offense is the age of the victim. Battery is a category one necessarily included lesser offense of battery on a person sixty-five years and older. Bryant v. State, 932 So. 2d 408, 410 (Fla. 2d DCA 2006); Fla. Std. Jury

Instr. (Crim) 8.16 (2018); §784.08(2)(c), Fla. Stat. (2019); §784.03, Fla. Stat. (2019). Aggravated battery is a category one necessarily included lesser offense of aggravated battery of a person sixty-five years of age or older. Fla. Std. Jury Instr. (Crim) 8.14 (2020); §784.08(2)(a), Fla. Stat. (2019); §784.045, Fla. Stat. (2019). Assault is a category one necessarily included lesser offense of assault on a person sixty-five years of age or older. Fla. Std. Jury Instr. (Crim) 8.17 (1997); §784.08(2)(d), Fla. Stat. (2019); §784.011, Fla. Stat. (2019). Aggravated assault is a category one necessarily included lesser offense of aggravated assault on a person sixty-five years of age or older. Fla. Std. Jury Instr. (Crim) 8.15 (2020); §784.08(2)(b), Fla. Stat. (2019); §784.021, Fla. Stat. (2019). Stalking is a category one necessarily included lesser offense of aggravated stalking of a person under sixteen years of age. Fla. Std. Jury Instr. (Crim) 8.7 (2020); §784.048(5), Fla. Stat. (2019); §784.048(2), Fla. Stat. (2019). Fraudulent use of personal identification information is a category one necessarily included lesser offense of fraudulent use of personal identification information of a person less than eighteen years of age or sixty years of age or older. §817.568(2)(a),(6), Fla. Stat. (2019); Fla. Std. Jury Instr. (Crim) 20.15 (2018). Similarly, the offense of possession of twenty grams or less of marijuana is a category one necessarily included lesser offense of the offense of possession of more than twenty grams of marijuana. Like the age of the sexual battery victim, the amount of marijuana is binary. Assuming possession of

marijuana is proved, the amount of marijuana is either proved to be more than twenty grams or it is necessarily less than twenty grams. The marijuana cannot be both more than twenty grams and less than twenty grams at the same time. The binary nature of the numeric value does not prevent the legal classification of possession of twenty grams or less of marijuana as a category one necessarily included offense of possession of more than twenty grams of marijuana. Fla. Std. Jury Instr. (Crim) 25.7 (2020); §893.13(6), Fla. Stat. (2019); §893.13(6)(b), Fla. Stat. (2019). The Schedule of Lesser Included Offenses found in the Florida Standard Jury Instructions is presumptively correct and complete, though it is not the final authority on lesser included offenses. Williams v. State, 957 So. 2d 595, 599-600 (Fla. 2007).

When the State charges a defendant with capital sexual battery of a victim less than twelve years of age under the pre-2014 version of the Florida Statutes and proves that a sexual battery occurred against a person, but the State fails to prove that the person was less than twelve years of age, sexual battery of a person as defined by section 794.011(5) has still been proven, always. It is for this reason that the offense of sexual battery, as defined by the pre-2014 version of section 794.011(5), must be a category one necessarily included lesser offense of capital sexual battery. This conclusion fits within the existing framework of the age-based necessarily included lesser offenses established by the Schedule of Lesser Included

Offenses in the Florida Standard Jury Instructions authorized by this Court. This Court should forego the subsuming statutory elements test found in Sanders v. State, 944 So. 2d 203, 206 (Fla. 2006), for determining category one necessarily included lesser offenses where the only difference between the higher and lower offenses is not in the conduct of the offense but is instead in the numeric value of a circumstance of the offense, such as the age of the victim. This Court should hold that where there is a less severe degree-variant offense of the charged offense and the only difference between the higher charged offense and the lower offense is a numeric value of some circumstance of the offense (victim age), then the lesser degree variant of the charged offense is a category one necessarily included lesser offense that must be instructed upon in all cases, unless the parties agree otherwise.

D. Rule 3.510, Florida Rules of Criminal Procedure:

“On an indictment or information on which the defendant is to be tried for any offense the jury may convict the defendant of... (b) **any offense that as a matter of law is a necessarily included offense** or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.” Fla. R. Crim. P. 3.510 (emphasis supplied). Rule 3.510(b) requires the trial court to give a requested instruction on a necessarily included lesser offense,

even where the evidence at trial incontrovertibly shows that the necessarily lesser included offense could not have been committed without also committing the greater charged offense. Wimberly at 930 (answering the certified question in the affirmative). A trial judge is not relieved of the obligation to instruct the jury on a necessary included lesser offense because he or she has determined that there is no evidence to support the lesser offense. Id. Rule 3.510 requires the trial court to instruct the jury on the necessarily included lesser offense regardless of the evidence at trial. Id. See, also, Clements v. State, 284 So. 2d 700 (Fla. 3d DCA 1973) (finding that the language of the prior version of Rule 3.510 requiring the jury to be instructed on a necessarily lesser included offense was mandatory).

The last sentence of Rule 3.510(b), which states that a “judge shall not instruct on any lesser included offense as to which there is no evidence,” only applies to category two permissive lesser offenses. Wimberly at 931 (finding that the State’s contention that the last sentence of Rule 3.510(b) applied to both category one necessarily included lesser offenses and category two lesser offenses was contrary to the intent of the Florida Supreme Court in adopting the rule’s language); Flint v. State, 463 So. 2d 554, 556 (Fla. 2d DCA 1985) (stating that “considering the historical distinction between necessarily included offenses (category 1) and lesser included offenses which are charged in the information and supported by the evidence (category 2), we are convinced that the words ‘and is

supported by the evidence’ modify only the phrase ‘a lesser included offense of the offense charged in the indictment or information’’).

This Court has stated that Rule 3.510’s requirement that a trial judge give a requested instruction on a necessarily included lesser offense is “bottomed upon a recognition of the jury’s right to exercise its pardon power.” Wimberly at 932. A majority of this Court has recently receded from this Court’s prior precedents relying on “a right of access” to a jury pardon as a basis for fundamental error in jury instructions. Knight v. State, 286 So. 3d 147, 153 (Fla. 2019). However, in that same case this Court made clear that the mandate of Rule 3.510(b), recognized in Wimberly, was still the law in Florida:

We note that, in *State v. Wimberly*, 498 So. 2d 929 (Fla. 1986), we relied on ‘the jury’s right to exercise its ‘pardon power’ as part of the rationale for our interpretation of Florida Rule of Criminal Procedure 3.510(b) and our holding that, under that rule, ‘[t]he trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense.’ *Id.* at 932. To be clear, in our decision today we do not recede from *Wimberly*.

Knight at 154.

Pursuant to the mandate of Rule 3.510, which was explained in Wimberly and maintained in Knight, Petitioner was entitled to have the jury instructed on the category one necessarily included lesser offense of sexual battery of a victim twelve or older. The trial court had no discretion to refuse to give the instruction

on sexual battery once requested, regardless of the evidence at trial. The trial court's refusal to give the instruction was per se reversible error⁷, and a new trial is

7 In Dean v. State, 230 So. 3d 420 (Fla. 2017), five justices of this Court voted in favor of affirming the petitioner's conviction and denying his request for a new trial where the trial court refused to give an instruction on a lesser offense. The Court's decision in Dean generated four opinions. Justices Lewis, Canady, and Lawson concurred with the per curiam opinion. Justice Polston concurred with an opinion in which Justices Canady and Lawson concurred. Justice Quince concurred in result only with an opinion. Justice Pariente concurred in part and dissented in part with an opinion. Chief Justice Labarga was recused. In the per curiam opinion, the Court wrote, "For the reasons expressed in Justice Polston's concurring opinion and Justice Quince's concurring in result only opinion, we approve the result of the Fourth District's decision to affirm Dean's convictions. Dean at 425. Justice Polston wrote in his concurring opinion that he would find that the failure to give the instruction on the necessarily included lesser offense was harmless error. Dean at 426 (Polston, J. concurring). Justice Canady and Justice Lawson concurred with Justice Polston's opinion. Justice Quince wrote in her opinion concurring with the result only that she would find that the requested lesser included offense was actually a category two lesser offense and not a category one lesser offense, but that if the lesser was a category one lesser then the trial court's failure to give the instruction was per se reversible error and not harmless error. Dean at 428 (Quince, J. concurring in result only). Because the Court in Dean's per curiam opinion approved the result "[f]or the reasons expressed in Justice Polston's concurring opinion and Justice Quince's concurring in result only opinion," and because Justice Polston and Justice Quince expressed two completely opposite positions on whether it was harmless error or per se reversible error, the question of whether a trial court's failure to give a requested instruction on a category one necessarily included lesser offense where there is evidence to support a conviction of both the greater offense and the lesser offense was not answered in Dean. See Caruthers v. State, 232 So. 3d 441 (Fla. 4th DCA 2017). As a result, this Court's precedent in Wimberly and Abreu remained in full force and effect. See Dean at 425 (Polston, J. concurring) (citing Abreu and stating, "I acknowledge that under this Court's precedent the trial court's failure to give a requested jury instruction on a necessarily lesser included offense one step removed from the charged offense is per se reversible error."). Less than one year

required for Count I. Wimberly at 932 (approving the decision in Wimberly v. State, 476 So. 2d 272 (Fla. 1st DCA 1985); State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978) (stating that “the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible”).

E. Section 794.011(5)(a),(b) (2018) (Post-2014 Sexual Battery):

If this Court decides to address the certified question, as currently stated by the First District, in order to determine whether the current statutory version of sexual battery is a category one necessarily included lesser offense of capital sexual battery, it is Petitioner’s position that sexual battery in its current statutory form (post-2014 statutory amendment) is still a category one necessarily included lesser offense. Unlike the pre-2014 version of the sexual battery statute (section 794.011(5)) which applied to any victim age twelve or older, the post-2014 sexual battery statute contains two classes of victim: those twelve years of age and older but less than eighteen years of age, and those eighteen years of age and older. §794.011(5)(a),(b), Fla. Stat. (2018). This means that where capital sexual battery is charged, and the jury believes beyond a reasonable doubt that the defendant has

ago and two years *after* Dean, this Court expressly stated that the holding in Wimberly was still the law in Florida. Knight at 154.

committed sexual battery against the victim but does not believe that the victim was less than twelve years old, it cannot be said that the next proper offense of conviction is automatically sexual battery on a victim twelve years of age or older but less than eighteen years of age (section 794.011(5)(a)) because it is possible that the jury could find that the victim was actually eighteen years of age or older (section 794.011(5)(b)).

However, sexual battery of a person twelve years of age and older but less than eighteen years of age (section 794.011(5)(a)) and sexual battery of a person eighteen years of age or older (section 794.011(5)(b)) have the same relationship to capital sexual battery that other category one necessarily included lesser offenses have to their higher offenses, where the only difference between the higher offense and its necessarily included lesser offenses is a numeric value range relating to some circumstance of the offense. First-degree felony grand theft has category one necessarily included lesser offenses of second-degree felony grand theft, third-degree felony grand theft, first-degree misdemeanor petit theft, and second-degree misdemeanor petit theft where the only differences between the higher theft offenses and the lesser offenses is the dollar value of the property taken. Fla. Std. Jury Instr. (Crim) 14.1 (2020); §812.014(2)(a), Fla. Stat. (2019); §812.014(2)(b), Fla. Stat. (2019); §812.014(2)(c)1,2,3 (2019); §812.014(2)(e), Fla. Stat. (2019); §812.014(3)(a), Fla. Stat. (2019). Just like the age ranges in the 2018 capital

sexual battery and sexual battery statute, the theft statute contains dollar value ranges that determine the offense's degree. In the schedule of lesser offenses found in the standard jury instruction on theft, each of the lesser theft offenses is listed as a category one necessarily included lesser offense of each greater theft offense. The jury is instructed on these lesser offenses and asked to determine beyond a reasonable doubt on the verdict form the proper value range of the property taken. The same is true for the offense of criminal mischief. According to the schedule of lesser included offenses in the standard criminal mischief jury instruction, first-degree misdemeanor criminal mischief and second-degree misdemeanor criminal mischief are category one necessarily included lesser offenses of third-degree felony criminal mischief where the only differences between the higher offense and the lower offenses is the dollar value of the property damaged. Fla. Std. Jury Instr. (Crim) 12.4 (2010); §806.13(1)(b)1., Fla. Stat. (2019); §806.13(1)(b)2., Fla. Stat. (2019); §806.13(1)(b)3., Fla. Stat. (2019). Just as in theft cases, the jury is instructed on each of the category one lesser offenses and asked to determine beyond a reasonable doubt on the verdict form the proper value range of the damage to the property. It is a simple and effective method for determining the proper offense of conviction. Because this approach is already used without issue in theft and criminal mischief cases, any argument that

the jury is likely to be confused by the inclusion of the instructions on all of the numeric value-based lesser offenses in capital battery cases is meritless.

When capital sexual battery is charged, trial courts should take the same approach to the inclusion of lesser offenses that is used in theft and criminal mischief cases, where a numeric value range is determinative of the proper offense of conviction. Just as in theft cases and criminal mischief cases, the degree of the sexual battery is determined by a numeric value range element (age of the victim). In a capital sexual battery case where the offense occurred after the 2014 statutory amendment took effect, the jury should always be instructed on the necessarily included lesser offenses of first-degree felony sexual battery of a victim twelve years of age or older but less than eighteen years of age and second-degree felony sexual battery of a person eighteen years of age or older. The jury should be instructed to make a factual finding beyond a reasonable doubt regarding the age range of the sexual battery victim: younger than twelve years of age, twelve years of age or older but less than eighteen years of age, or eighteen years of age or older. This approach serves the legitimate needs of all involved parties:

The practice of instructing juries on necessarily lesser included offenses arose under the common law and continues today because it serves the legitimate needs of the prosecution, the defendant, the jury and the judicial system. Any truth-seeking mechanism which limits the jury to verdicts of guilty or not guilty solely on the charged offense would be both deficient and inefficient.

It would be deficient in that the jury faced with the evidence that a necessarily lesser included offense, but not the charged offense, had been committed and a choice of two false verdicts, guilty or not guilty as charged, might reason that guilty as charged was closer to the truth than not guilty as charged.... Ideally, when a criminal charge is brought against a defendant, there are three possible true verdicts: the defendant is guilty as charged, the defendant is not guilty as charged but is guilty of an offense necessarily included in the charged offense and supported by the proof, or the defendant is not guilty of either the charged offense or of any necessarily included offense.

Wimberly at 932-33 (Shaw, J. dissenting).

Instructing the jury on necessarily lesser included offenses serves the legitimate purpose of preventing a miscarriage of justice by enabling the jury to choose the true verdict. *Id.* By treating both lesser degrees of sexual battery as category one necessarily included lesser offenses of capital sexual battery, instructing the jury on these lesser offenses and the corresponding age ranges, and directing the jury to decide beyond a reasonable doubt the correct age range on the verdict form, the trial court eliminates any potential claims of error or prejudice. The defendant can lodge no complaint that the process deprived him of any rights or that he suffered any prejudice. The jury, having been given the value ranges of the necessarily included offenses to choose from, can convict the defendant of the offense it believes has been proved beyond a reasonable doubt. There can be no argument by the defendant that the jury, seeing no lesser offenses and believing

that the defendant was not guilty of the charged offense but still guilty of some crime, chose to convict the defendant of the charged offense because it could not bear to see the defendant acquitted outright. This is a key reason why giving each of the necessarily included lesser offenses is critical in capital sexual battery cases. The “commonly held belief that individuals who commit sexual assaults are more likely to recidivate” and the “societal outrage directed at child molesters” have been recognized by this Court, and these factors make defendants accused of these type of offenses especially vulnerable to the emotions of the jurors. See McLean v. State, 934 So. 2d 1248, 1256 (Fla. 2006). It is unfathomable that a jury, believing beyond a reasonable doubt that the defendant sexually battered a child, would acquit the defendant outright because the State had failed to prove that the child was less than twelve years of age. A jury that believes beyond a reasonable doubt that a defendant charged with capital sexual battery has sexually battered a child but is unsure of whether the child was less than twelve years of age will almost certainly convict that defendant of capital sexual battery if the alternative is an outright acquittal because the jury was not instructed on at least one of the category one lesser included offenses of sexual battery of a victim twelve years of age or older but less than eighteen years of age and sexual battery of a victim eighteen years of age or older. Instructions on the category one necessarily included lesser offenses allow a true verdict to be returned and prevent miscarriages of justice.

The theft and criminal mischief approach, which treats all value-based degree variants of the charged offense as category one necessarily included lesser offenses, also ensures that justice is served for the victim where the jury believes that a defendant has sexually battered a child but is unsure that the child is less than twelve years of age. Where the jury believes beyond a reasonable doubt that a defendant has sexually battered a child but is unsure of whether the child was less than twelve years of age, and the jury has been properly instructed on the category one necessarily included lesser offenses of sexual battery found at section 794.011(5)(a) and (b), the jury can still return a true verdict and rightfully convict the defendant of a first-degree or second-degree felony, punishable by up to thirty or fifteen years respectively. The jury, if it follows the law, is not forced to award an outright acquittal to a defendant who it believes beyond a reasonable doubt sexually battered the victim⁸.

The First District's position in Allen was that based on the definition of category one necessarily included lesser offenses in Sanders v. State, 944 So. 2d

⁸ Though, for reasons explained above, it is far more likely that a jury that believes a defendant has committed sexual battery but is unsure of the victim's age will convict the defendant of capital sexual battery rather than acquit him outright.

203, 206 (Fla. 2006)⁹, sexual battery is not a category one necessarily included lesser offense. Allen at 707. The First District noted in Allen that because sexual battery requires the victim to be between twelve and eighteen years old and capital sexual battery requires the victim to be less than twelve years old, the elements regarding the age of the victim from the lesser offense of sexual battery are not always subsumed within those of the charged offense of capital sexual battery. However, offenses which have differing degrees of severity based not on differing conduct but instead on a differing numeric value of a circumstance of the offense do not fit neatly within the Sanders definition of necessarily included lesser offenses. Where the only difference between a greater offense and a lesser offense is a numeric value range of some circumstance of the offense, such as age of the victim or dollar value of the property taken, the proper approach should be to instruct the jury on each lesser and allow it to make a factual finding beyond a reasonable doubt regarding the proper numeric value range. The physical act of sexual battery is the same regardless of the age of the victim. The younger age of the victim is simply an aggravator that increases the severity of the offense. The Sanders test for subsuming statutory elements does not appropriately address lesser

⁹ See Sanders at 206 (“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.”).

offenses that are the same in conduct as a higher offense but differ from the higher offense only with regard to a numeric value range of a circumstance of the offense, such as age of the victim or dollar value of property taken.

This Court should forego the Sanders subsuming statutory elements test for determining category one necessarily included lesser offenses where the only difference between the higher and lower offenses is not in the conduct of the offense but is instead in the numeric value of an involved circumstance of the offense, such as age of the victim or dollar value of the property taken. This Court should hold that where there are less severe degree-variant offenses of the charged offense and the only difference between the higher charged offense and the lower offenses is a numeric value or value range of some circumstance of the offense, then the lesser degree variants of the charged offense are category one necessarily included lesser offenses that must be instructed upon in all cases, unless the parties agree otherwise. Capital sexual battery, battery on a person twelve years of age or older but less than eighteen years of age, and battery on a person eighteen years of age or older are examples of these type of degree-variant offenses that are the same in conduct but different in a numeric value range of a circumstance of the offense (the age range of the victim). The conduct of sexual battery is the same across all three offenses. The only difference is the age range of the victim.

If this Court reaches the certified question as currently written and addresses the current form of the sexual battery statute, this Court should find that the different degrees of the offense of sexual battery proscribed by section 794.011(5)(a) and (b) are category one necessarily included lesser offenses of capital sexual battery and that the jury must be instructed upon them when capital sexual battery is the charged offense. This Court should hold that trial courts must instruct capital sexual battery juries on the category one lesser offenses of sexual battery and provide a place on the jury verdict form for the jury to make its factual finding of the victim's age range.

F. Pre-2014 Sexual Battery as a Category Two Lesser of Capital Sexual Battery:

A category two 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 at 206. Again, this test for lesser offenses should not be applied to degree-variant offenses which are composed of the exact same conduct and are only differentiated by the age of the victim or some other strictly numeric value of a particular circumstance of the offense. Due to the binary nature of the numeric values, a strict following of the Sanders definition of category two permissible lesser included offenses is not

functional for age-based, degree-variant offenses. Under a strict following of the Sanders definition of category two permissive lesser included offenses, when capital sexual battery is charged and the victim is alleged in the charging documents to be less than twelve years of age, sexual battery of a victim twelve or older would never be a lesser because the charging document did not allege that the victim was twelve years of age or older. Even where evidence was introduced at trial that the victim was older than twelve years old at the time of the alleged capital sexual battery, the defendant would not be entitled to an instruction on sexual battery of a victim older than twelve years of age as a category two permissive lesser included offense simply because the charging document alleged the victim was under twelve years old. This Sanders test for determining category two permissive lesser included offenses is fundamentally flawed when applied to offenses comprised of the exact same conduct but differentiated only by a numeric value of a circumstance involved in the offense, such as the age of the victim, the weight of a controlled substance possessed, the dollar value of property taken, or the dollar value of property damage done. The State's choice to charge the greater offense (capital sexual battery, possession of more than twenty grams of marijuana, etc.) would prohibit the jury from being instructed on an appropriate lesser offense even where there was evidence supporting that lesser offense at trial. This is not just a concern for the defense. In the event that capital sexual battery on a victim

less than twelve years of age is charged, the evidence at trial proves that a sexual battery against the victim occurred, but the evidence fails to prove the victim was less than twelve, a strict following of the Sanders definition of permissive lesser included offenses would prevent the State from seeking and the jury from considering the lesser offense of sexual battery of a victim older than twelve because the charging document did not allege that the victim was older than twelve. Though the evidence at trial proved that the defendant committed a sexual battery against the victim, the Sanders test would eliminate sexual battery as a category two permissive lesser offense and the defendant would be entitled to an acquittal. This is not a just result. This situation also leads to the same concern expressed above, that a jury that has a reasonable doubt as to the age of the victim but not that the capital sexual battery defendant committed a sexual battery against the victim, would face the prospect of acquitting the defendant outright because it did not have the chance to convict the defendant of the appropriate lesser offense of sexual battery. The Sanders definition of a permissive lesser included offense would deny the jury the lesser in that situation. The jury will likely choose to convict the defendant of capital sexual battery in that situation, though the charged offense was not proven, because a jury would be loathe to acquit a defendant it believed sexually battered a child of any age.

In the instant case, there were discrepancies in the evidence from which the jury could have found a reasonable doubt as to the victim being less than twelve years of age and, therefore, the jury should have been instructed on the lesser of sexual battery on a victim twelve years of age or older. Because the age of the victim was a binary choice of either less than twelve years of age or twelve years of age and older, a reasonable doubt as to the victim being less than twelve automatically supports the conclusion that she was older than twelve years of age. As a result Petitioner's jury should have been instructed on the lesser offense of sexual battery. The witnesses that testified to the timeline of events gave multiple inconsistent, vague, confused, and conflicting accounts of where and when the offense alleged in Count I occurred.

Reasonable doubt as to whether the victim was less than twelve years old at the time of the offense can arise from conflicts in the evidence and the lack of evidence. Fla. Std. Jury Instr. (Crim) 3.7 (1997). A jury is entitled to rely upon its own conclusion about the credibility of any witness and the reliability of any testimony. Fla. Std. Jury Instr. (Crim) 3.9 (2013). "A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness." *Id.* A jury may disbelieve evidence presented by the State even if it is uncontradicted. Maurer v. State, 668 So. 2d 1077, 1079 (Fla. 5th DCA 1996). A jury does not have to accept and believe the State's witnesses even where they are uncontradicted.

State v. Paul, 638 So. 2d 537, 539 (Fla. 5th DCA 1994). Further, the testifying victim's appearance can be circumstantial evidence from which a jury can infer the victim's age. McMichael v. State, 152 So. 3d 821 (Fla. 2d DCA 2014); Brown v. State, 802 So. 2d 434, 436-37 (Fla. 4th DCA 2001); State v. Surin, 920 So. 2d 1162, 1164 (Fla. 3d DCA 2006).

Petitioner's trial counsel highlighted in closing argument the unreliable nature of the witness testimony regarding the timing and location of the alleged offenses:

Like I told you guys in opening, the dates were very important, because it was going to be very confusing. That is, I don't think anyone here that took the stand that talked about, you know, the timeline of these events. I don't think anyone got it right. I think everybody made inconsistent statements about whether they were on Aztec first, whether they were on Williams first, whether—so in all honesty, I don't think anybody here really knows.

(T 183).

Then in court today she said she moved to Aztec when she was 11. Again, that is inconsistent with what she told the Child Protection Team investigator. She said from Aztec she moved to Williams when she was 11 to 12.¹⁰

10 Q: You said just now that the first time that this would happen you were nine years old?

A: Yes, sir.

Q: And was that at Williams?

(T 184).

She never gave any details about, you know, a specific time of year, specific, you know, dates, months, you know, seasons, anything else.

(T 185).

A: Yes, sir.

Q: All right. Do you remember giving a statement to Ms. Sandy Behrens at the Child Advocacy Center?

A: Yes, sir.

Q: You told her the first time was at Aztec?

A: Yes, sir.

Q: So Aztec, not Williams?

A: Aztec was when I turned 11.

Q: And you also stated in that interview that this had happened first at Aztec from ages 9 through 10; and then Williams, ages 11 through 12; and then Sims from 13 to 14?

A: I have got Williams and Aztec mixed up.

Q: So which was it?

A: Nine through 10 at Williams; 11 through 12 at Aztec.

Q: So it's possible that you do not remember?

A: I do remember.

Q: You remember now?

A: Yes, sir.

Q: But you did not remember at the time when you gave the statement back on January 12, 2017?

A: I was under a lot of pressure.

Q: In that same interview with Ms. Behrens, you had told her that the first time was at Aztec, which that wasn't—that is not true. The first time was at Williams you are saying now. Right?

A: Yes, sir.

(T 55-56).

Then again, the mom said that they were on Aztec first in 2010, which is different than what T.W. testified to today. Then they moved to Williams in 2014, which contradicts what T.W. testified to today, and then Sims in 2015.¹¹

(T 186).

Again, there's no other evidence in this case. It's all word of mouth from a person who has admitted that she may—you know, that she doesn't remember a lot of things and that she could be mistaken about some of these dates.

(T 187).

Given the unreliable nature of the witness testimony regarding the timeline and location of the offense in Count I and the common sense conclusion that if there was a reasonable doubt as to whether the victim was less than twelve years of age then conversely there was evidentiary support for the conclusion that the victim was twelve years of age or older, the trial court should have instructed the

11 Q: So it was Aztec in 2010?

A: Yes.

Q: And then from Aztec you moved to Williams or Sims?

A: Williams.

Q: All right.

A: And then Sims.

Q: And then Sims. So Aztec, Williams, Sims, Bob Sykes?

A: (Indicating.)

Q: Then when did you move into Sims?

A: 2015.

Q: So you were at Williams for a year?

A: (Indicating.)

(T 107).

jury on the lesser included offense of sexual battery of a victim twelve years of age or older. The trial court's failure to do so was reversible error.

G. Rule 3.490, Florida Rules of Criminal Procedure:

If this Court finds that sexual battery is not a category one or category two lesser included offense of capital sexual battery, then the trial court's failure to instruct the jury on the offense of sexual battery of a victim twelve years of age or older was still reversible error pursuant to Rule 3.490 of the Florida Rules of Criminal Procedure. "If the indictment or information charges an offense divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence." Fla. R. Crim. P. 3.490. "The judge shall not instruct on any degree as to which there is no evidence." Id.

Because the age of the victim is a binary choice (either less than twelve years of age or twelve years of age and older) when deciding between the offenses of capital sexual battery of a victim less than twelve years of age and sexual battery of a victim twelve years of age or older (for offenses committed prior to 2014), inherently weak evidence that the victim is less than twelve years of age conversely supports the conclusion that the victim is twelve years of age or older. Consequently, where, as in Petitioner's case, capital sexual battery (victim less than twelve years of age) is charged and where the only testimony offered by the

State that the victim is less than twelve years of age is vague, confused, and inconsistent, the jury must be instructed on the lesser degree offense of second-degree felony sexual battery of a victim twelve years of age or older. This is especially true where, as here, the defense argues to the jury that the testimony regarding the age of the victim cannot be relied upon to support the charged offense.

Imagine a hypothetical case where a defendant is charged with felony possession of more than twenty grams of marijuana. The State's only witness, the officer who found the defendant in possession of the marijuana, testifies that he found the marijuana in the defendant's pocket during a search of the defendant's person¹², that he weighed the marijuana, and that the marijuana weighed twenty-one grams. However, during cross-examination the officer testifies that the scale he used to weigh the marijuana is sometimes off by several grams and has a tendency to give different weights for the exact same item when the exact same item is weighed more than once. In this hypothetical, there is certainly direct evidence that the marijuana weighed more than twenty grams so as to support the charge of possession of more than twenty grams of marijuana. But, because of the inconsistency of the scale, there is also a valid, reasonable argument that the scale

¹² For the purposes of the hypothetical there is no dispute that the substance was marijuana or that the search was constitutional.

cannot be relied upon and therefore the weight actually may be less than twenty-one grams. Can there be any doubt in this hypothetical that the jury should receive an instruction on the lesser degree offense of misdemeanor possession of less than twenty grams of marijuana in addition to the instruction on the charged offense? Due to the obvious weakness of the testimony regarding the weight of the marijuana, Rule 3.490, along with the ideals of justice and due process, demands that the jury also be instructed on the lesser degree offense of misdemeanor possession of less than twenty grams of marijuana.

Here, the obvious weakness in the testimony regarding both the age of the victim when she lived at certain locations and the location where each alleged offense occurred supported the lesser degree offense of sexual battery of a person twelve years of age or older. Assuming arguendo that sexual battery of a person twelve years of age or older is not a category one or category two lesser included offense to capital sexual battery of a victim less than twelve years of age, then Rule 3.490 still required that the jury be instructed on the lesser degree offense of sexual battery of a person twelve years of age or older. The trial court's failure to do so was reversible error.

CONCLUSION

This Court should hold that the pre-2014 offense of sexual battery on a person twelve years of age or older was a category one necessarily included lesser offense of capital sexual battery on a person less than twelve years of age and that the trial court's failure to instruct the jury on the offense in Petitioner's case was per se reversible error. If this Court finds that the offense of sexual battery is a category two permissive lesser offense, then it should still hold that the instruction on the lesser offense should have been given to the jury because there was sufficient evidence to support the offense. The trial court's failure to do so was reversible error. If the Court finds that the offense is neither a category one nor a category two lesser offense, then this Court should still hold that the jury should have been instructed on the offense pursuant to Rule 3.490 and the trial court's failure to do so was reversible error. Petitioner respectfully requests a new trial on Count I.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, this day of October 8, 2020. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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