IN THE SUPREME COURT OF FLORIDA

REGGIE EUGENE ALLEN,

Appellant,

vs.

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

STATE OF FLORIDA,

Appellee.

_____/

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

REPLY MERITS BRIEF OF APPELLANT

JESSICA J. YEARY
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

VICTOR D. HOLDER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 71985
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
victor.holder@flpd2.com

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

CASES

STATUTES

OTHER AUTHORITIES

RULES

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.

Respondent argues in its answer brief that evidence adduced at trial was not sufficient to convict Petitioner of sexual battery of a person twelve or older in 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" (RAB 10)[1]. As a result, Respondent argues that sexual battery is not a category one necessarily included lesser offense of capital sexual battery. This position ignores the jury's inherent right to reject any and all testimony it deems unreliable or lacking in credibility and assumes that just because testimony is offered to a jury that it is necessarily accepted as true by the jury. The jury, as fact-finder, possesses the right to disbelieve any and all evidence offered to it, even where the evidence may seem to be uncontradicted. Reasonable doubt as to whether the victim was less than twelve years old at the time of the

[1] Respondent's answer brief on the merits will be referred to as RAB followed by the appropriate page number, all in parentheses.

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, several Florida district courts have stated that 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). Thus, the jury is at liberty to infer from the circumstantial evidence of the testifying victim's appearance that she is not the age that she testifies she is.

As a result, sexual battery of a person twelve or older (as defined by the pre-2014 version of section 794.011(5)) must be a

category one necessarily included lesser offense to capital sexual battery. If a jury finds that a defendant has committed an act of sexual battery but rejects the testimony that a victim is younger than the age of twelve, then automatically the jury has found that the defendant has committed sexual battery of a victim twelve years of age or older because of the binary nature of the age requirement. The victim is either younger than twelve years of age or twelve and older. There is no other possibility. When the jury finds that the sexual conduct has been proved beyond a reasonable doubt, but that there is a reasonable doubt as to whether the victim was less than twelve, the conviction must then be for sexual battery of a person twelve or older.

Respondent takes issue with Petitioner's analysis of the element of the age of a capital sexual battery victim (under the pre-2014 version of the statute) as a binary choice and argues that Petitioner's comparison of the crimes of capital sexual battery and sexual battery to the crimes of battery on a person sixty-five years of age and older and simple battery is "incorrect" (RAB 11). Respondent states that "when a defendant commits battery on a person 65 years and older the defendant has always satisfied the

elements of simple battery" and that "Capital Sexual Battery and Sexual Battery both have their own mutually exclusive age element" (RAB 11). Respondent makes a distinction without a difference. If a jury believes beyond a reasonable doubt that the defendant has committed a battery against a victim, but it also does not find beyond a reasonable doubt the aggravating element that the victim was older than sixty-five, then the State has necessarily only proved simple battery. If a jury believes beyond a reasonable doubt that an act of sexual battery occurred, but has a reasonable doubt that the State has proved the aggravating element of capital sexual battery that the victim of the sexual battery was less than twelve years old, then the State has necessarily only proved sexual battery because the age of the victim is binary: either younger than twelve or twelve and older.

Respondent also takes issue with Petitioner's comparison of the age element to the monetary value element in theft or criminal mischief cases. Respondent argues that a person "who steals ten thousand dollars is also guilty of stealing five thousand dollars, three thousand dollars, or ten dollars" (RAB 12). Respondent makes a similar argument as to weight of a substance.

Respondent's statement is accurate when dealing with fungible items that can be broken into smaller denominations or units like money. But, Respondent's attack on the comparison of the degrees of sexual battery to degrees of theft or criminal mischief does not hold up where the property stolen or damaged is property not divisible into smaller units. If a defendant in a third-degree felony grand theft prosecution is accused of stealing an antique vase, the State must prove that the vase's worth is more than $750[2]. This element for the worth of the property in theft or criminal mischief cases is akin to the element of the age of the victim in capital sexual battery cases. The actual worth of the vase cannot be simultaneously above and below $750, just as the actual age of the victim cannot be simultaneously above and below twelve. However, the question at issue is not the actual worth of the property, but instead: what has the State proved regarding the property's worth to the jury? If the jury does not believe beyond a reasonable doubt that the State's evidence has proved the worth of the vase above $750, then the jury must convict of one of the category one necessary lesser included offenses of first-degree or second-degree

[2] § 812.014(2)(c)1, Fla. Stat. (2020).

misdemeanor theft (depending on the value range of the vase it believes has been proven). Likewise, if the jury does not believe that the State has proved the victim in a capital sexual battery case was less than twelve years old, then the jury must convict of the lesser of sexual battery of a person twelve or older. In every grand theft case and felony criminal mischief case there is the possibility that the jury will conclude that the State's evidence regarding value of the property was insufficient to convict of the charged offense. As a result, the category one necessarily included lesser theft and criminal mischief offenses are always instructed upon (unless the parties agree otherwise). The same is true of capital sexual battery cases. In every capital sexual battery case there is a possibility that the jury will conclude that the State's evidence was insufficient to prove that the victim was less than twelve.

Respondent asserts that "in the instant case, when the age of the victim is known and the dates charges *[sic]* 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" (RAB 13). Respondent fails to see that unless the State and the defense have stipulated to the age

of the victim, the age of the victim is never simply "known." The age of the victim is an element of the offense that must be proved by the State beyond a reasonable doubt to the jury as fact-finder. Only the jury as fact-finder has the authority to determine whether the age of the victim has been proved beyond a reasonable doubt to be less than twelve years old. That is why in every capital sexual battery case the jury should be instructed on the category one necessarily included lesser offense of sexual battery of a person twelve or older unless the parties agree otherwise.

Respondent argues that the trial court's error of failing to instruct the jury on the crime of sexual battery as a lesser offense in Count I was harmless after this Court's decisions in Knight v. State, 286 So. 3d 147 (Fla. 2019), and Dean v. State, 230 So. 3d 420 (Fla. 2017) (RAB 14). For decades the rule in Florida has been that the failure to give a requested instruction on a category one lesser included offense one step removed from the charged offense was per se reversible error and the failure to give a requested instruction on a lesser included offense two or more steps removed from the charged offense could be reviewed for harmless error. State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978) ("Only failure to

instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible. Where the omitted instruction relates to an offense two or more steps removed… reviewing courts may properly find such error to be harmless").

Pursuant to Rule 3.510 of the Florida Rules of Criminal Procedure the 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). This Court has stated that Rule 3.510's[3] 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 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 in Knight at 153. 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:

[3] Fla. R. Crim. P. 3.510

> 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.

The jury's pardon power is "part" of the rationale for Rule 3.510(b). Knight at 154. But, the jury's pardon power is not the only rationale for instructing jurors on lesser offenses. When a lesser offense is not given, there is a danger that jurors will resolve doubts in favor of the charged offense rather than grant an outright acquittal to a defendant the jury believes has committed some offense. This danger is heightened where the defendant is charged with a heinous crime like capital sexual battery of a child younger than twelve. A jury that believes a defendant sexually battered a child but that has a reasonable doubt as to whether the child was younger than twelve is going to convict the defendant of capital sexual battery where the alternative is an outright acquittal because sexual battery of a child twelve or older was not available to it as a

lesser offense. The United States Supreme Court has recognized this specific danger when a lesser included offense is not instructed upon:

> Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205, 212-13 (1973). See also Spaziano v. Florida, 468 U.S. 447, 455 (1984) (observing that "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict... simply to avoid setting the defendant free").

In Dean, three justices agreed that "where the evidence supports the charged offense as well as the requested instruction

on a necessarily lesser included offense, any error in failing to give the requested instruction is harmless because the defendant is not entitled to an opportunity for a jury pardon." Dean at 426 (Polston, J. concurring). This position focuses solely on the opportunity for a jury pardon. This position does not acknowledge the fact that Rule 3.510 also protects a defendant's presumption of innocence and prohibits a miscarriage of justice by insuring that the jury can choose a true verdict.

The per se reversible error rule provides a legitimate remedy where the trial court fails to abide by the requirements of Rule 3.510. If this Court were to adopt the harmless error approach espoused in Justice Polston's concurring opinion in Dean, the protections of Rule 3.510 would be eviscerated. The refusal to give an instruction on a necessarily included lesser offense would always be harmless error because there would always be evidence that "supports the charged offense." If there was no evidence supporting the charged offense, the trial court would have granted a judgment of acquittal.

Where the lesser is not given to the jury and the jury convicts of the charged offense rather than acquitting the defendant outright

because it feels that a verdict of guilty of the charged offense is closer to justice than acquittal, there is often no way to know whether the jury would have convicted of the lesser offense had it had the opportunity. The harmless error test is not suitable in this situation. The per se reversible error approach is simple to administer and guarantees that a defendant's presumption of innocence is protected and that a true verdict will be chosen by the jury. Failure to instruct the jury on a category one necessarily included offense is per se reversible error in Florida and has been for decades. If this Court now adopts a harmless error approach to review a trial court's failure to instruct the jury on a category one necessarily lesser included offense, it will do so at the expense of longstanding Florida decisional law and the bedrock legal principle of stare decisis.

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. As documented in Petitioner's initial merits brief, the alleged victim gave conflicting testimony and statements regarding the dates and locations of the charged offenses and her age at those times. The trial court's failure to give the requested lesser offense 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, Florida Rules of Criminal Procedure, and that the trial court's failure to do so was reversible error. Petitioner respectfully requests a new trial on Count I.

CERTIFICATES

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on David Welch, Assistant Attorney General, at crimapptlh@myfloridalegal.com, on January 15, 2021.

Respectfully submitted,

JESSICA J. YEARY
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Victor D. Holder
VICTOR D. HOLDER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 71985
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
victor.holder@flpd2.com

ATTORNEYS FOR APPELLANT