Filing # 137525682 E-Filed 10/29/2021 10:14:37 AM

IN THE SUPREME COURT OF FLORIDA

DAVID WILLIAM TRAPPMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO. SC21-1479
DCA CASE 1D19-1883
LT NO. 57-2017-CF-2011

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

APPENDIX TO JURISDICTIONAL BRIEF OF PETITIONER

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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, via the Florida Courts E-Filing Portal, to David L. W. Welch, Assistant Attorney General, at crimapptlh@myfloridalegal.com, and, via US Mail, to David William Trappman, DC # P43060, R M C - Main Unit, P O Box 628, Lake Butler, FL 32054-0628, on this date, October 29, 2021.

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1883

DAVID WILLIAM TRAPPMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Santa Rosa County.
David Rimmer, Judge.

February 10, 2021

M.K. THOMAS, J.

David Trappman (Appellant) appeals his convictions for aggravated battery of a law enforcement officer, battery of a law enforcement officer, and resisting arrest. He argues that his conviction and sentencing on both battery charges violate double jeopardy. As explained herein, we disagree and affirm.

Appellant was arrested after an incident at his home, when police appeared to execute an arrest warrant for his wife. Agitated with the police presence and their failure to immediately present a copy of the warrant, Appellant walked from his yard and entered his home while commenting that he hoped officers did not "get bitten by my dog."

Once officers entered the home, Appellant was instructed to proceed back outside with his two dogs while the warrant on his wife was executed. At trial, officers testified that Appellant initially complied; however, once outside, he began to rile up the dogs by banging their heads together and yelling at them. He eventually reappeared in the doorway of the home holding both dogs by the collars and refused the officers' orders to go back outside. Sergeant Bird—the victim of both batteries—testified that when he approached, Appellant reached out and shoved him with one hand. Sergeant Bird responded by driving Appellant towards the front door with both hands. Appellant then let go of a dog while exclaiming "dog up, dog up." The dog, a pit bull, leapt at Sergeant Bird and latched onto his leg, causing injury and subsequent scarring.

The theory of the State's case was that Appellant had initially committed battery by shoving Sergeant Bird, and that he separately committed aggravated battery by subsequently "siccing" the dog on Bird.[1] The jury apparently agreed, as Appellant was found guilty as charged. The trial court then adjudicated Appellant guilty on all charges and sentenced him to a total of ten years in prison. Appellant initiated an appeal. After this Court's review of the *Anders*[2] brief filed by his counsel, the parties were ordered to file supplemental briefing to address whether Appellant's dual convictions for battery and aggravated battery violate the prohibition on double jeopardy found in the Fifth Amendment to the U.S. Constitution. *See also* Art. I, § 9, Fla. Const.

As an initial matter, we conclude that Appellant's failure to preserve the issue is no obstacle to relief, as double jeopardy violations are per se fundamental error. *See Rosado v. State*, 129 So. 3d 1104, 1107 n.1 (Fla. 5th DCA 2013) (citing *State v. Johnson*, 483 So. 2d 420, 422 (Fla. 1986)). Appellant bears the burden on

[1] The State reasoned that Mr. Trappman either intentionally and knowingly caused permanent injury or disfigurement to Sergeant Bird, or that he used a deadly weapon during the battery, the weapon being the dog itself. *See* § 784.045, Fla. Stat. (2017).

[2] *Anders v. California*, 386 U.S. 738 (1967).

appeal to demonstrate that his dual convictions violate double jeopardy. *See Mercer v. State*, 219 So. 3d 936, 937 (Fla. 1st DCA 2017) (citing *Sprouse v. State*, 208 So. 3d 785, 787 (Fla. 1st DCA 2016)). We conclude that because there was sufficient evidence at trial from which the jury could have convicted Appellant of both offenses based on distinct acts—his shove of Bird and the release and order for the dog attack—the dual convictions for battery and aggravated battery do not violate double jeopardy. *See id.*

In reaching this conclusion, we apply the three steps of the double jeopardy analysis: "(1) whether the convictions were based on an act or acts occurring during the same criminal transaction and/or episode; (2) whether the convictions were predicated on the same or distinct acts; and (3) if the convictions did not occur during separate episodes and were not based on distinct acts, whether the two convictions 'survive a same elements test as defined by section 775.021, Florida Statutes, [(2014)], commonly referred to as the *Blockburger* analysis.'" *Mercer*, 219 So. 2d at 937–38 (quoting *Partch v. State*, 43 So. 3d 758, 760 (Fla. 1st DCA 2010)).

Here, as in *Mercer*, because the shove and instigation of the dog attack were upon the same victim, occurred at the same location, and occurred over the course of approximately one minute, we are persuaded by Appellant's argument that the two acts were part of a single criminal episode. *See Mercer*, 219 So. 2d at 938. However, viewing the evidence in the light most favorable to the jury's verdict, we also conclude there was sufficient evidence of two distinct acts from which the jury could have convicted Appellant of both offenses. *See id.* Furthermore, if the evidence supports convictions for two offenses based on distinct acts, it is not necessary to examine whether they would survive a same elements test under *Blockburger*. *Id.* (citing *Partch*, 43 So. 3d at 762 ("explaining that where dual convictions are based on distinct acts, it is unnecessary to apply the same elements test")).

Because there was evidence from which the jury could find Appellant guilty of aggravated battery based on the release and order for the dog attack and battery for the shove, the dual convictions do not violate double jeopardy. Accordingly, we affirm the judgment and sentence.

AFFIRMED.

TANENBAUM, J., concurs; BILBREY, J., concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

BILBREY, J., concurring.

I concur in the majority opinion and agree that we must affirm based on *Mercer v. State*, 219 So. 3d 936 (Fla. 1st DCA 2017). *See Sims v. State*, 260 So. 3d 509, 514 (Fla. 1st DCA 2018) ("Each panel decision is binding on future panels, absent an intervening decision of a higher court or this court sitting en banc."). In *Mercer*, we held that there was no double jeopardy violation in allowing convictions for aggravated battery and manslaughter when the same victim was attacked closely in time first by a punch and then by a fatal kick.[1] *Mercer*, 219 So. 2d at 938. We construed these different means of attack as distinct acts so that the separate convictions did not violate double jeopardy.[2] *Id.*; *see also* §

[1] The fact that Mercer may have been a principal to the aggravated battery rather than the actual perpetrator does not distinguish our holding in *Mercer* from this case. It would violate double jeopardy for a defendant to be convicted both as the actual perpetrator and as a principal of the same crime. *See Mays v. State*, 198 So. 3d 35 (Fla. 2d DCA 2015); *State v. Gunn*, 381 So. 2d 1186 (Fla. 2d DCA 1980).

[2] Our holding in *Mercer* arguably conflicts with cases from other districts holding that a conviction for aggravated battery and battery on the same victim in the same criminal episode violates double jeopardy. *See*, *e.g.*, *Olivard v. State*, 831 So. 2d 823 (Fla. 4th DCA 2002) (holding that double jeopardy was violated when appellant was convicted of simple battery for striking the victim with an object and aggravated battery for biting off his ear in the

775.021(4), Fla. Stat. I also note that here the distinct acts were alleged in the information thereby avoiding any additional double jeopardy concern. *See Lee v. State*, 258 So. 3d 1297 (Fla. 2018).

David William Trappman, pro se, Appellant.

Jessica J. Yeary, Public Defender, and Maria Ines Suber, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, Tallahassee, for Appellee.

same attack); *Arnold v. State*, 514 So. 2d 419 (Fla. 2d DCA 1987). But *Mercer* does seem consistent with *State v. Meshell*, 2 So. 3d 132 (Fla. 2009), and many other cases that allow multiple convictions for illegal sexual acts in the same episode on the same victim, so long as distinct acts by different anatomical combinations are alleged and proved. *See also Graham v. State*, 207 So. 3d 135 (Fla. 2016); *State v. Drawdy*, 136 So. 3d 1209 (Fla. 2014). In any event, *Mercer* is binding on this panel.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

DAVID WILLIAM TRAPPMAN,

Appellant,

v.

CASE NO. 1D19-1883
LT NO.57-2017-CF-2011

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING, REHEARING EN BANC, AND FOR CERTIFICATION OF CONFLICT TO THE SUPREME COURT.

Appellant, David William Trappman, moves for rehearing, rehearing en banc, and certification of conflict with other decisions of the district courts of appeal, due to this Court's decision in the instant case issued on February 10, 2021, in **Trappman v. State**, ___so.3d ___, 2021 WL 486590 (Fla. 1st DCA February 10, 2021). The motions are filed pursuant to Rules, 9.330(a)(2)(A), 9.330 (2)(C), and Rule 9.331(d)(1), of the Florida Rules of Appellate Procedure. Undersigned initially expresses a belief, based on a reasoned and

studied professional judgment, that the issue herein is of exceptional importance (signature of counsel below). In support of the motions, Appellant states the following:

Rule 9.330(a)(2)(A), of the Florida Rules of Appellate Procedure, provides that if a party moves for rehearing, that party shall state with particularity the points of law or fact that, in the opinion of the movant, the Court overlooked or misapprehended in its order or decision. Appellant argues that here, in its opinion of **Trappman v. State**, **supra**, this Court employed the wrong analysis in determining if the prohibitions against double jeopardy were violated when Trappman was convicted and sentenced for aggravated battery on a law enforcement officer and battery on a law enforcement officer as a result of an altercation Appellant had with the police when they were attempting to serve a warrant on his wife. Without dispute, the two offenses occurred within seconds of each other and during the same episode and/or transaction when it was argued that Appellant both pushed the officer and ordered his dog to attack him. This Court held that pursuant to **Mercer v. State**, 219 So.3d 397 (Fla. 1st DCA 2017), it was permissible to

convict Appellant of Aggravated Battery on a Law Enforcement Officer and Battery on a Law Enforcement Officer because both convictions were predicated on distinct acts (a push and the dog attack on the officer); evidence that was sufficient to support the verdict of the jury for the two distinct crimes.

However, this Court overlooked that the appropriate analysis as to double jeopardy in situations such as the one at bar is not whether there were two distinct acts, but whether one of the convictions is subsumed in the elements of the greater offense. **See**, **Tuttle v. State**, 177 So. 2d 1246 (Fla. 2015). In **Tuttle**, the Supreme Court held that in determining whether double jeopardy was violated, when the actions of the defendant arose against the same victim and during the same criminal episode, the court had to examine whether pursuant to the exceptions contained in Section 775.021(4)(b)3., Florida Statutes, the lesser crime was subsumed in the greater offense. **Id.** at 1248; **Pizzo v. State**, 945 So.2d 1203 (Fla. 2006).

Moreover, the issue of whether the offenses of aggravated battery and battery on the same victim during the same episode as

presented in this appeal violated double jeopardy has been resolved by this Court in **Green v. State**, 84 So.3d 356 (Fla. 1st DCA 2012). In **Green**, the facts revealed that the defendant attacked another detainee in the Duval County jail. The single encounter lasted only a few moments, but it resulted in a puncture wound and a cut or gash on the victim's torso. Green was charged with aggravated battery with a deadly weapon and aggravated battery with a deadly weapon upon another detainee. **On the facts, this Court rejected the state's arguments "that the two stab wounds to the victim constituted separate offenses for each wound," and therefore justified the two convictions**. E.s. ***Id***. at 357. This Court held that under the clear language of section 784.082, Florida Statutes, aggravated battery with a deadly weapon and aggravated battery with a deadly weapon by one detainee upon another were degree variants of the same offense and not separate offenses, quoting to Section 775.021(4)(b), Florida Statutes (statutes describing degrees of the same offense to be construed most favorably to accused). And that, a defendant could not be convicted twice for the same offense arising from the same set of circumstances. **Id**., at 357.

See also, **Hall v. State**, 654 So.2d 253 (Fla. 1st DCA 1995), wherein this Court reversed convictions for aggravated battery and aggravated battery on a person 65 years of age or older which arose from the same facts:

> [W]e conclude that the record clearly reflect that the convictions for aggravated battery upon a person 65 years of age or older and aggravated battery arose from the same facts. Therefore, appellant may not be convicted of both. . . .
>
> In summary, we affirm the convictions for sexual battery, kidnapping and aggravated battery upon a person 65 years of age or older; we reverse the conviction and sentence for aggravated battery; and we reverse the sentence for kidnapping and remand for resentencing as to that offense.

Hall, at 253; **Cook v. State**, 813 So.2d 1010, 1101-02 (Fla. 1st DCA 2002) (Section 775.021(4)(b), Florida Statutes (1999) provides for separate conviction and sentence for each criminal offense committed in the course of one criminal episode or transaction, unless the offenses required identical elements of proof, the offenses are degrees of the same offense, or the offenses are lesser included offenses the elements of which are subsumed by the greater offense, citing to **Grubbs v. State**, 769 So.2d 503 (Fla. 5th DCA 2000),

holding that, in the conviction and sentencing for criminal offenses committed in the course of a criminal episode, it is the intent of the legislature that there be a separate conviction and sentence for each criminal offense, **unless one of the offenses is a degree of the other**, or necessarily included lesser offense subsumed in the other, and both offenses are identical:

> In the instant proceeding, Appellant was convicted for the identical offense, aggravated battery, on two separate counts arising from the same criminal episode.

Id., at 1012; **Pruett v. State,** 731 So.2d 113 (Fla. 1st DCA 1999). Battery on a law enforcement officer is an offense subsumed in the greater offense of Aggravated Battery of a law enforcement officer, and as such, this Court's precedent requires that this court find that double jeopardy bars convictions and sentences for both offenses.

This Court is bound by its own precedent unless and until an intervening decision from the Florida Supreme Court, the United States Supreme Court, or this Court sitting en banc compels otherwise. **Wanless v. State**, 271 So.3d 1219 (Fla. 1st DCA 2019).

Rule 9.331(d)(1), Florida Rules of Appellate Procedure, provides for rehearing en banc when the action is necessary to maintain uniformity in the court's decisions. I express a belief, based on a reasoned and studied professional judgment that the panel decision issued by this Court on February 10, 2021, is contrary to the above quoted authorities of this Court, and that therefore, consideration by the full court is necessary and required in order to maintain uniformity of decisions by this Court (signature of counsel below). Clearly, this Court must make a decision as to what the appropriate standard of review is required. Is this Court required to follow the mandates of the statute which requires that the appropriate analysis is whether one of the offenses is subsumed into the greater offense, or, is this court be at liberty to employ whatever analysis to insure it can affirm the convictions? Here aggravated battery on a law enforcement officer and battery on a law enforcement officer are offenses which are degrees of the same offense, and battery on a law enforcement officer is a lesser included offense of aggravated battery on a law enforcement officer, the elements of the lesser offense being subsumed in the greater offense.

And lastly, pursuant to Rule 9.330 (2)(C), Florida Rules of Appellate Procedure, Appellant requests that at the very minimum this Court should certify conflict to the Supreme Court because the opinion of this Court issued on February 10, 2021, conflicts with the following decisions of the Supreme Court and other District Court of Appeals:

State v. Tuttle, 177 So.3d 1246 (Fla. 2015) (the legislature has stated its intent to convict and sentence for each offense defined as separate **with three exceptions**: offenses requiring identical elements of proof, offenses which are degrees of the same offense as provided by statute, and lesser offenses the elements of which are subsumed in the greater offense).

Rivera v. State, 286 So.3d 930 (Fla. 5th DCA 2019) (separate acts committed during a criminal transaction or episode. The court held dual convictions for aggravated battery and battery violated double jeopardy because the offense of battery was subsumed within the aggravated battery); **Nunoz v. State**, 212 So.3d 1146, 1147-48 (Fla. 5th DCA 2017)(separate acts committed during a

criminal transaction or episode. The court held dual convictions for aggravated battery and battery violated double jeopardy because the elements of simple battery are subsumed in the elements of aggravated battery); **Rosado v. State**, 129 So.3d 1104 (Fla. 5th DCA 2013) (same).

Olivard v. State, 831 So. 2d 823 (Fla. 4th DCA 2002)[1](separate acts – dual convictions for aggravated battery and simple battery violated double jeopardy where the defendant committed battery and aggravated battery against the same victim, in the same location, and the defendant's actions where within the course of one continuous criminal episode of attacking the victim); **Russo v. State**, 804 So.2d 419 (Fla. 4th DCA 2001) (two separate acts during an altercation between defendant and victim. Court held one conviction for aggravated assault was acceptable and therefore second conviction for aggravated assault violated double jeopardy).

[1] Concurrent opinion acknowledges conflict between the opinion of this Court and **Olivard**. See opinion, page 4, footnote.

Arnold v. State, 514 So.2d 419 (Fla. 2nd DCA 1987)[2] (dual convictions for aggravated battery and battery on the same victim during same criminal episode violate double jeopardy because the lesser offense is subsumed within the greater offense).

WHEREFORE, and based upon the foregoing, Appellant respectfully requests that this Court grants rehearing, rehearing en banc and hold that the convictions in this cause for Aggravated Battery on a Law Enforcement Officer and Battery on a Law Enforcement Officer violate double jeopardy, and remand with directions that the lesser offense be stricken and Appellant be resentenced. At the very minimum, this Court should certify conflict with the decisions of the Second, Fourth and Fifth district courts of appeal on the issue.

[2] Concurrent opinion acknowledges conflict between the opinion of this Court and **Arnold**. See opinion, page 5, footnote.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, via the Florida Courts E-Filing Portal, to David L. W. Welch, Assistant Attorney General, at crimapptlh@myfloridalegal.com, and, via US Mail, to David William Trappman, DC # P43060, R M C Work Camp, P O Box 628, Lake Butler, FL 32054-0628, on this date, February 23, 2021.

Respectfully submitted,

JESSICA J. YEARY
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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1883

DAVID WILLIAM TRAPPMAN,

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STATE OF FLORIDA,

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On appeal from the Circuit Court for Santa Rosa County.
David Rimmer, Judge.

September 29, 2021

OPINION ON MOTION FOR REHEARING, REHEARING EN BANC, AND FOR CERTIFICATION OF CONFLICT TO THE SUPREME COURT

M.K. THOMAS, J.

Appellant filed a Motion for Rehearing, Rehearing En Banc, and for Certification of Conflict. We deny the motion for rehearing and rehearing en banc. We certify conflict with the decision of the Fourth District Court of Appeal in *Olivard v. State*, 831 So. 2d 823 (Fla. 4th DCA 2002).

BILBREY and TANENBAUM JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

David William Trappman, pro se, Appellant.

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Ashley Moody, Attorney General, Tallahassee, for Appellee.