

IN THE SUPREME COURT OF FLORIDA

WILLIE RAFORD,)
)
 Petitioner,)
)
 vs.) CASE NO.SC01-379
) L.T. No. 4D98-4341
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S REPLY BRIEF ON THE MERITS

On review from the Circuit Court
of the Seventeenth Judicial Circuit,
In and For Broward County, Florida
[Criminal Division].

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	iii
ARGUMENT	1
Point 1.	
THE FELONY CHILD ABUSE CONVICTION MUST BE VACATED BECAUSE IT IS NOT A LESSER OFFENSE IN THIS CASE	1
Point 2.	
THE STATE FAILED TO PROVE A CRIME WAS COMMITTED	3
Point 3.	
MISINSTRUCTION OF THE JURY ON AN UNCHARGED CRIME WHICH WAS MISREPRESENTED AS A LESSER OFFENSE REQUIRES REVERSAL	4
CONCLUSION	5
CERTIFICATE OF SERVICE	5
CERTIFICATION OF COMPLIANCE	6

AUTHORITIES CITED

<u>CASES CITED</u>	<u>PAGE</u>
<i>Hall v. State</i> , 752 So. 2d 575 (Fla. 2000)	4
<i>Hunt v. State</i> , 613 So. 2d 893 (Fla. 1992)	1
<i>Jacobson v. State</i> , 476 So. 2d 1282 (Fla. 1985)	4
<i>Nixon v. State</i> , 773 So. 2d 1213 (Fla. 1 st DCA 2000)	1-3
<i>Savoie v. State</i> , 422 So. 2d 308 (Fla. 1982)	4
<i>Simpson v. State</i> , 418 So. 2d 984 (Fla. 1982)	1

PRELIMINARY STATEMENT

Petitioner was the defendant at trial and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Honorable Court.

ARGUMENT

Point 1.

**THE FELONY CHILD ABUSE CONVICTION MUST BE VACATED
BECAUSE IT IS NOT A LESSER OFFENSE IN THIS CASE**

The state first says "defense counsel told the trial court that there were two lesser included offenses, child abuse and misdemeanor battery (T. 278)." AB3. A reading of the discussion at that page shows defense counsel was simply advising the trial court of the potential lesser included offenses, in response to the court's question. T278. Based on this discussion, the state here continually asserts that petitioner did not argue felony child abuse was not a lesser offense. AB9. Yet counsel plainly objected to giving felony child abuse during the charge conference and during a discussion of lesser included offenses. T280. That discussion also included the observation of the trial court that battery could be given as a lesser because the jury could find petitioner "was not acting as a parent." T285. The trial court plainly considered the issue as one involving of parental privilege, and the objection was sufficient. The issue is preserved where the trial court overruled the objection to the instruction. *Simpson v. State*, 418 So. 2d 984 (Fla. 1982); *Hunt v. State*, 613 So. 2d 893, 898 n.4 (Fla. 1992).

The state also cites *Nixon v. State*, 773 So. 2d 1213 (Fla. 1st DCA 2000) to support its waiver argument. The *Nixon* court found waiver because the defense requested felony child abuse. *Id.* at 1215. Here, the defense objected to an instruction on felony child

abuse, and requested battery as a lesser, so *Nixon* does not apply.

The state does not address petitioner's argument that the statutory changes cannot be presumed to alter the common law privilege. IB19-20.

Petitioner otherwise relies on the argument in his Initial Brief.

Point 2.

THE STATE FAILED TO PROVE A CRIME WAS COMMITTED

The state argues "[t]his point is outside the scope of the issue with which the Fourth District certified conflict." AB16 n.2. It is not. The Fourth District decided the parental privilege did not apply at all to felony child abuse ("Section 827.03(1)(a) makes the 'intentional infliction of physical or mental injury' a third degree felony, and the legislature has not made an exception for the parental privilege"), *Raford*, slip op. at 4, n. 3."¹ But *Wilson* found the privilege undisturbed. *Raford* is plainly in conflict with *Wilson* (and *Nixon* and other cases cited in the Initial Brief) on this issue.

The petitioner otherwise relies on his Initial brief.

¹ Though the Fourth District also held somewhat inconsistently that the parental privilege was in the nature of an affirmative defense. *Raford*, n.2.

Point 3.

**MISINSTRUCTION OF THE JURY ON AN UNCHARGED CRIME WHICH
WAS MISREPRESENTED AS A LESSER OFFENSE REQUIRES REVERSAL**

The state correctly points out this issue is not within the scope of the certified conflict. AB21, n.4. Nevertheless, this court can, and should, decide it: “[o]nce we have conflict jurisdiction, we have jurisdiction to decide all issues necessary to a full and final resolution. See *Jacobson v. State*, 476 So. 2d 1282, 1284 (Fla. 1985); *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982).” *Hall v. State*, 752 So. 2d 575 (Fla. 2000).

Petitioner otherwise relies on his Initial Brief on this issue.

CONCLUSION

Based upon the foregoing argument authorities, petitioner respectfully requests this Court accept review, reverse the conviction and sentence in this case or provide other relief the court finds appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this _____ day of April, 2001.

STEVEN H. MALONE
Assistant Public Defender

CERTIFICATION OF COMPLIANCE

In accordance with the Florida Supreme Court Administrative Order counsel for petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STEVEN H. MALONE
Assistant Public Defender