IN THE SUPREME COURT OF FLORIDA

SAYSINH KHIANTHALAT
PETITIONER,

V

CASE NO SC06-1802
L.T. NO. 2D05-2592

STATE OF FLORIDA,
RESPONDENT.
______________________________/

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On June 23, 2004, the State Attorney for the Tenth Judicial Circuit in and for Polk County charged petitioner with nine counts of lewd battery on a child 12 years of age or older but less than 16 years of age. See section 800.04(4), Florida Statutes. The Amended Information alleged petitioner between February 12, 2003, and May 15, 2003, "engaged in sexual activity with [the victim], a child older than 12 years of age but less than 16 years of age." The victim was born February 14, 1989.

On March 2–3, 2005, petitioner's trial was held. The victim testified at the start of the instant offenses, she was thirteen (13) years old and petitioner was twenty-six. Initially, the victim felt uncomfortable because petitioner was her brother-in-law. However, since petitioner was older, the victim thought it was okay. Petitioner and the victim had penis-to-vaginal sex when the victim was still thirteen. Petitioner did not make her, but the victim had oral sex with petitioner twice between February and May 2003.

Prior to the jury instructions, defense counsel requested a lesser-included instruction of simple battery for the lewd battery counts. The State objected because simple battery is not a Category 1 lesser-included offense

for lewd battery. The State also argued there was no evidence presented that would qualify for a simple battery. Moreover, any kissing or hugging between petitioner and the victim was not charged in the Amended Information. Thus, there was no support for a simple battery instruction as a Category 2 lesser-included to lewd battery. Finally, the State noted petitioner was not charged with sexual battery.

Petitioner argued because the victim was a minor she was not legally capable of consenting to sexual activity; thus, petitioner was entitled to a battery instruction even though the information did not specifically allege and the evidence did not establish he touched the victim against her will. The trial court agreed with the State there was no evidence presented evidencing any touching by petitioner against the will of the victim, and simple battery is not an element of lewd battery. Accordingly, the trial court denied petitioner's request for a proposed lesser-included instruction of simple battery.

At the conclusion of petitioner's trial, the jury returned guilty verdicts for the remaining (6) counts of lewd battery. On August 4, 2006, the Second District Court affirmed petitioner's conviction. In so doing, the appellate court held the trial court properly refused to give a simple battery instruction as a lesser-included

offense of lewd battery under Fla. Stat. § 800.04(4), because the (13) year-old victim's age did not preclude her consent to engaging in sex with defendant, and evidence of the non-consensual touching required for simple battery did not exist. See Khianthalat v. State, 935 So. 2d 583 (Fla. 2d DCA 2006).

In rejecting Petitioner's argument, the Second District, in footnote 4, remarked Petitioner's argument is not without support; in Jackson v. State, 920 So. 2d 737 (Fla. 5th DCA 2006), that court, relying on the presumption of incapacity where the victim was over the age of twelve, concluded the defendant in that case was entitled to an instruction on simple battery even though there was no allegation of nonconsensual touching.

Thereafter, Petitioner filed notice of intent to seek the discretionary jurisdiction of this Court. On January 17, 2007, this Court accepted jurisdiction in the instant case.

SUMMARY OF THE ARGUMENT

Petitioner argues the trial court committed reversible error by denying Petitioner's requested jury instruction of simple battery as a permissible lesser-included offense of lewd and lascivious battery even though there was no allegation or proof of nonconsensual touching. The Second District affirmed the trial court's decision denying Petitioner's requested jury instruction because the charging document in the instant case failed to allege, and the evidence failed to show, a lack of consent in the touching by the victim. The Second District further concluded the presumption of incapacity to consent is not applicable to offenses under section 800.04(4), Florida Statutes.

Petitioner claims the Second District's opinion conflicts with the holding in Jackson v. State, 920 So.2d 737 (Fla. 5th DCA 2006), and Biles v. State, 700 So.2d 166 (Fla. 4th DCA 1997). Petitioner claims lack of consent is presumed because a child between 12 and 16 is legally incapable of giving consent. Consequently, the jury instruction for simple battery as a permissible lesser-included offense for lewd and lascivious battery should have been given in this case.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED PETITIONER'S REQUESTED INSTRUCTION ON SIMPLE BATTERY AS A LESSER-INCLUDED OFFENSE OF LEWD BATTERY.

Petitioner argues the trial court committed reversible error by denying Petitioner's requested jury instruction of simple battery as a permissible lesser-included offense to the charge of lewd and lascivious battery on a child between 12 and 16 even though there was no allegation or proof of nonconsensual touching. The Second District Court of Appeal affirmed the trial court's ruling Petitioner was not entitled to the simple battery instruction as a permissible lesser-included offense based upon the instant facts. Specifically, the fact the charging document did not specifically allege, and the evidence did not establish, Petitioner ever touched the thirteen (13) year-old victim against her will.

No doubt, the law is clear an instruction can not be given on a permissive lesser-included offense unless both the accusatory pleading and the evidence support the commission of that offense. State v. Von Deck, 607 So.2d 1388 (Fla. 1992). Even so, Petitioner argues the simple battery instruction should have been given as a permissive, lesser-included offense in the instant case because in

prosecuting for lewd battery on a child over 12 but under 16, the child is legally incapable of giving consent. In affirming the trial court's decision to deny Petitioner's request for the simple battery jury instruction, Respondent contends the Second District properly concluded the fact the instant victim was thirteen (13) years-old at the time of the offense did not legally preclude her from consenting to engaging in sex with Petitioner.

In concluding as it did, the Second District examined the lineage of Florida's history of sexual offenses. To this end, the Second District notes Florida's sexual battery statute, section 794.011, retains the historical presumption incapacity to consent ends at age eleven. See section 794.011(2)(a), Florida Statutes, ("a person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony"). By contrast, section 800.04(4), the statute under which Petitioner was charged, does not apply to children of such tender years. Thus, the Second District determined the historical presumption of incapacity to consent is not applicable to offenses under the statute which Petitioner was charged and convicted.

Respondent notes, as a matter of public policy, the Legislature often draws the line distinguishing the capacity of juveniles to legally consent to negate charges of various criminal offenses. See e.g. section 787.01(1)(b), Florida Statutes, ("confinement of a child under the age of 13 is against her or his will within the meaning of this subsection if such confinement is without the consent of her or his parent or legal guardian"). In sexual abuse cases, this line has historically been drawn for children of tender years. That is, 11 years or younger. See e.g. Caulder v. State, 500 So.2d 1362 (Fla. 5th DCA 1987).

Petitioner claims the Second District Court's holding below conflicts with two other District Court's of Appeals – the Fourth in the case of Biles v. State, 700 So.2d 166 (Fla. 4th DCA 1997); and the Fifth in the case of Jackson v. State, 920 So.2d 737 (Fla. 5th DCA 2006). Contrary to Petitioner's assertion, Respondent submits the facts in the instant case are distinct from those in Biles v. State, 700 So.2d 166 (Fla. 4th DCA 1997). To illustrate, in Biles, the defendant was charged with lewd, lascivious, or indecent assault upon a child, in that he "did handle, fondle, or make assault upon [the victim], . . . to-wit: did touch the breast of [the victim] with his hand." During trial,

moreover, the child-victim testified the defendant touched her breast. Not surprisingly, based upon the language of the charging document and the facts presented, the Fourth District reversed the defendant's conviction because the trial court failed to instruct the jury on the permissive lesser-included offense simple battery.

Like the instant case, in Jackson v. State, 920 So.2d 737 (Fla. 5th DCA 2006), the trial court denied a defendant's request for a jury instruction on simple battery as a permissible lesser-included offense of lewd and lascivious battery because the charging document did not specifically allege the defendant's sexual activity with the minor victim was un-consented to, and there was no evidence at trial that anything occurred against the victim's will. In finding the trial court's denial of defendant's requested jury instruction was error, the Jackson court relied on its previous holding in Caulder, supra..

In that case, the Caulder court noted there was a historic principle that children of tender years have always been considered legally incapable of giving consent to sexual abuse, so that their lack of consent is presumed by law, and thus need not be specifically alleged or proved. Caulder at 1362-1363. Importantly, the facts in

Caulder are distinct to the facts in the instant case as well as those in Jackson. For example, in Caulder, the defendant argued simple battery was a *necessary* lesser-included offense to the charge of sexual battery upon a child *eleven (11) years of age or younger*. Thus, the Caulder court's attention to the historic principle that children eleven (11) years or younger lack of consent is presumed by law is consistent with the Second District's reasoning in the instant case. By contrast, the defendant in Jackson as well as the defendant here, argued lack of consent is presumed by law for children between the ages of 12 and 16 years old. Respondent submits the Second District's decision in the instant case should be affirmed because it is consistent with the historical principle concerning Florida's sexual offenses involving juveniles.

Accordingly, the decision of the Second District in Khianthalat v. State, 935 So. 2d 583 (Fla. 2d DCA 2006), should be affirmed.

CONCLUSION

Based on the forgoing discussion, the State respectfully requests this Honorable Court approve the opinion of the district court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000—Drawer PD, Bartow, Florida 33831, on this 29th day of March, 2007.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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