IN THE SUPREME COURT OF FLORIDA

SAYSINH KHIANTHALAT, :

Petitioner, :

vs. : Case No. SC06-1802

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Petitioner, Saysinh Khianthalat, was charged with 9 counts of lewd and lascivious battery in violation of section 800.04, Florida Statutes (2002), for offenses occurring between February 11, 2003, and May 15, 2003, on a child over 12 but under 16 via a variety of sex acts. He was also charged with solicitation to commit perjury in an official proceeding in violation of sections 837.02 and 777.04, Florida Statutes (2003), occurring on June 15, 2004; and he was charged with tampering with a witness in violation of violation of section 914.22, Florida Statutes (2003), also occurring on June 15, 2004. (V1/R91-94) The child victim is the same in all of the counts, and she will be referred to as ST. Mr. Khianthalat had a jury trial on February 28 though March 3, 2005. (V1,2,3) During trial the trial court granted Mr. Khianthalat's motion for judgment of acquittal as to the lewd and lascivious counts of 6,8, and 9. (V3/T276-282) On March 3, 2005, the jury returned verdicts of guilty on all the remaining 8 counts. (V1/R104,105)

On April 26, 2005, the trial court rendered Mr. Khianthalat's sentence as follows: 15 years of imprisonment on each of the lewd and lascivious battery counts and 5 years of imprisonment on each of the counts for solicitation to

commit perjury and tamper with a witness. Some sentences were to run concurrent and some consecutive. The total sentence imposed was 45 years. (V1/R63-76) This sentence was apparently done to meet the minimum sentence under the guidelines which came to 538 months. (V1/R106-123) Mr. Khianthalat timely filed his notice of appeal on May 13, 2005. (V1/R124)

In Mr. Khianthalat's appeal, he attacked the trial court's failure to give his requested instruction on battery as a lesser-included offense to the lewd and lascivious battery charges. The Second District upheld the trial court's decision in its August 4, 2006, opinion, but noted potential conflict with another district court of appeal.

STATEMENT OF THE FACTS

On September 22, 2003, two detectives were investigating charges that Mr. Khianthalat had sex with an underage minor, his ex-sister-in-law, ST. On that date, the two detectives appeared at Mr. Khianthalat's work place, to question him on events that at that point were already six months old. (V3/T256,272-273) Mr. Khianthalat stated in the recorded conversation, that the relationship with ST had developed earlier in the year, changing from simple hugging to sexual. (V3/T259-260) He admitted to two episodes of penis to vagina sex with ST (V3/T260-261), one episode of her performing oral sex on him (V3/T262-263), and "three to four" times of digital penetration (V3/T264). On tape, he indicated a belief that "it all took place in March". (V3/T264) On tape, he indicated a belief that "it all took place in March". (V3/T264) His relationship with his wife, Samantha, ST's sister, fell apart when Samantha discovered him kissing ST. (V3/T266)

During trial, Mr. Khianthalat testified that he had known the Terry family for ten or eleven years, had married Samantha Terry, and was at the Terry house for most of that time period. (V3/T285-286) He stated that the night he was thrown out, he had given ST a kiss on the cheek when the incident occurred with his wife. (V3/T288-289). He testified that in a

subsequent conversation with his wife, some two or three months later, his wife questioned him regarding the allegations of sexual contact discovered in ST's diary. (V3/T290) He told her at that time that the allegations were false. (V3/T290-291) He continued to stop by the house after the incident to visit with his children and drop off supplies, but declined his wife's request that he move back with her. (V3/T292-293) He said on the date of the tape recording he was supervising and operating machinery at work that needed his presence when he was called to the office. (V3/T294-295). He did not know ST and her mother had gone to the police department at the end of August, and he was surprised to see the police officers. (V3/T295-296) He stated the officers began the interview as follows:

> They are saying blow jobs, oral sex, penis-to-vagina. And they said that, you know, 'we know that you did it. We have seen the reports that you did it. We just want to hear your side of the story. You know, why don't you just go ahead and sit down and let us know what you said. We know you gave her- - or she gave you oral sex. We know you fondled her with her - - in her vagina with your fingers.' They didn't ask me if I did those things. They came out saying that I did those things.

(V3/T298) He then said he answered their questions the way he did because he felt he was required to obey a police officer, and he was afraid of losing his job if he did not get them out of the way so that he could go back to work. (V3/T300)

ST also testified at trial. She stated that at first she thought of Mr. Khianthalat as a brother-in-law, but then she developed a "crush-type thing" on Mr. Khianthalat. (V2/T170) She said the conduct started when he french kissed her and progressed to him touching her bottom. (V2/T171) She stated that:

> Well, at that time I was thirteen years old and didn't know much. And I thought that since he was older than me, that it was okay and no one would find out, and we would just do our thing and no one would ever know.

(V2/T172) She said the first episode of penis-to-vagina sex occurred on February 11, 2003. (V2/173-174) She and Mr. Khianthalat had penis-to-vagina sex two more times between February 11 and May of 2003. (V2/T177) She also spoke of two episodes of oral sex with Mr. Khianthalat and one episode of digital penetration during that time period. (V2/T181,184) ST said her mother found out about the sex by reading her journal. (V2/T186) She also stated she was scared at first when her mother told her they were going to the police station, and it made her feel uncomfortable. (V3/T186-187)

Following Mr. Khianthalat's arrest, he did call the Terry residence and talked to ST in a recorded conversation. This recording was played for the jury. (V2/T187,189-192) The recorded conversation indicated a desire on the part of Mr. Khianthalat to have ST testify that she "made it all up"

(V2/T197) and fear on the part of ST that she would be charged with a crime for giving a false statement. (V2/T197-198) Throughout the conversation, Mr. Khianthalat was shown as urging her to go talk to his attorney (V2/T205-206).

SUMMARY OF THE ARGUMENT

The Second District Court's opinion conflicts with two other District Court's of Appeals – the Fifth in the case of Jackson v. State 920 So. 2d 737 (Fla. 5th DCA 2006); and the Fourth in the case of Biles v. State, 700 So. 2d 166 (Fla. 4th DCA 1997). While the Second District held that the information had to allege and the testimony had to show a lack of consent in the touching in order to be entitled to the lesser of simple battery in a lewd and lascivious battery charge, the Fourth and Fifth have held to the contrary. The Fourth and Fifth Districts have reached the opposite but correct result. Lack of consent is presumed by law in a child of tender years because that child is legally incapable of giving consent. This is true in lewd battery cases where the child is between 12 and 16; thus, simple battery is a lesser-included offense for lewd and lascivious battery and should have been given as a jury instruction in this case.

ARGUMENT

ISSUE I

DID THE TRIAL COURT COMMITT REVERSIBLE ERROR BY DENYING PETITIONER'S REQUESTED JURY INSTRUCTION ON BATTERY AS A LESSER-INCLUDED OFFENSE OF LEWD AND LASCIVIOUS BATTERY?

During the jury instruction conference, Mr. Khianthalat asked for battery as a lesser to the remaining lewd and lascivious battery charges. The State objected arguing that there was no evidence of a battery, and the trial court agreed there was no evidence that any touching was against the will of ST. The request for battery as a lesser of lewd and lascivious battery was denied and no lessers were given. (V3/T354-357) During the argument on this issue, the State pointed out that battery was not a Category 1 lesser of lewd and lascivious battery; but as a recent case argued before this Court notes, the lesser of lewd conduct under section 800.04 and the placement of lewd conduct among other charges have not been properly established since the massive changes to section 800.04 in 1999. See Williams v. State, Case No. SC06-594.

In Mr. Khianthalat's opinion, the Second District held he was not entitled to simple battery as a lesser included to lewd and lascivious battery; because lack of consent was not alleged in the information and the victim did not testify to a

lack of consent. The Second District found the unavailability of consent as a defense to a charge of lewd act cannot be confused with the legal presumption that a child under 12 cannot consent to sexual activity. The Court claimed the distinction between the two is clear based on Florida's history of sexual offenses; however, the Fifth District looked at that same history and came to the opposite conclusion.

In Jackson v. State, 920 So. 2d 737 (Fla. 5th DCA 2006), an opinion the Second District Court of Appeal's acknowledges in footnote 4 as supporting Mr. Khianthalat's position, the Fifth District held that the appellant was entitled to simple battery as a lesser of lewd and lascivious battery even though the information did not allege a lack of consent and the victim did not testify the act was against her will. Contrary to the Second District's position, the Fifth held that a child of tender years is legally incapable of giving consent to sexual abuse; so the lack of consent is presumed by law which need not be alleged or proved. Id. at 738. The Fifth District based this decision on its prior holding in Caulder v. State, 500 So. 2d 1362, 1363-1364 (Fla. 5th DCA 1987), for its historical basis:

> What the State overlooks is the historic principle that children of tender years have always been considered as legally incapable of giving consent to sexual abuse, so that their lack of consent is presumed by law, [ftnt. 3 omitted] and thus need not be specifically alleged or proved.

The Caulder case held that in prosecuting "for sexual battery on a child 11 years of younger, lack of consent, though an element, need not be specifically alleged or proved as it is presumed by law, and thus the jury should be instructed upon request on the lesser offense of simple battery." Jackson, 920 So. 2d at 738. The Court then applied this logic to an information charging lewd and lascivious battery:

> The absence of an express allegation of an unconsented-to touching in this case did not preclude an instruction on simple battery as a permissive lesser included, anymore than the omission of such specific allegation in charging lewd and lascivious battery rendered the amended information defective.

Id. The Fifth District held Mr. Jackson "was entitled, upon request, to an instruction on battery as a lesser included offense of lewd and lascivious battery even though the overwhelming evidence favored the State's charge." Id. The Court reversed and remanded for a new trial on the lewd and lascivious battery charge.

In Biles v. State, 700 So. 2d 166 (Fla. 4th DCA 1997), the Fourth District also reversed for a new trial on a lewd and lascivious battery charge; because the trial court denied the appellant's request for battery as a lesser-included offense. The information did not allege a lack of consent and the child did not say the touching was without consent, yet the

Fourth found the trial court should have given the simple battery as a lesser to lewd and lascivious battery, "because the facts alleged in the information and the evidence presented satisfy the elements of that lesser included offense." Id. at 167. Even though the Fourth District noted that "[a]n instruction on a permissive lesser included offense must be given 'when the pleadings and the evidence demonstrate that the lesser offense is included in the offense charged.'" (quoting from Amado v. State, 585 So. 2d 282 (Fla. 1991)(quoting Wilcott v. State, 509 So. 2d 261,262 (Fla. 1987)); it did not find the lack of consent being mentioned in the information for lewd assault an obstacle to requiring the lesser of simple battery upon request. In reversing for a new trial, the Fourth District rejected the same argument the trial court made in Mr. Khianthalat's case. The trial court in Biles refused to give the lesser of battery to lewd assault because battery means the issue of consent and there is no issue of consent in lewd assault. Biles, 700 So. 2d at 166,167. Just as the Fourth District rejected that reasoning in reversing for a new trial, so should that same reasoning be rejected in Mr. Khianthalat's case and a new trial ordered.

As was noted in Belser v. State, 854 So. 2d 223,224-225 (Fla. 1st DCA 2003):

> Even if the weight of the evidence is overwhelmingly in favor of the state's charge, the defendant is entitled to an instruction on a lesser offense where the

> charging document and the evidence adduced at trial court support a conviction for the lesser offense.
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> * * *
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> Further, the fact that preponderance of the evidence may have demonstrated lewd and lascivious molestation rather than simple battery does not vitiate the need of instructing on the lesser offense. In Henderson v. State, 370 So. 2d 435,437 (Fla. 1st DCA 1979), the court stated that the reasons why lesser included offense instruction must be given are the "jury pardon" concept and the long-established prohibition against allowing trial judges to make evidentiary determinations that properly lie within the province of the jury.

Even though the evidence for simple battery may be weak in Mr. Khianthalat's case compared to the evidence of lewd and lascivious battery, he was still entitled to this next-step lesser-included charge. The "jury pardon" concept requires the lesser be given to the jury for its consideration as it is within their province to decide the issue. Mr. Khianthalat was denied this in his jury trial. He is entitled to a new trial on all six convictions for lewd and lascivious battery.

In Mr. Khianthalat's opinion the Second District makes a distinction between a legal presumption that a child under 12 cannot consent to sexual activity and the unavailability of consent as a defense to lewd and lascivious acts for a child between 12 and 16. It is a distinction without a difference. Neither group—the under 12 or the 12-16—is deemed legally

able to consent to sexually activity. The only real difference is the penalty wherein sexual battery on a child under 12 is far more serious than with a child 12-16. And even though a child who is 12-16 may consent to sexual activity with someone over 18, that consent is no defense to the perpetrator.

Prior to 1999 lewd and lascivious conduct had a special statutory provision that excluded "committing the crime of sexual battery." Sec. 800.04, Fla. Stat. (1997). That language was eliminated in 1999, and the result is that a sexual battery without force on a child between 12-16 now constitutes lewd battery. See Welsh v. State, 850 So. 2d 467 (Fla. 2003). As was pointed out in the beginning of this argument, the jury instructions and its list of lessers has not kept up with the 1999 changes. What lewd battery should be a lesser of and what should constitute a lesser of it needs to be re-examined in light of the 1999 changes. This has been partially addressed in the presently pending case of Williams v. State, Case No. SC06-594. What should be a lesser of lewd battery now that it includes sexual battery is what needs to be addressed here. Because of the 1999 changes, battery should be a lesser included of lewd and lascivious battery when the information alleges a sexual battery as the lewd act. In Mr. Khianthalat's case, the six charges of lewd and lascivious battery were all based on sexual battery conduct.

He was entitled to battery as a lesser instruction, and the trial court's refusal to give this next-step lesser upon request constitutes reversible error. Biles, Jackson. Mr. Khianthalat is entitled to a new trial on the six lewd and lascivious battery convictions.

CONCLUSION

Based on the foregoing arguments and authorities, Mr. Khianthalat is entitled to a new trial on his six convictions for lewd and lascivious battery.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Bill McCollum, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of February, 2007.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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