IN THE SUPREME COURT OF FLORIDA

JACKIE CORNELIUS WILLIAMS,

Petitioner,

vs. Case No. SC06-0594

STATE OF FLORIDA,

Respondent.

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

INITIAL BRIEF OF PETITIONER

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On June 30, 2003, the State Attorney in and for the Twentieth Judicial Circuit, Collier County, Florida, filed an information which it later amended charging Petitioner, Jackie Cornelius Williams, with sexual battery upon V.G., a person older than 12 but less than 16, by putting his penis inside of or in union with her vagina without her consent; and in the process he used or threatened to use a deadly weapon or actual physical force likely to cause serious personal injury with Mr. Williams being 18 or older on May 29, 2003, contrary to section 794.011(3), Florida Statutes (2002). Mr. Williams was also charged with kidnapping the same person on the same date in violation of section 787.01, Florida Statutes (2002). (V1/R15,16,29,30,40,41)

Mr. Williams had a jury trial; and on June 17, 2004, the jury found him guilty of lewd or lascivious battery as a lesser of the sexual battery and not guilty of the kidnapping. (V1/R96,97;V4/ T267) On July 14, 2004, Mr. Williams was sentenced to 10 years of prison to be followed by 5 years of sexual offender probation. (V1/R99-123;SV/154) A Notice of Appeal was timely filed on July 22, 2004. (V1/R125,126)

In Mr. Williams' appeal to the Second District Court of Appeals, he raised as his only issue the erroneous giving of the lesser lewd or lascivious battery. The Second District

upheld the trial court's decision and the jury's verdict. It did so based on 1999 amendments to the lewd or lascivious statute that made prior case law inapplicable; however, the Court also noted those same amendments were raising issues in this areas in more recent cases. So the Second District certified the following question as being of great public importance:

> MAY THE CRIME OF LEWD OR LASCIVIOUS BATTERY PROHIBITED BY SECTION 800.04(4), FLORIDA STATUTES (2002), BE A PERMISSIVE LESSER INCLUDED OFFENSE OF THE CRIME OF SEXUAL BATTERY CHARGED PURSUANT TO SECTION 794.011(3), FLORIDA STATUTES (2002)?

STATEMENT OF THE FACTS

The victim in this case, V.G., testified that she was fifteen years of age in May of 2003. (V3/T25) She met Mr. Williams in the fall of 2002 at her job at the mall. He introduced himself to her, told her that his name was Mike, and said he was 19 years of age. They exchanged phone numbers, and she saw him five or six times. They went out to the movies, to the park, or to eat. She said they were just friends and there was no physical relationship or contact. (V3/T26-27)

On May 29, 2003, he called and asked her if she wanted to go out to eat; and she agreed. He picked her up at her house, and they went to his house. She was sitting on the couch watching TV, and they were talking when Mr. Williams grabbed her and pulled her by the hair into the bedroom. (V3/T28-29)

While they were in the bedroom, someone came in. Mr. Williams went out of the room and spoke to the person. He then came back in, got undressed, grabbed her, slammed her on the bed, and forcefully put his penis into her vagina without her consent. (V3/T30-32) Afterwards she said Mr. Williams told her he would have to kill her, because she would call the police. He began to choke her. She kicked him off her and ran for the door. He grabbed her by the throat, slammed her head against the wall, and punched her in the left eye, which

began to bleed. They struggled, and she made it into the kitchen. She said Mr. Williams grabbed some scissors and tried to stab her, but she got the scissors away from him (V3/T32-33)

V.G. said she tried to get out the door, holding the scissors behind her back. Mr. Williams grabbed her hair, and they struggled toward the living room. She kicked the bottom of the screen door out and went out through the front door. She got out onto the driveway, and Mr. Williams jumped on top of her trying to get the scissors away from her. A woman pulled up in a car, and V.G. screamed for help saying that Mr. Williams was trying to rape and kill her. 911 was called, and she was taken to the hospital. She had cuts on her fingers, a bite mark, and her left eyebrow over the eye was cut and needed seven stitches. (V3/T35-38)

On cross-examination she admitted she had grabbed the scissors from Mr. Williams and stabbed him in the right shoulder. (V3/T57-58)

A visitor to a neighbor testified he heard crashes coming from Mr. Williams' apartment, and he heard a male voice scream out the "F ing bitch tried to stab me." He saw a girl come out of the apartment into the street wearing a bloody T-shirt whose face was "hamburger." His girlfriend called 911 and police came. (V3/T66-68,71)

The registered nurse/sexual assault nurse examiner was called to the emergency room to see V.G. She said that V.G.

had lots of blood on her face, multiple bruises to neck and other parts of her body but no indications of trauma to her vulva, hymen, vagina or cervix. (V3/T75-86)

The crime scene investigator testified he found no blood on the carpet in the living room, no damage to walls in the hallway, no semen on the bedding or clothing, but some semen on the man's underpants. (V3/T100-101,109,110) He said her clothes appeared to have been stepped out of, not torn off. (V3/T111,112)

Sergeant Mike Fox testified that he conducted a taped interview with Mr. Williams in which he admitted he had consensual sex with V.G., but denied he raped her. The tape was admitted into evidence over defense objection that it was cumulative, and it was played for the jury. (V3/T119,126-127) In the tape Mr. Williams admits that he and V.G. had consensual sex in his house on his bed. Afterward V.G. became aggressive, because Mr. Williams said he did not want to leave his wife and son for her. He said she grabbed up some scissors and got a nasty look on her face. When he asked her to leave, she "just went crazy." (V3/T133,135,141-142) He said that V.G. came at him with the scissors trying to cut him and did cut him on the leg as he tried to block her. Mr. Williams said they struggled and wrestled around the house as she kept trying to cut him with the scissors. He tried to get to the phone, but she kept coming after him telling him she was going to kill him. She broke the screen out, ran outside

to a woman in a car, and told the woman he was raping her and trying to kill her. She got cut when they were struggling with the scissors. He went to the phone and dialed 911 but could not get an answer. Then he called his wife and told her what was going on. (V3/T142-146) Mr. Williams said he did not know that V.G. was a minor. (V3/T149) Mr. Williams denied that he went and picked her up. He said that she came to his house and came into his bedroom, without his knowledge. (V3/T149,131,153,154) The officer admitted Mr. Williams had stab wounds and was bleeding from his left bicep and lower leg. (V3/T169)

Mr. Williams' testimony during trial was substantially the same as the admissions he made for the police with some exceptions. (V4/T210-248) He admitted that he picked up V.G. at her house on May 29, 2003; that they had consensual sex; and that his penis penetrated her vagina. He also admitted that he was 29 years of age at the time. (V4/T215,221,232) He stated, however, he did not know V.G. was 15. She had lied to him about her age. (V4/T232) He said he had lied to the police when he said that he did not pick up V.G. that day at her house, but he did so because he did not want his wife to know he had brought another woman to the house. (V4/T211,212)

He described the struggle through the house. Mr. Williams stated that after they had sex, V.G. wanted to know if he was going to leave his wife and son for her. When he told her he would never leave them for anyone, she got very

upset and grabbed the scissors. He tried to get them away from her, and they both got hurt during the struggle. She stabbed him twice. (R4/T222-230)

The court, over defense objections, read the instructions to the jury for lewd and lascivious battery as a lesser included offense. (V3/T187-190;V4/T202-209,252-253) The jury returned a verdict of guilty of lewd or lascivious battery. (V4/T267;V1/ R96,97)

SUMMARY OF THE ARGUMENT

In 1999 the legislature overhauled Ch. 800, lewd or lascivious conduct, to the point where the lines between it and Ch. 794, sexual battery, have been blurred. This Court should maintain the integrity of Ch. 800 and keep it separate from Ch. 794. Not to do so creates double jeopardy issues and problems with what are appropriate lesser. No matter how this Court answers the Second District's question, however, the Petitioner is entitled to a new trial. Either it was error to allow Mr. Williams to be convicted of lewd or lascivious battery as a lesser of sexual battery with violence or weapon or the jury was misled when it was told the lessers were in a descending order when they were not.

ARGUMENT

ISSUE I

MAY THE CRIME OF LEWD OR LASCIVIOUS BATTERY PROHIBITED BY SECTION 800.04(4), FLORIDA STATUTES (2002), BE A PERMISSIVE LESSER INCLUDED OFFENSE OF THE CRIME OF SEXUAL BATTERY CHARGED PURSUANT TO SECTION 794.011(3), FLORIDA STATUTES (2002)?

For many years the lewd or lascivious statute had language that excluded the commission of a sexual battery as part of its definition. Prior to 1984 (undersigned counsel only went back as far as 1975) the statute read:

> 800.04 Lewd, lascivious or indecent assault or act upon or in presence of child.—Any person who shall handle, fondle or make an assault upon any child under the age of fourteen (14) years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without the intention to commit involuntary sexual battery, shall be guilty of a felony of the second degree….

(Emphasis added.) The statute was amended in 1984 to correct some problems such as the victim's lack of chastity or consent as defense, but the intent to keep lewd and lascivious conduct separate from sexual battery was strengthened:

> 800.04 Lewd, lascivious or indecent assault or act upon or in presence of child.—Any person who shall:
>
> (1) Handle, fondle or make an assault upon any child under the age of 16 years in a lewd, lascivious or indecent manner;
>
> (2) Commit an act defined as sexual battery under s.794.011(1)(f) upon such child; or

> (3) Knowingly commit any lewd or lascivious act in the presence of such child,
>
> without committing the crime of sexual battery shall be guilty of a felony of the second degree….

(Emphasis added.) See Ch. 84-86, sec. 5.

This language of "without committing the crime of sexual battery" remained in the statute until 1999 when it was removed. At that time the lewd or lascivious conduct statute underwent many changes adding in subsections for additional offenses (lewd or lascivious battery—second-degree felony; lewd or lascivious molestation—first-degree, second-degree and third-degree felonies depending on the age of the victim and perpetrator; lewd or lascivious conduct—second-degree or third-degree felonies depending on the age of the perpetrator; and lewd or lascivious exhibition—second-degree or third-degree felonies depending on the age of the perpetrator). It was during that major overhaul of sec. 800.04, Fla. Stat. (1999), that the line between sexual battery and lewd or lascivious battery was dissolved. As a result, there has been a great deal of confusion as to whether or not they are the same crime when arising from the same conduct and whether or not lewd or lascivious battery is now a lesser of sexual battery with a deadly weapon or physical force.

Prior to 1999 this Court made clear its position on how lewd or lascivious conduct stood in relation to a sexual

battery. State v. Hightower, 509 So. 2d 1078, 1079 (Fla. 1987), stated that the unique statutory language "without committing the crime of sexual battery" in sec. 800.04 made it clear that lewd or lascivious conduct and sexual battery were mutually exclusive. Therefore, the crime of lewd or lascivious conduct was not a necessarily included offense of sexual battery. In Welsh v. State, 850 So. 2d 467, 470 (Fla. 2003), this Court took Hightower one step further and held that lewd or lascivious conduct was also not a permissive included offense of sexual battery. This Court did note the substantial amendments to the 1999 lewd or lascivious statute, but it refused to express any opinion as to the effect of these changes on the issue of being a lesser to sexual battery. That issue is now before this Court.

It is important to note this Court said in Hightower that if the phrase "without committing the crime of sexual battery" was excluded from sec. 800.04, then a person having forcible sex with a child under 16 would be guilty of both crimes. Hightower, 509 So. 2d at 1079. The State relied on this dicta in Robinson v. State, 919 So. 2d 623 (Fla. 2d DCA 2006). Faced with the 1999 version of section 800.04 with the "unique" language of "without committing the crime of sexual battery" gone, the defendant was convicted of both sexual battery and lewd or lascivious molestation on a 13-year-old child. Only a single act supported both of these convictions—digital penetration of the vagina. The defendant argued both

convictions for the same act violated double jeopardy, and the State argued Hightower. The Second District rejected the State's argument and found "convictions for sexual battery and lewd or lascivious molestation violate double jeopardy principles when the offenses 'were both perpetrated on the same victim, at the same time and place, during the same criminal episode.'" Robinson, 919 So. 2d at 623, quoting from Johnson v. State, 913 So. 2d 1291, 1291 (Fla. 2d DCA 2005). Hightower, which wasn't faced with this issue, does point out in ftnt. 4 that only one conviction can be obtained for the same conduct; however, the Second District was concerned and certified the following question as being one of great public importance:

> MAY A DEFENDANT BE CONVICTED OF BOTH SEXUAL BATTERY UNDER SECTION 794.011(5), FLORIDA STATUTES (2002), AND LEWD AND LASCIVIOUS MOLESTATION UNDER SECTION 800.4(5), FLORIDA STATUTES (2002), FOR A SINGLE SEXUAL ACT?

The State did not seek this Court's jurisdiction in Robinson, so the question went unanswered.

Although this question is not at issue in Mr. Williams' case, the question shows the problems caused by the 1999 amendments which removed the "unique" language that kept sexual battery separate and apart from lewd or lascivious. Mr. Williams' issue is what now constitutes lessers of sexual battery and whether or not lewd or lascivious battery is a permissive lesser.

Most of the essential facts in this case are uncontroverted. Mr. Williams admitted to having sex with V.G., V.G. was 15 at the time, and Mr. Williams was 29. The controversy was whether or not the sex act was consensual as Mr. Williams claimed or nonconsensual and accompanied with a deadly weapon or physical force likely to cause serious personal injury as V.G. claimed. The State charged Mr. Williams with sexual battery with a deadly weapon or physical force--a life felony under sec. 794.011(3). When it came to lessers, the State asked for and received lewd or lascivious battery--a second-degree felony under sec. 800.04(4)(a)--over objection, sexual battery without violence--a second-degree felony under sec. 794.011(5), and simple battery.

The jury was told there are lessers to sexual battery with a deadly weapon or physical force, and they were given these 3 lessers in a descending order both in the instructions and in the verdict form. The jury was also told they must return a guilty verdict for the highest offense which has been proven beyond a reasonable doubt and only one verdict may be returned as to each crime charged. (V1/R80-83,90,96;V4/T252-254,261,262)

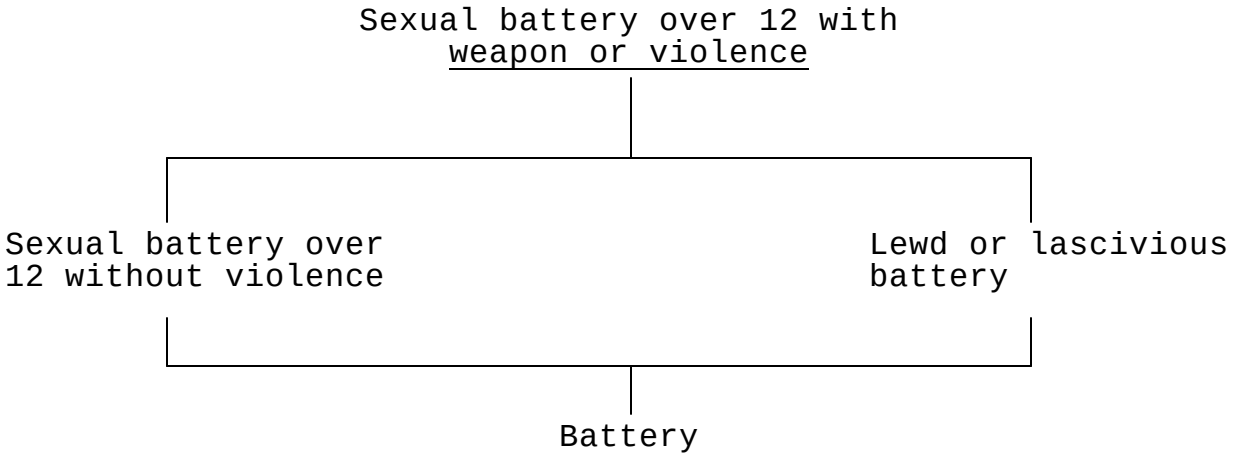
It is more than just reasonable to assume that the jury is being told sexual battery with violence is a more severe crime than lewd or lascivious battery, lewd or lascivious battery is a more severe crime than sexual battery without violence, and sexual battery without violence is a more severe

crime than simple battery. The jurors are told about the lessers and these lessers are put in a descending order in order to give effect to the jury's right to exercise its "pardon power." This Court has noted the importance of the jury "pardon power" in the past. See State v. Baker, 456 So. 2d 419, 422 (Fla. 1984)("lesser included offenses" allow for the non-constitutional right of an accused to an instruction that gives the jury an opportunity to convict for an offense with a less severe punishment than the crime charged); State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986)(the requirement that a trial judge give a necessarily lesser included offense instruction is based on a recognition of the jury's right to exercise its "pardon power."); State v. Connelly, 748 So. 2d 248 (Fla. 1999)(recognizes that jury verdicts can be factually inconsistent as a result of lenity coming from the jury's inherent authority to acquit).

In Mr. Williams' case, however, there was a glitch in the descending order—lewd or lascivious battery is the same degree of felony and carries the same punishment as sexual battery without violence under sec. 794.011(5). They are both second-degree felonies punishable by up to 15 years of imprisonment as per sec. 775.082(3)(c), Fla. Stat. (2002). In addition 794.011(5) and 800.04(4) are both listed as level 8 offenses under sec. 921.0012, Fla. Stat. (2002). What is more, sexual battery without violence under sec. 794.011(5) and battery are listed as Category 1 necessary lessers for sexual battery on a

victim over 12 with violence or weapon in the jury instructions. So under the Standard Jury Instructions in Criminal Cases the trial court had no options on giving the lesser of sexual battery without violence and battery; but when it added in lewd or lascivious battery—a charge not listed as a lesser as of 2006, it gave the jury the erroneous assumption/presumption that lewd or lascivious battery was a greater offense in degree and punishment than sexual battery without violence even though it was not.

At the very least the jury in Mr. Williams' case was misled about the descending order of lesser, and at the very most the State may be seeking an ability to present a "family tree" of lesser wherein 2 or more lessers of the crime charged are not lessers to each other as so:



This dichotomy makes the jury instruction as to convicting for 'the most serious crime proven' wrong and creates the novel issue of whether the jury can find guilt on 2 different crimes

arising from only 1 initial charge.

All of this brings us to the question certified by the Second District and shows why the question was certified—the answer is not simple and has many ramifications. If this Court finds that the removal of the "unique" language "without committing the crime of sexual battery" has lifted all previous restrictions that had prohibited lewd or lascivious conduct from being a lesser of sexual battery, than it must deal with the ramifications. Does sexual battery on a person over 12 without violence remain a Category 1 necessary lesser of sexual battery with violence, putting it on the same level as lewd or lascivious battery? Is the jury to be told they are not dealing with lessers in a descending order when faced with 2 lessers of the crime charged of equal degree and punishment? Can the State be forced to chose which lesser it will use if the novel use of a "family tree" concept of lessers is not to be allowed? Will the defendant have any input on these lessers should an election have to be made. This is what the 1999 amendments to lewd or lascivious conduct has done. It dissolved the barrier that once kept lewd or lascivious conduct separate and apart from sexual battery and created a pool of mud where the statutes are running together without any barriers.

In light of all the confusion, the answer to the Second District's question should be in the negative. Lewd or lascivious conduct can not be a lesser of sexual battery with

violence or a weapon. It should remain its own charge in Ch. 800 and kept separate from Ch. 794. The State had sexual battery with violence or a weapon and sexual battery without violence in sec. 794 as a lesser should the jury reject the victim's claims of violence or use of a weapon as it did in Mr. Williams' case. If the State is dealing with a child older than 12 but less than 16 so that chastity and consent are not issues, then the State should set forth a separate count in the information. Should the jury convict on both sexual battery with or without violence and lewd or lascivious battery based on the same conduct, then the constitutional double jeopardy provisions can step in and the trial court can discharge the defendant on 1 of the 2 convictions. This is what this Court recognized in Hightower in ftnt. 4, and this is what will keep the complex lewd or lascivious conduct in Ch. 800 separate and apart from sexual battery in Ch. 794. For as complicated a lewd or lascivious battery is, lewd or lascivious molestation with its variety of felony degrees based on ages of the victim and perpetrator is much worse. Mr. Williams should be given a new trial.

If this Court does not agree with Mr. Williams and answers the Second District's question in the affirmative, then it should still order a new trial for Mr. Williams based on the fact that the jury was misled as to the descending order of lessers. Since lewd or lascivious battery is not a greater offense than sexual battery without violence and

battery is the next step down for both of these charges, then the jury should have been told this instead of being misled. Inasmuch as Mr. Williams was acquitted of sexual battery with violence or a weapon, then the retrial must be for lewd or lascivious battery with only the Category Two lessers as set forth in the Standard Jury Instructions in Criminal Cases as possible permissive lessers (attempt, assault, battery, unnatural and lascivious act). Sexual battery without violence in sec. 794.011(5) is no longer at issue as it is not a lesser of lewd or lascivious battery as it is neither a lesser in degree or penalty. See Sanders v. State, 912 So. 2d 1286 (Fla. 2d DCA 2005), presently pending before this Court is SC05-2115. Whether or not this Court will allow the novel concept of a "family tree" of lessers in the future will depend on how it answers the questions in this case.

CONCLUSION

Based on the foregoing arguments and authorities, Mr. Williams is entitled to a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of June, 2006.

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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APPENDIX