IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. SC08-903

JOSHUA MESHELL,

Respondent.
_____)

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

By: NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 765910
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
Phone: 386/252-3367

COUNSEL FOR RESPONDENT

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SUMMARY OF ARGUMENT

The District Court of Appeal correctly affirmed only a single conviction for the two charged acts of lewd battery that were shown to have taken place on December 19.

ARGUMENT

(RESTATED:) THE CORRECT UNIT OF PROSECUTION FOR LEWD BATTERY AND SEXUAL BATTERY IS NOT EACH SEPARATE TOUCHING OR PENETRATION OF A PROTECTED BODILY AREA, BUT INSTEAD A SINGLE ACT OR SINGLE EPISODE UNLESS THAT EPISODE IS DIVISIBLE BY TIME, PLACE, OR NUMBER OF VICTIMS.

Standard of review. As the State correctly sets out in its brief, determining whether double jeopardy is violated based on undisputed facts is a legal determination, and this court's review of this matter is thus de novo. State v. Paul, 934 So. 2d 1167, 1171 (Fla. 2006).

Certified question. As the State also correctly notes in its merit brief, the Fifth District Court certified the following question in this case:

> ARE THE SEX ACTS PROSCRIBED BY SECTIONS 794.011 AND 800.04(4), FLORIDA STATUTES, PROPERLY VIEWED AS "DISTINCT CRIMINAL ACTS" FOR DOUBLE JEOPARDY PURPOSES, SO THAT A DEFENDANT CAN BE SEPARATELY CONVICTED FOR EACH DISTINCT ACT COMMITTED DURING A SINGLE CRIMINAL EPISODE?

Meshell v. State, 980 So. 2d 1169, 1175 (Fla. 5th DCA 2008). Respondent submits that the legal question at the heart of the matter before the District Court, and this Court, should be more simply phrased as "what is the correct unit of prosecution for lewd battery (and also, necessarily, for sexual battery)"?[1]

[1] The two offenses are identically defined in the Florida Statutes, except for reference to the age of the victim in the lewd battery statute. Sexual battery consists of "the oral,

The federal and Florida constitutional guarantees against double jeopardy protect, *inter alia*, against multiple punishments for the same offense. State v. Paul, supra, 934 So. 2d 1167 at 1171-72. It is the legislative branch, and not the prosecuting authority, that defines what is a single "offense." Sanabria v. United States, 437 U.S. 54, 69 (1978). There are few, if any, constitutional limitations on the legislative power to define "offenses." Id. "But once Congress has defined a statutory offense by its prescription of the 'allowable unit of prosecution,' that prescription determines the scope of protection afforded.... Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this [legislative] choice." Id. at 69-70. Accord Morman v. State, 811 So. 2d 714, 716 (Fla. 2d DCA 2002) (deciding, by reference to Sanabria, correct unit of prosecution for pre-1999 version of lewd conduct statute); McKnight v. State, 906 So. 2d 368 (Fla. 5th DCA 2005) (same, as to vehicular homicide). See State v. Rubio, 967 So. 2d 768, 776-77 (Fla. 2007) (citing McKnight in Medicaid fraud context).

State v. Paul, supra, 934 So. 2d 1167 (Fla. 2006), does not expressly involve "unit of prosecution" analysis because the crimes charged in that case arose under three separate subsections of the

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anal, or vaginal penetration by, or union with, the sexual organ or another or the anal or vaginal penetration of another by any other object." Section 794.011(1)(h), Fla. Stat. Lewd battery, proscribed by Section 800.04(4), may be committed in two ways; the one that applies to this case is defined as "sexual activity" with a child, with "sexual activity" defined exactly as "sexual battery" is defined in Section 794.011(1)(h). See Section 800.04(1)(a), Fla. Stat.

lewd offenses statute.[2] The case now before this court involves two counts each charged under subsection 800.04(4), Fla. Stat., which proscribes lewd battery. This case, unlike Paul, thus raises only the question when separate convictions *under the same statutory subsection* can stand. In this situation, Sanabria and its progeny of "unit of prosecution" cases apply. McKnight, supra; Rubio, supra. The correct question for this court to determine, in order to bring clarity to the caselaw on this subject, is *what is the correct unit of prosecution* in lewd battery cases (which are indistinguishable from sexual battery cases for this purpose.)

This case. Mr. Meshell, as the State concedes, was convicted of two counts of lewd battery, each constituting a second-degree felony, for one act of fellatio and one act of penile/vaginal intercourse, both occurring December 19. The record affirmatively shows that only one victim was involved, and the record does not establish, or tend in any way to suggest, that more than one time or place was involved. On those facts, the question arises what unit of prosecution was intended by the Florida Legislature: i.e., did

[2] Paul involved counts charging lewd molestation under Section 800.04(5), lewd conduct under Section 800.04(6), and lewd exhibition under Section 800.04(7). This court held that Mr. Paul was correctly convicted of one count of lewd conduct and one count of lewd exhibition for one act, and held separately that he had been incorrectly convicted of one count of lewd molestation and one count of lewd conduct for another criminal episode that took place at a different time. The analysis was that the offense of lewd conduct is always subsumed by the offense of lewd molestation, but that the offense of lewd exhibition is never subsumed by the offense of lewd conduct since each offense contains an element the other does not. Paul, 934 So. 2d at 1173-74.

the Legislature intend for each sequential contact with *each body part mentioned by the statute* to constitute grounds for a new second-degree felony, or did the Legislature intend to warrant only a single 15-year sentence for a sexual episode that involves a single victim, involves only the offense of lewd battery, and is discrete from any other conduct as to time and place?

Argument. The State would have this Court first analyze what constitutes an episode or transaction, then analyze what constitutes each act within such an episode or transaction, then add the two totals to arrive at the number of prosecutions the State may bring. (Petitioner's Merits Brief at 10-15) The State further suggests that this Court should analyze what constitutes an "act" in terms of victim impact, and should authorize punishment for each "act" accordingly. (Petitioner's Merits Brief at n. 5, p. 15) The proper inquiry is what is the relevant *legislatively-intended* unit of prosecution. Sanabria; Rubio; McKnight. That unit may *either* be represented by an act, or by a brief unbroken episode divisible into more than one act. Grappin v. State, 450 So. 2d 480 (Fla. 1984); see generally State v. Parrella, 736 So. 2d 94 (Fla. 4th DCA 1999) and Hill v. State, 711 So. 2d 1221, 1224 (Fla. 1st DCA 1998). The question what unit of prosecution was intended is a common-sense one. Guetzloe v. State, 980 So. 2d 1145 (Fla. 5th DCA 2008); Rubio, 967 So. 2d at 777. Any ambiguity in the intended unit of prosecution must be resolved by

application of the rule of lenity. Grappin; McKnight.

The Colorado Supreme Court has had occasion to decide the issue now before this court, with reference to the Colorado legislature's intent in passing its statute proscribing sexual assault on a child. Woellhaf v. People, 105 P. 3rd 209 (Colo. 2005). The Court in Woellhaf concluded that "the General Assembly has not specifically authorized multiple punishments for each and every type of sexual contact that transpires within one act or incident of sexual assault on a child." Id. at 213-14. The Woellhaf court, as is this court, was considering a statute that "provid[es] for alternate ways of committing the same offense." Id. at 215. The Colorado statute at issue in Woellhaf proscribed "any sexual contact" with a child. Id. The Colorado Supreme Court read "any" as "an unlimited, non-restrictive phrase;" this Court agrees. See Grappin, supra, holding that a statute proscribing "an" act indicates the unit of prosecution is an *act*, while a statute proscribing "any" conduct indicates that the intended unit of prosecution is an *episode*. The statutory language at issue in this case, which defines "sexual battery" in both the lewd battery and sexual battery statutes, does not contain either the term "a" or "any;" it proscribes "penetration...or union...or... penetration." The key to the "a/any" cases is statutory ambiguity, which is present with "any" (but absent with "a.")

A case following Woellhaf, People v. Mintz, 165 P. 3rd 829 (Colo.

App. 2007), is even more closely on point with this case: in Mintz, the Colorado court construed an incest statute that proscribed "penetration or sexual intrusion...or...sexual contact," and ruled that that language was "functionally equivalent" to the "any sexual contact" language construed in Woellhaf for unit of prosecution purposes. The holding in Mintz was that the level of detail in the People's case was insufficient to show that separately chargeable acts of incest took place. 165 P. 3rd at 835-36.

In the Florida statutes at issue, as in the statutes at issue in Woellhaf and in Mintz, ambiguity is present, since in Florida sexual battery may be accomplished by any of various statutorily-defined methods. As the Fifth District noted in its opinion in this case, Florida's appellate courts have not authorized multiple convictions under alternate-conduct statutes where a defendant commits each of the statutorily-provided alternate methods of committing the crime. Meshell, 980 So. 2d 1169, 1174 (Fla. 5th DCA 2008). For example, if a defendant by one act causes both an unwanted touching and minor bodily harm, he has not thereby committed two simple batteries. Id. The same rule should prevail here, as the Legislature has not made it clear that each touching of each protected body part warrants a separate conviction.

The rule of lenity governs this case. Grappin, supra. The State may argue that lenity is not to form part of double jeopardy analysis,

citing Section 775.021(4), Florida Statutes. The question what unit of prosecution is intended is unaffected by the inquiry set out in Section 775.021(4). Hill v. State, supra, 711 So. 2d at 1224. Once the unit of prosecution is discerned, if more than one *statutorily defined criminal offense* is charged to cover the same *act or episode*, the courts go on to apply the Blockburger[3] test, which determines how many different kinds of convictions a defendant may incur for a single act or episode. The analysis in State v. Paul, supra, exemplifies the difference. In Paul, two *units of prosecution* were present - one an act taking place in one room, and the other an episode taking place in another room. Two convictions ultimately resulted from one unit, and one conviction from the other: Blockburger analysis caused this court to arrive at that final conclusion, discussed above at n.2. Here Blockburger analysis is not reached, as only one subsection of one statute is involved, and the only questions before this court are *how many units of prosecution are warranted, and how many are reflected in the convictions appealed from.*

The Legislature has also indicated, by its silence after the Paul decision, that it does not object to this Court's analysis in that case. This Court in Paul held that two episodes took place, one in one room and the other in a separate room; the factors this Court used in reaching that decision were whether the episodes were

[3] Blockburger v. United States, 284 U.S. 299 (1932).

separate in time and place, and whether more than one victim was involved. Paul, 934 So. 2d 1167, 1172-73 (Fla. 2006). When the Legislature disagrees with this Court, it makes its views known. See Section 810.015, Fla. Stat. (2001) [expressly nullifying Delgado v. State, 776 So. 2d 233 (Fla. 2000)]; Section 893.101, Fla. Stat. (2002)(expressly overriding statutory interpretation in Chicone v. State, 684 So. 2d 736 (Fla. 1996); Chapter 88-131, s. 7, Laws of Florida, amending Section 775.021(4), Florida Statutes, so as to override statutory interpretation in Carawan v. State, 515 So. 2d 161 (Fla. 1987) [see Smith v. State, 547 So. 2d 613 (Fla. 1989)].

The Fifth District Court, in its opinion in this case, expressed concern whether the factual allegations in the pleadings and proof may be taken into account in analyzing double jeopardy questions. Taking the pleading and proof into account at some stage of unit-of-prosecution analysis is logically unavoidable: the Legislature determines what the unit of prosecution is, but the courts as a practical matter must determine how many units have been charged and how many have been proved. See Woellhaf at 215.

As noted above, this Court has already effectively held in State v. Paul, supra, 934 So. 2d 1167 (Fla. 2006), how to analyze, as a practical matter, what is the unit of prosecution in a lewd offense case: the courts are to look at the number of victims, and whether any spatial or temporal break took place in the events that should

result in a new prosecution. Accord Morman v. State, supra (as to pre-1999 lewd offense statute). Here the State failed to establish that separate prosecutions were warranted for the defendant's acts of fellatio and penile/vaginal penetration, since the State failed to establish, or suggest, that there was any spatial or temporal break between the two. This Court should approve the District Court's decision affirming only one conviction for lewd battery, based on its analysis in State v. Paul.

CONCLUSION

The respondent submits that this Court should rephrase the certified question as follows: "WHAT IS THE CORRECT UNIT OF PROSECUTION IN CASES CHARGING LEWD BATTERY AND SEXUAL BATTERY?" The respondent further submits that the question should be answered as set out above, i.e., that the correct unit of prosecution may be either a single act or a single incident, depending on whether the incident is divided by passage of time, distance in space, or number of victims.

This Court should affirm the District Court's decision reducing Respondent's two lewd battery convictions to a single conviction.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER

_____

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
Phone: 386/252-3367

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Assistant Attorney General Kristen L. Davenport, of 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by way of the Attorney General's in-basket at the Fifth District Court of Appeal, and mailed to Mr. Joshua Meshell, No. X58334, Bay C. F., 5400 Bayline Drive, Panama City, FL 32404 on this _____ day of July, 2008.

_____
NANCY RYAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, in that it is set in Courier New font, 12-point.

_____
Nancy Ryan
Florida Bar No. 765910

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By: NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 765910
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
Phone: 386/252-3367

COUNSEL FOR RESPONDENT