IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC08-903

JOSHUA MESHELL,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE

The Defendant was charged by information with five counts of lewd and lascivious battery. (R. 84-88). A jury trial was held on May 10, 2007. (R. 1-65). The Defendant was found guilty on counts I, III, IV, and V. The jury deadlocked on count II; a mistrial was declared on that count, and it was later nol-prossed. (R. 59-60, 183).

The Defendant timely appealed his convictions and sentences to the Fifth District Court of Appeal. On April 11, 2008, the district court issued an opinion reversing the Defendant's conviction on count III, finding that a conviction on that count violated double jeopardy. Meshell v. State, 33 Fla. L. Wkly. D1010 (Fla. 5th DCA April 11, 2008). Noting the need for further clarification of double jeopardy in this context, the court certified the following as a question of great public importance:

> 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?

Id. at D1012.

The State timely filed its notice to invoke the discretionary jurisdiction of this Court. On May 14, 2008, this

Court entered its order accepting jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

STATEMENT OF FACTS

The Defendant was charged by information with five counts of lewd and lascivious battery, stemming from three consecutive days of sexual activity with the 13-year-old victim. (R. 84-88). On December 19, 2006, the information alleged, the Defendant's penis penetrated or had union with the victim's vagina (count I); the Defendant's mouth had union with the victim's vagina (count II); and the Defendant's penis had union with the victim's mouth (count III). (Id.).

The information further alleged that the Defendant's penis penetrated or had union with the victim's vagina on December 20, 2006 (count IV) and on December 21, 2006 (count V). (Id.)

The Defendant was tried for these offenses on May 10, 2007. (R. 1-65). The victim's mother testified that the Defendant moved into the house behind them in November, 2006. (R. 13). He lived there with the victim's uncle. (R. 14). The victim began spending a lot of time with the Defendant in December of 2006, although the Defendant assured the victim's mother that nothing inappropriate was going on. (R. 14). The Defendant was 23 years old at the time; the victim was 13. (R. 15).

The victim testified that her sexual relationship with the Defendant began on December 19. (R. 19). They were laying in the Defendant's bed at his house and started touching each other. (R. 20). The Defendant put his mouth on her vagina and she put

her mouth on his penis, and then he put his penis in her vagina. (R. 20).

The victim testified that they had vaginal intercourse again on December 20 on the floor in the Defendant's bedroom. (R. 20-21). The following day, December 21, they had vaginal sex a third time. (R. 21-22). The victim noted that she initiated the sexual activity and consented to it. (R. 25).

Two deputy sheriffs with the Orange County Sheriff's office went to the Defendant's home on December 23, 2006. (R. 27-28, 34). The Defendant answered the door, saw the uniformed deputies, and became nervous and concerned; he slumped over and grew teary-eyed. (R. 28-29, 35).

The Defendant waived his Miranda[1] rights and spoke to the deputies. (R. 29, 36). He admitted that he had a sexual relationship with the victim, beginning on December 19 and continuing for three days. (R. 30). The Defendant prepared a written statement, in which he admitted to three incidents of vaginal intercourse. He also stated that the victim put his penis in her mouth. (R. 31-32, Exh. 2). The date of birth on the Defendant's driver's license was December of 1983. (R. 33).

During closing argument, the prosecutor asserted that the Defendant was charged with one count for each sexual act. (R. 42). Defense counsel argued that the State was prosecuting his

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

client multiples times for one sex act; counsel further noted that the Defendant never admitted performing oral sex on the victim. (R. 44-45).

The jury was instructed that a separate crime was charged in each count of the information and that evidence of each must be considered separately. (R. 55).

The jury found the Defendant guilty as charged on counts I, III, IV, and V, but deadlocked on count II. (R. 59-60). The trial court declared a mistrial on count II, and this count was later nol-prossed. (R. 60, 183).

At sentencing, the Defendant argued that his conviction on count III violated double jeopardy, as count III and count I involved acts committed during a single episode, in a single location, with no meaningful temporal break. (R. 67). The trial court rejected this argument, finding that the acts constituted different batteries. (R. 68-69). The Defendant was given a downward departure sentence of 10 years imprisonment followed by 25 years sex offender probation. (R. 73-74, 154-58).

On appeal, the district court rejected the trial court's ruling and concluded that the Defendant's conviction on count III did violate double jeopardy. Meshell v. State, 33 Fla. L. Wkly. D1010 (Fla. 5th DCA April 11, 2008). The court found this area of law to be in need of clarification, however, and certified a question of great public importance. Id.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause does not prohibit multiple convictions for distinct criminal acts. The acts defined as "sexual activity" and proscribed by section 800.04(4), Florida Statutes, are properly viewed as distinct criminal acts for double jeopardy purposes. Accordingly, a defendant can be separately convicted for each distinct act committed, even during a single criminal episode.

Here, the evidence at trial demonstrated that the Defendant placed his penis inside the victim's mouth and then inside her vagina. These two acts are sufficiently distinct to allow for separate criminal convictions.

The district court erred in finding a double jeopardy violation here, and its decision should be reversed. The certified question should be answered in the affirmative.

ARGUMENT

THE SEX ACTS PROSCRIBED BY SECTIONS 794.011 and 800.04(4), FLORIDA STATUTES, ARE PROPERLY VIEWED AS "DISTINCT CRIMINAL ACTS" FOR DOUBLE JEOPARDY PURPOSES.

The district court has asked this Court to decide whether multiple acts of "sexual activity" under section 800.04, Florida Statutes, are properly viewed as distinct criminal acts for double jeopardy purposes and accordingly subject to separate convictions and punishments. This question should be answered in the affirmative.

The district court concluded that the Defendant was improperly convicted of two counts of lewd and lascivious battery in a single criminal episode – one count for penetrating the victim's vagina with his penis, and one count for penetrating the victim's mouth with his penis. Whether double jeopardy is violated is a question of law, subject to de novo review. State v. Paul, 934 So. 2d 1167, 1171 (Fla. 2006). The defendant bears the burden of establishing a double jeopardy violation. Koon v. State, 463 So. 2d 201, 203 (Fla.), cert. denied, 472 U.S. 1031 (1985). Applying that standard here, the district court's decision should be reversed.

Double Jeopardy Analysis – State v. Paul

This Court has held that the power to define criminal offenses and the appropriate punishment for those offenses rests solely with the Legislature. Hayes v. State, 803 So. 2d 695, 699

(Fla. 2001). The Double Jeopardy Clause, however, forbids multiple convictions or punishments for a single criminal act, unless the Legislature intended such separate convictions and sentences. Id.

In Paul, this Court engaged in a comprehensive examination of double jeopardy, providing a step-by-step guide to the analysis required in evaluating whether multiple convictions or punishments are authorized for the conduct at issue. The first issue to be determined is whether the crimes occurred during one "criminal episode," as crimes occurring during multiple episodes may lead to multiple convictions without violating double jeopardy. 934 So. 2d at 1172-73. In evaluating whether there was more than one criminal episode, courts must consider whether there were multiple victims, whether the crimes took place in multiple locations, and whether there was a temporal break between the crimes. Id. at 1173.

If the court finds that there was indeed only one criminal episode, it must then consider whether the Legislature plainly intended separate punishments. If so, the analysis ends and multiple punishments may be imposed. Id. at 1171-72.

If, on the other hand, the legislative intent is unclear, then the Blockburger[2] test, as codified in section 775.021, Florida Statutes, is applied to determine that intent. Id. at

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

1172. Under Blockburger's same elements test, the court must consider whether each offense contains an element distinct from the other, without regard to the charging document or the proof at trial. Id. at 1173.

If this same elements test is passed, then the court must go on to consider the other tests set forth in section 775.021(4)(b). Specifically, the court must evaluate whether the two offenses necessarily require identical elements of proof (§ 775.021(4)(b)(1)), whether the two offenses are degrees of the same offense (§ 775.021(4)(b)(2))[3], and whether one offense is a necessary lesser included offense of the other (§ 775.021(4)(b)(3)). Id. at 1174-75.

Finally, and most relevant to the issue in the present case, multiple convictions are *always* appropriate where there are "distinct criminal acts." Id. at 1173 n.3. This principle of double jeopardy analysis, less well-defined than those discussed above, was the source of the district court's confusion.

By definition, this "distinct criminal act" analysis is a factual one and must consider the evidence at trial, or at least the allegations in the information. (The same is true in

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[3]While not directly at issue in this case, the State notes that this particular test has morphed into an analysis of whether the crimes address the "same evil." The State respectfully submits that this analysis should be reconsidered and the plain language of the statute instead applied, as Justice Cantero suggested in his concurring opinion in Paul. 934 So. 2d at 1176-79.

determining whether there were separate criminal episodes). The lower court's concern that such consideration violates Paul's statement that double jeopardy analysis must be undertaken without regard to the pleading or proof mixes up the standard Blockburger analysis with this separate exception. Meshell, 33 Fla. L. Wkly. at D 1011. Double jeopardy usually focuses on the legal Blockburger test. In this case, however, where the issue is whether there were distinct criminal acts, the analysis is more of a factual one.

Paul's Footnote 3 – Distinct Criminal Acts

The Double Jeopardy Clause does not prohibit multiple convictions and punishments where the defendant "commits two or more distinct criminal acts." Hayes, 803 So. 2d at 700.[4] The issue in such cases is not whether there are multiple criminal episodes or multiple victims, but whether there was more than one criminal *act*. Id. at 701. Objective criteria should be used in determining whether there was a single act or multiple acts, considering whether there has been a separation of time, place, or circumstances. Id. at 704.

Unlike the case with different criminal *episodes*, however, distinct criminal *acts* can take place even with virtually no change in time or place. For example, the district court

[4]This is true even if the distinct acts take place during a single criminal episode and fail to satisfy the requirements of section 775.021. Hayes, 803 So. 2d at 698.

properly rejected a double jeopardy challenge to two convictions where the defendant sold cocaine to two individuals, a confidential informant and an undercover agent, even though both transactions were completed in one location and within a total time of 30 seconds. Richardson v. State, 969 So. 2d 535, 538 (Fla. 1st DCA 2007).

Although the sales were undoubtedly the product of a single criminal episode, they were not based on the exact same factual event, and accordingly the jury was entitled to conclude that there were two, physically discrete sales. Id. at 536-38. The defendant "had enough time, albeit only seconds, to reflect on the second sale" and commit an additional crime after the first was "*fait accompli*." Id. at 539. See also Blockburger, 284 U.S. at 302 (holding that two convictions for sale of morphine hydrochloride to single purchaser did not violate double jeopardy, as each sale constituted a distinct offense, however closely one followed the other).

Lower courts considering the "distinct act" requirement in the context of general sexual activity (i.e. lewd acts) have largely focused on whether the alleged acts took place simultaneously or sequentially. See, e.g., King v. State, 834 So. 2d 311, 313 (Fla. 5th DCA 2003) (separate convictions for lewd or lascivious molestation reversed where defendant touched victim's breast and buttocks at practically the same time);

Morman v. State, 811 So. 2d 714, 717 (Fla. 2d DCA 2002) ("practically simultaneous touching of two proscribed areas" were not sufficiently distinct to allow two convictions); Eaddy v. State, 789 So. 2d 1093, 1095 (Fla. 4th DCA 2001) (defendant could not be convicted of two counts of lewd assault where he fondled victim's breasts and vagina during same incident, with no testimony regarding how much time, if any, elapsed between two inappropriate touchings). See also Gisi v. State, 909 So. 2d 531, 533 (Fla. 2d DCA 2005) (reversing separate convictions for "handling and fondling activities" that were simply "foreplay preceding the intercourse").

Indeed, these courts have sometimes reasoned that the statute prohibiting lewd and lascivious conduct with a child focuses on general conduct involving sexual *activity* and not on the individual *acts* that comprise the lewd and lascivious activity. See Morman, 811 So. 2d at 717. Under this rationale, even sequential acts could be viewed as part of a single sexual episode.

This is especially true when courts essentially ignore the separate *acts* distinction and instead apply the more exacting separate *episode* analysis, focusing solely on whether there was a "*significant* spatial and/or temporal break between any of the activities." Cabanela v. State, 871 So. 2d 279, 282 (Fla. 3d DCA 2004) (emphasis added). See also Binns v. State, 979 So. 2d 439,

442 (Fla. 4th DCA 2008) (reversing lewd and lascivious conduct convictions where acts took place during single episode, without considering distinct nature of acts); Romage v. State, 890 So. 2d 550 (Fla. 5th DCA 2005) (reversing lewd and lascivious molestation convictions where each act took place during a single episode in a single location with no "meaningful" temporal break, without considering distinct nature of acts).

The State submits that many of these molestation cases fail to properly apply the distinct acts test. As this Court stated in Hayes, distinct acts can take place even during a single criminal episode; the tests should not be the same. Indeed, if the premeditation required for a first degree murder conviction can form in a matter of seconds, it seems questionable that a new intent to lasciviously touch a child in another distinct area of his or her body seems to require some heightened period of reflection.

Perhaps due to the nature of the acts involved in the crime, this confusion between a separate criminal episode and a distinct criminal act seems to be less prevalent when the defendant is charged with sexual battery. See, e.g., Carlyle v. State, 945 So. 2d 540, 543 (Fla. 2d DCA 2006) (affirming multiple sexual battery convictions where each act was distinct – victim forced to perform oral sex, followed by vaginal sex, followed by oral sex, followed by anal sex); Schwenn v. State, 898 So. 2d 1130,

1132 (Fla. 4th DCA 2005) (affirming multiple convictions for sexual battery where each act was distinct in character); Grunzel v. State, 484 So. 2d 97 (Fla. 1st DCA 1986) (affirming separate convictions for two counts of sexual battery where defendant performed cunnilingus immediately before having intercourse with victim); Begley v. State, 483 So. 2d 70, 74 (Fla. 4th DCA 1986)(affirming multiple convictions for three separate acts of sexual battery, even though time of various batteries was not specified).

As the court explained in affirming two attempted sexual battery convictions based on evidence that the defendant attempted to insert his penis into the child's anus and then into the child's vagina:

> As the [sexual battery] statute indicates, each act is a sexual battery of a separate character and type which logically requires different elements of proof. Clearly, penetration of the vagina and penetration of the anus are distinct acts necessary to complete each sexual battery. Therefore, notwithstanding the short interval of time involved here, we believe each act is a separate criminal offense.

Duke v. State, 444 So. 2d 492, 494 (Fla. 2d DCA), approved, 456 So. 2d 893 (Fla. 1984). See also Saavedra v. State, 576 So. 2d 953, 956-57 (Fla. 1st DCA 1991) (sexual batteries of separate character and type, requiring different elements of proof, warrant multiple punishments), approved, 622 So. 2d 952 (Fla. 1993); Bartee v. State, 401 So. 2d 890, 893 n. 4 (Fla. 5th DCA 1981) ("whether multiple factual events, such as repeated blows

or knife stabbings, constitute separate offenses or but one offense in the aggregate, may depend on whether they are different *in quality* ... and therefore 'separate and distinct' offenses in fact.")(emphasis added)

Indeed, as a practical matter more than one activity constituting sexual battery can rarely be accomplished simultaneously. More importantly, the acts defined as sexual battery are by their very nature distinct in character. A defendant sliding his hand down a victim's body may touch her in several different prohibited areas without committing more than one distinct act. A defendant placing his sexual organ or other object in more than one orifice has, as a practical matter, certainly committed more than one distinct act.[5]

Here, the Defendant was not charged with sexual battery, but with lewd or lascivious battery. However, there is absolutely no logical reason to apply a different analysis than the sexual battery cases discussed above.

The statute under which the Defendant was convicted prohibits a person from engaging in "sexual activity" with a child between the ages of 12 and 16. § 800.04(4), Fla. Stat. The act of "sexual activity" is defined in numerous ways: oral, anal, or vaginal penetration by or union with the sexual organ of

[5]This is, of course, especially true from the victim's perspective.

another, or anal or vaginal penetration by any other object. § 800.04(1)(a), Fla. Stat. As the district court noted, the definition of "sexual activity" exactly tracks the language of the sexual battery statute. § 794.011(1)(h), Fla. Stat.

Accordingly, for the same reason that multiple acts are appropriately punished with multiple convictions under the sexual battery statute, multiple acts under the lewd or lascivious battery statute should be as well. See Samuel v. State, 925 So. 2d 475 (Fla. 4th DCA 2006) (affirming dual convictions for lewd and lascivious battery where defendant performed oral sex on child and then had child perform oral sex on him; acts were distinct in character and sufficiently separated to allow time to form new criminal intent). But see Coffield v. State, 872 So. 2d 430, 431-32 (Fla. 4th DCA 2004) (reversing separate convictions for lewd and lascivious battery where defendant touched victim's vagina and then inserted his penis there; finding insufficient "spatial and temporal" break between acts).

Here, the Defendant was charged in count I with placing his penis in the victim's vagina and in count III with placing his penis in the victim's mouth. No matter how short the time-frame between these two acts, they were clearly separate and distinct and required a separate intent by the Defendant.

Conclusion

The district court erred in concluding that there was only a single criminal act, and its decision should be reversed by this Court. A defendant who engages in more than one act of "sexual activity" under the lewd and lascivious battery statute by definition has committed multiple crimes and should be punished accordingly.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this honorable Court reverse the decision of the district court and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Initial Brief on the Merits has been furnished to Nancy Ryan, counsel for Respondent, 444 Seabreeze Boulevard Suite 210, Daytona Beach, Florida 32118, by hand delivery to the Public Defender's Basket at the Fifth District Court of Appeal, this _____ day of June, 2008.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

_____
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