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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

SUMMARY OF ARGUMENT

The Double Jeopardy Clause does not prohibit multiple convictions for distinct criminal acts, as was the case here. The Defendant's argument that the Legislature intended only a single conviction for each criminal episode, no matter the scope of the sexual activity that occurred during that episode, is not supported by the statutory language, case law, or common sense.

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 LEGISLATURE CLEARLY INTENDED THAT THE SEX ACTS PROSCRIBED BY SECTIONS 794.011 and 800.04(4), FLORIDA STATUTES, SHOULD BE TREATED AS "DISTINCT CRIMINAL ACTS" SUBJECT TO CONVICTION AND PUNISHMENT FOR EACH PENETRATION.

In its Initial Brief, the State asked this Court to reverse the district court's decision, answer the certified question in the affirmative, and hold that two separate acts of penetration constitute distinct criminal acts for double jeopardy purposes. In his Answer Brief, the Defendant does not address the question certified by the district court, but instead asks this Court to rephrase the question to address the correct "unit of prosecution" for lewd battery.[1]

According to the Defendant, the "distinct criminal act" analysis used by this Court in State v. Paul, 934 So. 2d 1167, 1173 n.3 (Fla. 2006), does not apply here because there were multiple charges under the same statutory section, rather than multiple charges under different statutory sections. The State submits that this is a distinction without a difference. In cases such as this and Paul, where the Defendant engages in multiple acts during a single episode, this Court must necessarily resolve whether the acts alleged are sufficiently

[1]The Defendant concedes that lewd battery is the equivalent of sexual battery, and accordingly that the Court's holding in the lewd battery context of this case will also apply to sexual battery cases. (Answer Brief at p. 2-3, n.1, p. 4).

distinct to be punished separately, whether under separate statutes or one.

The State further notes that this "unit of prosecution" analysis was used by neither the court nor the parties below, nor is it mentioned in the numerous cases discussing whether multiple convictions are appropriate for sexual conduct. (See Initial Brief at p. 11-16). Instead, the vast majority of these cases focus on the distinct nature of the acts in question, rather than on the appropriate "unit of prosecution," as the Defendant proposes now. But see Morman v. State, 811 So. 2d 714 (Fla. 2d DCA 2002) (applying unit of prosecution test for multiple counts of lewd and lascivious act on child; concluding that statute focused on sexual activity, not individual acts of activity in the same spatial and temporal zone; where acts not sufficiently discrete under that analysis, multiple prosecutions prohibited).

Judge Cobb once remarked that double jeopardy law in Florida often grows "curiouser and curiouser." Carawan v. State, 495 So. 2d 239, 240 (Fla. 5th DCA 1986), remanded, 515 So. 2d 161 (Fla. 1987). The different approaches available in this case, and indeed the lower court's opinion itself, illustrate the continuing confusion in this area of law.

All parties agree, however, that the key to solving this issue is *discerning legislative intent*. Whether that intent is evaluated by applying the principle that the Legislature intended

each "separate and distinct criminal act" to be punished separately (a fact-based inquiry), or is instead evaluated by applying the principle that the relevant "unit of prosecution" is the most important issue (a law-based inquiry), or even by a hybrid of the two tests (evaluating the statute to determine the appropriate factual focus)[2] the State submits that the result is clear: a defendant who is charged with lewd battery is properly convicted of a separate crime each time he engages in a different penetration.

The unit of prosecution analysis discerns legislative intent by considering the wording of the statute and its legislative history so as to define "the aspect of criminal activity that the Legislature intended to punish." State v. Rubio, 967 So. 2d 768, 777 (Fla. 2007) (quotation omitted).[3] This determination requires "a common sense approach," considering "the statutory language, the purpose of the statute, the evil to be corrected, the legislative history, and the pertinent case law that has applied the statute or

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[2]See Burk v. State, 705 So. 2d 1003 (Fla. 4th DCA 1998) (language of child pornography statute indicated intent to punish each photograph; accordingly, each photograph constituted distinct criminal act).

[3]This analysis often turns on the use of the words "any" versus "a". See, e.g., Rubio, 967 So. 2d at 776-78; Bautista v. State, 863 So. 2d 1180, 1188 (Fla. 2003); Wallace v. State, 724 So. 2d 1176, 1178 (Fla. 1998); Guetzloe v. State, 980 So. 2d 1145, 1148 (Fla. 5th DCA), rev. denied, ___So. 2d ___ (Fla. Aug. 22, 2008).

Similar enactments." McKnight v. State, 906 So. 2d 368, 371 (Fla. 5th DCA 2005).

For example, this Court in Rubio was asked to determine whether the patient brokering statute was intended to punish each *referral* of a patient in a fee-splitting arrangement or only each *global arrangement* for fee-splitting regardless of the number of times patients were referred. 967 So. 2d at 777-78. Analyzing the language used in the statute, each referral was found to constitute an appropriate unit of prosecution. Id.

Similarly, this Court considered the language of the DUI manslaughter statute, its history, and common sense when it was asked to determine whether the Legislature intended to impose a punishment for each *death* or only each *driving incident* under the statute, concluding that the Legislature intended to punish each death in a DUI crash as a separate offense. Bautista, 863 So. 2d at 1187.

Applying this test here, this Court is asked to determine whether the Legislature intended to punish each separate penetration of the victim or merely each sexual episode, as the Defendant asserts. Looking at the language of the statute, the evil addressed, and case law addressing this matter in other states and here in Florida, the result is clear – each penetration constitutes a separate offense.

The statute prohibits a defendant from engaging in "sexual activity" with a child between the ages of 12 and 16. § 800.04(4), Fla. Stat. Sexual activity is defined as "the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." 800.04(1)(a), Fla. Stat.

Clearly, then, the Legislature has defined sexual activity by focusing on the act of penetration. Where, as here, the Defendant placed his sexual organ in the mouth of the victim, and then placed his sexual organ in the vagina of the victim, he engaged in two penetrations -- two acts of sexual activity -- and committed two crimes.[4] See State v. Rummer, 432 S.E. 2d 39, 45-47 (W. Va. 1993) (by use of word "or" in defining sexual intercourse, legislature indicated that crime could be committed in various ways, with each type of prohibited contact constituting a separate offense).

This position is supported by the numerous Florida cases finding that more than one act of penetration constitutes more than one crime. See Initial Brief at p. 13-16 (citing cases). It is further supported by similar holdings in other states, as discussed below. Finally, it is supported by common sense.

[4]Indeed, the different nature of the crimes committed by the Defendant is well illustrated by the fact that the jury found him guilty of two of the penetrative acts but not a third.

While the Defendant quickly dismisses any consideration of the sexual conduct from the victim's perspective, the State submits that the Legislature was in fact greatly influenced by a concern for the victim in creating this crime to begin with, abrogating the old common law form of rape and its attendant fallacies. See generally State v. Rider, 449 So. 2d 903, 904-05 (Fla. 3d DCA 1984) (discussing differences between common law rape and sexual battery), rev. denied, 458 So. 2d 273 (Fla. 1985); State v. Aiken, 370 So. 2d 1184, 1185-86 (Fla. 4th DCA 1979) (same), approved, 390 So. 2d 1186 (Fla. 1980). See also Marr v. State, 494 So. 2d 1139, 1142 (Fla. 1986) (proposed jury instruction singling out the testimony of sexual battery victim as deserving more rigid scrutiny by a jury than other testimony "should no longer play a role in Florida jurisprudence").

By expanding the sexual battery and lewd act statutes, the Legislature recognized that more needed to be done to protect the bodily integrity of victims of sexual crime. Interpreting this statute in the manner suggested by the Defendant would be contrary to this well-established body of law.

As the Washington Supreme Court explained in concluding that the appropriate unit of prosecution for rape was penetration, however slight, and that each penetration constituted a separate crime:

> Each penetration in this case clearly constitutes an independent violation of the victim's personal integrity. ...
>
> Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed.

State v. Tili, 985 P.2d 365, 371 (Wash. 1999) (affirming multiple convictions for separate penetrations of different orifices during continuous sexual attack against same victim; quoting Wisconsin case).

Perhaps the best reasoning can be gleaned from a Maryland case collecting numerous cases from other jurisdictions and concluding that it would follow "the well established law of this and other states with respect to a defendant's liability for multiple acts committed against a victim during a single criminal episode":

> The courts of this country have had little difficulty in concluding that separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction. ...
>
> Assertion of a sole intent and objective to achieve sexual gratification (through multiple sex acts) is akin to an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts. To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be

> commensurate with his culpability. It would reward the defendant who has the greater criminal ambition with a lesser punishment.
>
> A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act. ...
>
> In this case each assault upon the victim involved a separate act of will on the part of the defendant and a separate indignity upon the victim. Under these circumstances we believe the legislative intention was that each assault should be deemed an additional offense.

State v. Boozer, 497 A.2d 1129, 1132-33 (Md. 1985) (quoting from several cases).

No common sense reading of the statute at issue here evidences any legislative intent to limit prosecution to one conviction per criminal episode or per victim, as the Defendant espouses. Accordingly, the Defendant's contention that the only relevant inquiry in determining the propriety of multiple convictions is whether there were multiple victims or a significant spatial or temporal break between the acts should be rejected by this Court.

In support of his argument, the Defendant points to two cases from Colorado, Woellhaf v. People, 105 P.3d 209 (Colo. 2005), and People v. Mintz, 165 P.3d 829 (Colo. Ct. App.), cert. denied, 2007 WL 2296922 (Colo. Aug. 13, 2007). However, these

cases involve statutes prohibiting sexual *contact*, not statutes focusing specifically on penetration.

Moreover, numerous cases from other states actually support the State's position here. See, e.g., State v. Sapp, 661 S.E. 2d 304, 308 (N.C. Ct. App. 2008) (defendant who withdrew from intercourse and then re-penetrated victim committed two rapes) Ellison v. United States, 919 A.2d 612, 616 (D.C. 2007) (by the end of vaginal activity defendant had accommodated that desire, and he then chose to satisfy a different desire by immediately attempting anal intercourse with same victim, making a "conscious decision to invade a new criminal interest and to satisfy a new criminal impulse"); Hill v. State, 929 So. 2d 375 (Miss. Ct. App. 2006) (tongue in victim's vagina and penis in victim's vagina constituted separate acts with separate facts); Minter v. State, 537 S.E. 2d 769, 772 (Ga. Ct. App. 2000) (penis in vagina and fingers in vagina constituted separate crimes; evidence supporting each count was not "used up" in proving different count); State v. Phillips, 924 S.W. 2d 662 (Tenn. 1996) (three discrete penetrations, each committed differently (by object, by tongue, by penis), each capable of producing its own attendant fear, humiliation, pain, and damage to victim, each engaging different body parts, and each requiring purposeful act on part of defendant, constituted three rapes); State v. Williams, 730 P.2d 1196, 1199 (N.M. Ct. App. 1986) (legislatively protected

interest under criminal sexual contact statute is the bodily integrity and personal safety of the individual; distinct touchings of two different protected areas of body constituted separate crimes, even though no break in activity by defendant); State v. Eisch, 291 N.W. 2d 800, 804-05 (Wis. Ct. App. 1980) (different *nature* of acts was important, rather than time elapsed between the acts; statute's reference to specific types of acts incorporated in definition of sexual intercourse constituted recognition that "[e]ach of these methods of bodily intrusion is different in nature and character.").

Although these courts used slightly different methods of analyzing this issue, all concluded that multiple penetrations during a single incident constituted multiple separate offenses warranting multiple convictions. See generally 75 C.J.S. Rape §2 (2008) (rape is not a continuous offense; each act of intercourse constitutes distinct offense, even if closely related in place and time); John C. Williams, Annotation, Multiple Instances of Forcible Intercourse Involving Same Defendant and Same Victim as Constituting Multiple Crimes of Rape, 81 A.L.R.3d 1228 (1977).

This Court should follow the majority of cases from around the country and hold that multiple penetrations of a single victim warrant multiple convictions. As a common sense matter of fact, each penetration is a distinct criminal act. As a common sense matter of law, the Legislature intended that

each separate penetration be subject to separate conviction and punishment. The district court's decision should be reversed, and the certified question answered in the affirmative.

CONCLUSION

Based on the arguments and authorities presented herein and in its Initial Brief, 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 Reply 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 September, 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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