IN THE SUPREME COURT OF THE STATE OF FLORIDA

GILBERT DUDLEY, III,

Petitioner,

v.

Case No. SC11-2292
5th DCA No. 5D10-2863

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is substantially accurate; however, Respondent would make the following additions and/or corrections:

Gilbert Dudley, III, hereinafter Petitioner, was charged with two counts of sexual battery on a mentally defective person. (R37, Vol I). In count I, it was alleged that on or about March 21, 2008, Petitioner penetrated or had union with the victim's vagina and, in count II, it was alleged that in 2007 Petitioner penetrated or had union with the victim's vagina or mouth. Id.

At the jury trial held on May 26, 2010, the victim revealed that she was 21 years of age at the time of trial. (T31, Vol I). She recalled that Petitioner put his "popsicle" inside of her, told her to take off her clothes, and he told her he would punch her if she did not do it. (T35-36, Vol I). The victim explained when asked that when she used the word "popsicle" she meant "dick". (T37, Vol I). Petitioner also touched her "boobs" and put his penis in her "butt," too. Id. During another incident, Petitioner put his popsicle in her vagina, felt her boobs, and asked her if that felt good. (T39, Vol I). The victim saw something come out of his popsicle which landed in her vagina. Id. Later on, Petitioner said he would try to do right by God,

but then he put his popsicle in her again the next day. (T40, Vol I). The victim's goals in life were to get a job and earn money. (T41, Vol I). On cross-examination, the victim explained that she waited to tell her mom because Petitioner had promised to take her to the park if she did not tell. (T45, Vol I).

The victim's mother explained her daughter's limitations; describing her as "childlike". (T70-72, Vol I). For example, if the victim were ill, she would not know to take any medication. (T70, Vol I). The victim is not allowed to cook because the smoke alarm went off the one time she attempted cooking. (T70,71-72, Vol I). If the mother was ill and unable to call 911, her daughter would not know to call 911. (T70, Vol I). Sometimes, the victim has to be told to take a shower. (T71, Vol I). The victim cannot be left alone for the weekend because the victim needs monitoring and is afraid of the dark. (T71, Vol I). The victim is home every day for about an hour at most before either the victim's mother or the victim's stepfather get home from work. (T71, Vol I). The victim can make her bed, etc.; however, she requires verbal prompting to mop the floor, and so forth. (T72, Vol I). The victim can handle doing laundry. (T72, Vol I). The victim has been diagnosed with cerebral palsy and as being bipolar. (T73, Vol I). The victim has been committed twice through ACT, a mental health institution, and twice at Orlando

Regional Hospital. (T73-74, Vol I). The victim's mother put the victim on birth control after an incident with an emotionally handicapped young man which caused the mother to worry about her daughter getting pregnant. (T75-77, Vol I). After the incident, the mother brought the victim to a pediatrician to check her out physically and the victim now receives Depo-Provera shots. (T76,77, Vol I).

The victim's special education teacher, Karen Hook (Ms. Hook), revealed that she works with kids who have an IQ lower than 70 and need a self-contained classroom. (T49, Vol I). The victim in this case participates in Special Olympics. Id. The victim graduated from high school in that she received a special diploma for completing functional curriculum. (T50, Vol I). With a special diploma the victim cannot go to college and she will not take the FCAT; the diploma simply reflects that she completed thirteen years of school. Id. Functional curriculum consists of training in the community and on campus in several areas, including cooking, cleaning, life skills, and social skills. Id. The ratio of students to teachers in such special classes is usually two to one. Id. Ms. Hook explained that she takes the students to job sites in the community where they volunteer in the hope that they get training to eventually obtain a job at one of the work sites. (T51, Vol I). The

students generally work at a job site for several weeks where they would clean or cook. Id. However, the students do not actually cook; they wrap sandwiches, for example. (T54, Vol I). A "job coach" stays with the students at their job site because the students learn at a slower rate and the job coach assists the student so management is able to focus on running the business. (T52, Vol I). The students also receive schooling on how to advocate for themselves, because they are unaware of their rights as adults. (T53, Vol I).

Ms. Hook explained that the victim requires constant prompting at the work sites, for example, to clean tables, including prompting her to get the spray bottle and towels. (T54, Vol I). Any change in the routine causes problems because the victim is not able to self-direct. (T55, Vol I). Similarly, if the victim knows she is going shopping it can go smoothly, but if she is not told ahead of time it can take her a while to process the change. (T56-57, Vol I). The victim also cannot understand that even though she may have money, if it is not enough money, she cannot purchase what she wants to purchase. (T57, Vol I). As a learning experience, Ms. Hook has allowed the victim to attempt to go through checkout where she is told she does not have enough money to buy the item. Id. In one instance, the victim possessed five dollars and attempted to buy a compact

disc which cost thirteen dollars. (T57, Vol I). The victim also cannot understand abstract concepts, such as "usual". (T57 Vol I).

Dr. Malcolm Graham, a psychologist who conducts evaluations for several agencies, evaluated the victim on July 31, 2008, for purposes of determining entitlement to receiving disability payments through Social Security. (T98-100,103-104, Vol I). Petitioner, who was living with the victim and her mother at the time, brought the victim to the appointment with Dr. Graham. (T79,100, Vol I). Dr. Graham noticed the victim was mentally retarded very quickly due to her slow speech and her inability to understand questions most people would have understood. (T100, Vol I). Dr. Graham conducted an intellectual evaluation using the Wechsler Adult Intelligence Scale which can take anywhere from 45 minutes to an hour. (T101,105, Vol I). However, it took less than an hour with the victim because of her lowered intellectual functioning. (T101,115, Vol I). Dr. Graham concluded that the victim was functioning in the moderate range of mental retardation. (T104, Vol I). She scored 61 on her verbal IQ scale, 50 on her performance IQ, and 51 on her full scale, putting her at less than one percentile. Id. In other words, at least 99 percent of the people who take the test scored higher than the victim. Id. The average IQ is 100; 67

percent fall within the average range, which is from 85 to 115. Id. The victim is significantly below the average range. Id. In fact, the lowest for the victim's age is 48 and her full scale was 51. (T104-105, Vol I). Dr. Graham concluded that there was little or no chance the victim would ever have an improvement on her present level of functioning. (T108, Vol I). Dr. Graham indicated the victim could not manage her own funds, she could not function independently, she will probably never drive a car or do any of the normal things people need to do to function independently. (T108-109, Vol I). The victim scored especially low in arithmetic, scoring two out of a possible seventeen or eighteen. (T108, Vol I). As such, Dr. Graham had concluded that the victim would "require consistent supervision" and eventually she would have to "be placed in a highly structured environment with willing friends who can take care of her." (T109, Vol I). On cross-examination, Dr. Graham indicated that the victim could make some simple decisions, such as what color clothes she wanted to wear or what she would like to eat. (T116, Vol I). But she would be incapable of making any decisions more complicated than that. (T116-117, Vol I).

It was Dr. Graham's opinion that she suffers from a mental defect which rendered her permanently incapable of appraising the nature of her conduct in the context of engaging in sexual

intercourse with Petitioner. (T110-111, Vol I). Dr. Graham did not believe the victim could intelligently, knowingly, and voluntarily consent to engage in sexual activity with Petitioner. (T111, Vol I).

According to the jury instructions given at trial, the term "mentally defective" was defined as suffering from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct. (T248, Vol II). On May 27, 2010, Petitioner was found guilty as charged by the jury in both counts. (R48-49, Vol I). On June 4, 2010, Petitioner filed a motion for new trial arguing that the verdict was contrary to the weight of the evidence, and that the court erred by denying the motion for judgment of acquittal in count I, as the evidence at trial did not establish that any acts occurred on the date listed in the information. (R50-51, Vol I).

At what had been scheduled as the sentencing hearing on July 7, 2010, the attorneys were directed by the court to provide memoranda of law. (R52, Vol I; T8, Vol II). The judge explained that the court had a concern with the meaning of the definition of "mentally defective". (T4-8, Vol II).

On August 20, 2010, the trial court orally set aside the jury's guilty verdicts and dismissed the charges, then stayed

the dismissal for fifteen days to allow the State time to file an appeal. (T12-22, Vol II). In its order, the trial court cited to Buck v. Bell, 274 U.S. 200 (1927), and Skinner v. Oklahoma, 316 U.S. 535 (1942), regarding state sanctioned sterilization, but noted that section 794.11(4)(e), Florida Statutes, was not literally a sterilization statute since it concerned itself with intercourse rather than conception and limited the right to consent to many citizens. (R72-73, Vol I). Contending that this statute essentially consigns certain persons to never being able to have legal sex, the court concluded that it should be interpreted strictly. (R74, Vol I). The trial judge found State v. Torresgrossa, 776 So. 2d 1009 (Fla.5th DCA 2001), to be most persuasive. (R75, Vol I). The trial court concluded that the victim in Torregrossa and the victim in the instant case were similar to the extent that both knew they were having sex and were able to explain the sexual acts involved, both victims were on birth control, both had a high school diploma or a certificate, the victim in Torregrossa had periodic employment while the victim in this case was being trained by Community Based Instructions to hold a job at Sonny's or the like, and both were rated in the range of a mental age of eleven years of age. (R75-76, Vol I). The trial court gave two examples of cases where the victim was defective, including Wilburn v. State, 763

So. 2d 353 (Fla. 4th DCA 1998), where the victim suffered from organic brain syndrome, and Moore v. State, 800 So. 2d 747 (Fla. 5th DCA 2001), where the victim was incapacitated by drugs and alcohol. (R76, Vol I). Finally, the trial court found the State had failed to present evidence from an expert about the victim's ability to appraise the nature of the sexual conduct. (R79, Vol I).

The State timely appealed from this order. The Fifth District Court of Appeal reversed the trial court's dismissal of Petitioner's convictions for two counts of sexual battery on a mentally defective person. State v. Dudley, 64 So. 3d 746, 750-752 (Fla. 5th DCA 2011).

After briefing on jurisdiction wherein the State argued that there was no express and direct conflict on the face of the opinions, this Court accepted jurisdiction. Briefing on the merits followed.

SUMMARY OF THE ARGUMENTS

It remains the State's position that there is no express and direct conflict between Mathis v. State, 682 So. 2d 175 (Fla. 1st DCA 1996), and State v. Dudley, 64 So. 3d 746, 750-752 (Fla. 5th DCA 2011)(*en banc*), as the Dudley court factually distinguished Mathis. However, if this Court does retain jurisdiction, the State would assert that this Court should disapprove the interpretation of "mentally defective" relied upon by the Mathis court. The trial court's dismissal of the two convictions for sexual battery on a mentally defective person was properly reversed and the convictions reinstated by the Fifth District Court of Appeal.

ARGUMENTS

POINT ONE (RESTATED)

NOT ONLY IS THE OPINION IN MATHIS NOT IN EXPRESS AND DIRECT CONFLICT WITH DUDLEY, BUT THE INTERPRETATION OF "MENTALLY DEFECTIVE" IN MATHIS IS ERRONEOUS AND SHOULD BE DISAPPROVED BY THIS COURT.

While acknowledging this Court's decision to accept jurisdiction in this case, it remains the position of the State that there is no express and direct conflict on the face of the decision under review. As the Fifth District Court pointed out, the instant case and Mathis v. State, 682 So. 2d 175 (Fla. 1st DCA 1996, are factually distinguishable primarily because, in the instant case, the State presented expert testimony which was found lacking in Mathis, i.e., that "the victim suffered from 'a mental disease or defect which render[ed] [her] temporarily or permanently incapable of appraising the nature of ... her conduct.'" Id. at 751. As the instant case and Mathis are factually distinguishable on the face of the opinions, the Fifth District Court's opinion in State v. Dudley, 64 So. 3d 746, 750-752 (Fla. 5th DCA 2011)(*en banc*), does not expressly and directly conflict with Mathis. Jurisdiction should be denied.

Notwithstanding the foregoing, this Court should affirm the Dudley court's holding reversing and reinstating the convictions

and disapprove the definition of "mentally defective" relied upon by the district court in Mathis.

As this Court recently reiterated in State v. Hackley, No. SC10-2316 (Fla. July 5, 2012), "[t]he question of statutory interpretation...is subject to *de novo* review. The first place we look when construing a statute is to its plain language - if the meaning of the statute is clear and unambiguous, we look no further." Id. (citations omitted).

Section 794.011(4)(e), Florida Statutes, makes it a first degree felony to commit a sexual battery upon a victim who is mentally defective and the offender knows or should know of this fact. Mentally defective is defined in section 794.011(1), Florida Statutes, as:

> "Mentally defective" means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct.

§ 794.011(1)(b), Fla. Stat. There is no Florida court which has specifically articulated an interpretation of the definition of mentally defective. Instead the district courts have addressed the issue on a case-by-case method.

Such cases include Hudson v. State, 939 So. 2d 146 (Fla. 4th DCA 2006), State v. Torresgrossa, 776 So. 2d 1009 (Fla. 5th DCA 2001), receded from by Dudley, Schimele v. State, 784 So. 2d 591 (Fla. 4th DCA 2001), Bowman v. State, 760 So. 2d 1053 (Fla.

4th DCA 2000), and Mathis. As the Fifth District Court explained the holdings in those cases:

> In Schimele, the Fourth District found that the state had presented sufficient evidence that the alleged victim was mentally defective where a psychologist testified that the twenty-six year old mentally "retarded" victim was obviously mentally impaired based upon his "childlike speech," and other overt characteristics. The expert testified that the victim scored a fifty-three (in the "moderately impaired range") on the Wechsler Adult Intelligence Scale, the standard IQ test. In comparison, the victim in our case had a slightly lower overall score of fifty-one. Although the victim in Schimele was able to work three days a week, for three hours a day as a supermarket bagboy, he required a similar level of supervision and care as the victim in our case. He had a similarly "young developmental age," limited "personal care ability," and "almost no mathematical ability." The psychologist in Schimele testified that the victim in that case was "incapable of understanding the nature of his conduct and its ramifications" and "was not able to give a knowing, voluntary, intelligent consent to having sexual relations" because of his mental limitations. Schimele, 784 So. 2d at 593.
>
> Bowman is also similar, holding that evidence of a low IQ score and comparable testimony from a school psychologist regarding the limited mental ability of the purported victim were sufficient to support a jury finding that the victim was mentally defective. Although the Bowman panel included fewer details regarding the mental ability of the victim in its opinion, the decision relates that the victim was in his early twenties but "behaves like a four or five year old in some respects, and a nine

or ten year old in others." Bowman, 760 So.2d at 1053. The victim was unable to read or write, but could sign his name. Id. A school psychologist testified that a person like the victim "should not be left to run an errand or cross the street on his own." Id. at 1055.

In Hudson, the Fourth District found the evidence sufficient to go to the jury on the issue of whether the victim was mentally defective in a sexual battery prosecution, even absent expert testimony, where the investigating detective testified that he believed the victim to be about seven to nine years old mentally, and the nurse who examined the twenty-six year old victim testified that the victim was "childlike and delayed," and "documented that [the victim] appeared to be mentally challenged." The evidence summarized in the Hudson opinion regarding that victim's mental limitations is less substantial than the evidence presented regarding the victim's mental limitations in our case.

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By contrast, in Mathis the First District reversed a conviction based upon the appellate panel's conclusion that the evidence was legally insufficient to permit a jury to find that the victim in that case was "mentally defective" on the date of the alleged sexual battery. Mathis is distinguishable for two reasons. First, the testimony in Mathis established the victim to be "right at the upper end of" the "trainable mentally handicapped range," and the mental capacity evidence regarding the victim was based upon observations made and testing done "fifteen months before the date of the alleged sexual battery." Mathis, 682 So. 2d at 180. Because the evidence in Mathis suggested that the mental capacity of the victim would improve with time, the

> panel was properly concerned about the lack of evidence addressing the mental capacity of the victim as of the date of the charged crime. There is no similar concern in our case, because the witnesses testified regarding the victim's mental condition at the time of the crimes. Additionally, the victim's mental condition here is permanent.
>
> Second, the Mathis panel expressed special concern regarding the fact that no expert opined that the victim suffered from "'a mental disease or defect which render[ed] [her] temporarily or permanently incapable of appraising the nature of ... her conduct.'" Id. (quoting § 794.011(1)(b), Fla. Stat. (1993)). In our case, Dr. Graham gave that opinion.

Dudley, 64 So. 3d at 750-51 (footnote omitted). The Fifth District Court concluded that, unlike the court in Mathis, the phrase "mentally defective" cannot be read to mean a complete lack of mental capacity. Moreover, the dictionary's definition of defective is "faulty" or "falling below the norm in structure or in mental or physical function." See Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/deficient/dictionary/defective, (last visited July 9, 2012). Neither the standard definitions found in the dictionary nor the statute's plain language connotes a total lack of mental capacity, except to appreciate the nature of his or her conduct regarding engaging in sexual acts.

On the other hand, the Mathis court found the definition of mentally defective analogous to insanity. However, the two

standards are clearly not the same by their plain language and, had the Legislature intended on relying upon the insanity standard, it would have said so since the definition of insanity is already codified at section 775.027, Florida Statutes. To the extent the Mathis court also found troubling a mentally defective victim's competency to testify, the mental abilities relating to testimonial competency and signifying mental defect must be evaluated separately. Bowman, 760 So. 2d at 1055("The fact that such a child is competent to testify, however, is not inconsistent with being mentally defective under section 794.011(1)(b), Florida Statutes."). The ability to testify involves understanding the nature of the duty to tell the truth, i.e., to be able to tell fact from falsehood. Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988). As noted by the Fifth District Court, children can be taught the ability and the duty to tell fact from falsehood. Mentally defective, on the other hand, concerns the inability to appraise conduct, which involves the intellectual ability to make abstractions. As such, this Court should disapprove the interpretation found in Mathis.

Moreover, other states with almost identical statutory language, i.e., that the victim suffered from a mental disease or defect that rendered him or her incapable of appraising nature of his or her conduct, have not been as limiting as the

Mathis court. Those states, such as Michigan, have concluded that this standard incorporates not only the awareness of the physical sexual act but, also, the moral awareness that the act is right or wrong. For example, in People v. Breck. 230 Mich.App. 450, 584 N.W.2d 602 (Mich. Ct. App. 1998), the defendant argued that whether "the victim could comprehend the moral consequences of the sexual acts he engaged in with defendant was irrelevant, as long as the victim knew that the acts were occurring and was doing nothing to stop them." Id. at 452. On the other hand, "[t]he prosecution argued that the victim could not appreciate the moral consequences of the acts[]" and, therefore, the State had proven that the victim, who was mentally retarded, was incapable of appraising the nature of his conduct. Id. The trial court agreed with the state, as did the appellate court, finding that interpreting the statute as the defendant argued:

> [i]n essence, it would limit the protections of the statute to those individuals who are so divorced from reality that they are not even aware of what is happening to them physically. However, that small group of individuals would be covered under one of the other designations of either "mentally incapacitated" or, more appropriately, "physically helpless," which includes persons who are unconscious, asleep, or for any other reason physically unable to communicate unwillingness to participate in an act. M.C.L. § 750.520a(i); M.S.A. § 28.788(1)(i). Thus, to construe the

> statutory language in the manner advocated by defendant would strip the statute of the protection that the Legislature intended for those individuals, like the victim, who know what is happening to them but are incapable of protesting or protecting themselves because of a severely diminished intellectual capacity.

Id. at 453. Of course, Florida also protects the physically helpless. See §§ 794.011(1)(e) & (4)(a), Fla. Stat.

In reaching their conclusion, the Michigan court relied upon People v. Easley, 42 N.Y.2d 50, 56-57, 396 N.Y.S. 2d 635, 364 N.E. 2d 1328 (N.Y. 1977), wherein the New York Court of Appeals held as follows:

> An ability to "appraise" is, of course, a qualitative matter, all the more so when the appraisal is one to be made of the "nature" of "conduct," with the variety of factors that the one "appraising" may have to take into account for such purposes. Cognitive understanding is involved. In a case such as the one before us, it includes being substantially able to understand what she was doing. An understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored.
>
> This is to be distinguished, however, from the participating woman's personal sense of morality. Whether her character is exemplary or depraved is beside the point. The object is not to probe the degree of her conformity or nonconformity to the norms of society. A knowing defiance of social mores, a mere

> yielding to temptation or passion, even an inclination to vice, these are not the concern of this statute.
>
> But to flaunt society or to arraign oneself against its view is entirely different from having an understanding, or the capacity to understand, that one is doing so. Whether there is an awareness of the social or other cost of one's conduct is a legitimate area of inquiry in determining whether one is so mentally defective that the protective shield of section 130.05 of the Penal Law is invoked. Such inquiry should of course include the question of whether the person whose mentality is being judged has insight into the "consequences" of conduct for which the law exacts criminal penalties.
>
> But that is not enough. The law does not mirror all prevailing moral standards. Therefore, there also needs to be inquiry as to whether there is a capacity to appraise the nature of the stigma, the ostracism or other noncriminal sanctions which society levies for conduct it labels only as immoral even while it yet "struggles to make itself articulate in law." Put in terms of this case, in its determination of [the victim's] capacity to appraise the sexual act, its significance and its consequences, the jury may well have been required to consider the "moral quality" of the act as it would be measured by society and to assess as well her ability to appreciate that fact.

(Citations omitted). In addition to Michigan and New York, Oregon, Hawaii, Idaho, Alabama, and Colorado also follow this interpretation of the phrase "incapable of appraising the nature of his conduct." See, e.g., State v. Callendar, 181 Or. App.

636, 647-48, 47 P.3d 514 (Or. Ct. App. 2002)("In light of that interpretation of ORS 163.305(3), evidence that the victim understood the mechanics of sex did not establish as a matter of law that she was capable of appraising the nature of her conduct and, thus, was not 'mentally defective.'"); State v. Gonzalves, 5 Haw. Ct. App. 659, 664, 706 P. 2d 1333 (Haw. Ct. App. 1995)("Without the ability to comprehend these [moral, societal, and medical] factors, the victim cannot be said to be capable of appraising the nature of the act. She would see only the shiny wrappings on Pandora's box, and none of the contents. She would be truly, in the old-fashioned phrase, taken advantage of.")(footnote omitted), overruled on other grounds by State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (Haw. 1993); State v. Soura, 118 Idaho 232, 237, 796 P.2d 109 (Idaho 1990)(" We also reject Soura's argument that the victim was capable of legally consenting to sexual intercourse with him by inference because she had been deemed capable of legally consenting to marriage, sexual relations within marriage, and termination of parental rights to her infant daughter."); Brooks v. State, 555 So. 2d 1134, 1137-38 (Ala. Crim. App. 1984)(" The young retarded victim of subnormal intelligence, functioning at a mental level of a 12-year-old, with his background and susceptibility to the influence of adults, could not have been expected to make a

reasonable judgment as to the nature or harmfulness of the acts of sodomy perpetrated upon him. It cannot be seriously argued that this young man had the mental capacity to appreciate how the acts would be regarded in his social environment and to appreciate the taboos of his society, or the stigma and ostracism to which he would be exposed."); and People v. Gross, 670 P.2d 799, 801 (Col. 1983)("If a victim is incapable of understanding how her sexual conduct will be regarded within the framework of the societal environment of which she is a part, or is not capable of understanding the physiological implications of sexual conduct, then she is incapable of 'appraising the nature of [her] conduct' under the language of the statute.").

Other states do not use the same language as Florida, i.e., "incapable of appraising the nature of his or her conduct;" instead, addressing the victim's ability to consent. In so doing, these states require that a victim appreciate the full range of medical and practical consequences of engaging in a sexual act. However, they do not require that the victim understand the moral consequences of their acts. See, e.g., State v. Mossbrucker, 758 N.W. 2d 663 (N.D. 2008)("[T]he statutory language is surely broad enough to encompass knowledge of the practical consequences of sexual intercourse such as unwanted pregnancy and sexually transmitted diseases, and we

conclude the intermediate construction better reflects the legislative intent to balance the individual's right to sexual freedom with society's interest in protecting the individual with a mental disease or defect from conduct the nature of which he or she is incapable of understanding."); Jackson v. State, 890 P.2d 587, 592 (Alaska Ct. App. 1995)("To appreciate the nature and consequences of engaging in an act of sexual penetration, the victim must have the capacity to understand the full range of ordinary and foreseeable social, medical, and practical consequences that the act entails"); Keim v. State, 13 Kan. App. 2d 604, 608, 777 P.2d 278 (Kan. Ct. App. 1989)("engaging in sexual intercourse with one who is mentally handicapped to a degree that he or she cannot understand the nature and consequences of engaging in the act is prohibited. Under normal circumstances a mental incapacity to consent would be apparent in ordinary social intercourse. The fact that further questioning may be necessary in some cases to determine if one's partner fully understands the nature and consequences of sexual intercourse, does not render the statute unconstitutional); State v. Johnson, 155 Ariz. 23, 26, 745 P.2d 81 (Ariz. 1987)("when the state asserts that the victim was incapable of consenting due to a mental disorder, it must prove that the mental disorder was an impairment of such a degree that

it precluded the victim from understanding the act of intercourse and its possible consequences."); State v. Chancy, 391 N.W. 2d 231, 235 (Iowa 1986)("It is apparent from Sullivan and Haner that a showing of inability to consent, for purposes of section 709.4(2), need not rise to the level of showing complete incompetency or lack of "'capacity for instruction and improvement.'" The key issue is whether the mental strength of the victim is so far below the normal that it precludes effective resistance. Persons who are so mentally incompetent or incapacitated as to be unable to understand the nature and consequences of the sex act are incapable of giving consent.")(citations omitted); Stafford v. State, 455 N.E. 2d 402, 405-06 (Ind. Ct. App. 1983)(" Adopting the standard that capacity to consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences[.]"); State v. McDowell, 427 So. 2d 1346, 1349 (La. Ct. App. 1983)("' [A] fair analysis of the cases which have treated this question and sound reason lead to the conclusion that consent which will be held sufficient assumes a mental capacity in the person consenting to the extent that she understands and appreciates the nature of the act of sexual intercourse, its character and the probable and natural consequences which may attend it.'"); and People v. McMullen, 91

Ill.App.3d 184, 190, 414 N.E. 2d 214, 217 (Ill. 1980)(" the evidence showed that although the victim seemed to understand the physical nature of sexual activity, she did not understand how such activity can affect a person's life and how illicit sexual activity is regarded by other people. Thus, she was unable to understand the social and personal costs of the act.").

Finally, New Jersey has the most restrictive approach, finding that so long as the victim knew she was engaged in sexual activity and could have refused, she was able to consent. State v. Olivio, 123 N.J. 550, 589 A.2d 597 (1991). However, the New Jersey court reached its interpretation after finding that the legislature had "amended the language to narrow the scope of mental defectiveness by replacing the word 'appraising' with 'understanding[;]'" thus, the Legislature made clear that the inability to appreciate that sexual conduct was 'either morally right or wrong' was not part of the test of mentally defective." Id. at 601. Of course, Florida uses the term "appraise" rather than "understand" in its definition of "mentally defective." See 794.011(1)(b), Fla. Stat.

Notably, not one of these decisions, including those states with the same statutory language as Florida, analogizes the mental defect standard to insanity, lending even more support to

the conclusion that the definition found in Mathis is legally erroneous. Assuming this Court has jurisdiction in this case, this Court should disapprove of the definition of "mentally defective" found in Mathis, and only in Mathis, and affirm the Dudley decision which is legally and factually consistent with Hudson, Schimele, and Bowman.

POINT TWO

THE STATE'S EVIDENCE IN THIS CASE ESTABLISHED THAT THE VICTIM WAS MENTALLY DEFECTIVE UNDER SECTION 794.011, FLORIDA STATUTES.

Petitioner challenges the sufficiency of the evidence in this case; however, the State's evidence established beyond a reasonable doubt that the victim was mentally defective under section 794.011(4)(e), Florida Statutes. Petitioner is entitled to no relief.

"In the criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt." Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982). "Sufficiency of the evidence is generally an issue of law that should be decided pursuant to the *de novo* standard of review." Santiago v. State, 874 So. 2d 617, 624 (Fla. 5th DCA 2004); see also Jones v. State, 790 So. 2d 1194, 1197 (Fla. 1st DCA 2001)("One familiar statement of the rule is that in reviewing an order denying a motion for a judgment of acquittal the appellate court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the state....This is a correct statement of the standard of review, but it is also the same standard the trial court must apply in ruling on the motion initially. By applying

the same standard, the appellate courts are, in effect, reviewing the decision de novo.")(citations omitted). Here, where the trial court *sua sponte* granted a directed verdict or judgment of acquittal after the jury's verdict, the standard of review should also be *de novo* since it remains a question of law. Jones, 790 So. 2d at 1197 ("The sufficiency of the evidence to support a particular criminal charge, whether evaluated by the trial court or by an appellate court, is a question of law.").

The evidence presented at trial, when considered in a light most favorable to the State, is as follows. At the jury trial held on May 26, 2010, the victim revealed that she was 21 years of age at the time of trial. She recalled that Petitioner put his "popsicle" inside of her, told her to take off her clothes, and he told her he would punch her if she did not do it. When she used the word "popsicle" she meant "dick". Petitioner also touched her "boobs" and put his penis in her butt, too. During another incident, Petitioner put his popsicle in her vagina, felt her boobs, and asked her if that felt good. The victim saw something come out of his popsicle which landed in her vagina. Later on, Petitioner said he would try to do right by God, but then he put his popsicle in her again the next day. On cross-examination, the victim explained that she waited to tell her

mom because Petitioner had promised to take her to the park if she did not tell. The victim's goals in life were to work at a job and earn money. In consideration of the foregoing, the Fifth District Court concluded that it was "clear from [the victim's] testimony that the victim, who was twenty-one years old at the time of trial, has a mental and developmental age far below her physical age, and that her ability to appraise the nature of many things is severely limited." Dudley, 64 So. 3d at 748. Further, that "[t]he victim's word choices and phraseology throughout the testimony reflect the mental ability of a young child." Id.

The victim's mother explained her daughter's limitations; describing her as "childlike". For example, if the victim were ill, she would not know to take any medication. The victim is not allowed to cook because the smoke alarm went off the one time she attempted cooking. If the mother was ill and unable to call 911, her daughter would not know to call 911. Sometimes, the victim has to be told to take a shower. The victim cannot be left alone for the weekend because the victim needs monitoring and is afraid of the dark. The victim is home every day for an hour at most before either the victim's mother or the victim's stepfather get home from work. The victim can make her bed, etc.; however, she requires verbal prompting to mop the floor,

or whatever. The victim can handle doing laundry. The victim's mother revealed that her daughter has been diagnosed with cerebral palsy and as being bipolar. The victim has been committed twice through ACT, a mental health institution, and twice at Orlando Regional Hospital. The victim's mother put the victim on birth control after an incident with an emotionally handicapped young man which caused the mother to worry about her daughter getting pregnant. After the incident, the mother brought the victim to a pediatrician to check her out physically and the victim now receives Depo-Provera shots.

The victim's special education teacher, Karen Hook (Ms. Hook), revealed that she works with kids who have an IQ lower than 70 and need a self-contained classroom. The victim in this case participated in Special Olympics. The victim graduated from high school in that she received a special diploma for completing functional curriculum. With a special diploma the victim cannot go to college and she will not take the FCAT; the diploma simply reflects that she completed thirteen years of school. Functional curriculum consists of training in the community and on campus in several areas, including cooking, cleaning, life skills, and social skills. The ratio of students to teachers in such special classes is usually two to one. Ms. Hook explained that she takes the students to job sites in the

community where they volunteer in the hope that they get training to eventually obtain a job at one of the work sites. The students generally work at a job site for several weeks where they would clean or cook. However, the students do not actually cook; they wrap sandwiches, for example. A "job coach" stays with the students at their job site because the students learn at a slower rate and the job coach assists the student so management is able to focus on running the business. The students also receive schooling on how to advocate for themselves, because they are unaware of their rights as adults.

Ms. Hook explained that the victim requires constant prompting at the work sites, for example, to clean tables, including prompting her to get the spray bottle and towels. Any change in the routine causes problems because the victim is not able to self-direct. Similarly, if the victim knows she is going shopping it can go smoothly, but if she is not told ahead of time it can take her a while to process the change. The victim also cannot understand that even though she may have money, if it is not enough money, she cannot purchase what she wants to purchase. As a learning experience, Ms. Hook has allowed the victim to attempt to go through checkout where she is told she does not have enough money to buy the item. In one instance, the victim possessed five dollars and attempted to buy a compact

disc which cost thirteen dollars. The victim also cannot understand abstract concepts, such as "usual".

Dr. Malcolm Graham, a psychologist who conducts evaluations for several agencies, evaluated the victim on July 31, 2008, for purposes of determining entitlement to receiving disability payments through Social Security. Petitioner, who was living with the victim and her mother at the time, brought the victim to the appointment with Dr. Graham. Dr. Graham noticed the victim was mentally retarded very quickly due to her slow speech and her inability to understand questions most people would have understood. Dr. Graham conducted an intellectual evaluation using the Wechsler Adult Intelligence Scale which can take anywhere from 45 minutes to an hour. However, it took less than an hour with the victim because of her lowered intellectual functioning. Dr. Graham concluded that the victim was functioning in the moderate range of mental retardation. She scored 61 on her verbal IQ scale, 50 on her performance IQ, and 51 on her full scale, putting her at less than one percentile. In other words, at least 99 percent of the people who take the test scored higher than the victim. The average IQ is 100; 67 percent fall within the average range, which is from 85 to 115. The victim is significantly below the average range. In fact, the lowest for the victim's age is 48 and her full scale was 51.

Dr. Graham concluded that there was little or no chance the victim would ever have an improvement on her present level of functioning. Dr. Graham indicated the victim could not manage her own funds, she could not function independently, and she will probably never drive a car or do any of the normal things people need to do to function independently. The victim scored especially low in arithmetic, scoring two out of a possible seventeen or eighteen. As such, Dr. Graham had concluded that the victim would "require consistent supervision" and eventually she would have to "be placed in a highly structured environment with willing friends who can take care of her." (T109, Vol I). On cross-examination, Dr. Graham indicated that the victim could make some simple decisions, such as what color clothes she wanted to wear or what she would like to eat. But she would be incapable of making any decisions more complicated than that.

It was Dr. Graham's opinion that the victim suffers from a mental defect which rendered her permanently incapable of appraising the nature of her conduct in the context of engaging in sexual intercourse with Petitioner. Dr. Graham did not believe the victim could intelligently, knowingly, and voluntarily consent to engage in sexual activity with Petitioner.

According to the jury instructions given at trial, the term "mentally defective" was defined as suffering from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct. On May 27, 2010, Petitioner was found guilty as charged by the jury in both counts.

This Court should sustain the Fifth District Court's conclusion that the State proved beyond a reasonable doubt that the victim was suffering from a mental defect which rendered her temporarily or permanently incapable of appraising the nature of her conduct in the context of engaging in sexual intercourse with Petitioner, especially in light of the opinion rendered by the State's expert witness. Compare Mathis, 682 So. 2d at 180 ("Of critical importance is the fact that Ms. Bryant was not asked whether, on the date of the alleged sexual battery, the alleged victim was suffering from "a mental disease or defect which render[ed][her] temporarily or permanently incapable of appraising the nature of ... her conduct.").

The victim's mental state in this case is analogous to the victim in Schimele. In Schimele, an expert testified that the victim scored 53 on the Wechsler Adult Intelligence Scale, a score which is exceeded by 99.9 percent of the adult population. Id. at 593. Although the victim worked as a bag boy, he had no

mathematical ability, could not feed himself, and was incapable of buying groceries. Id. Finally, the expert testified that the victim in Schimele was not able to give a knowing, voluntary, intelligent consent to having sexual relations with Schimele. Id. Similarly herein, the victim tested at 51 points on the Wechsler Adult Intelligence Scale, she volunteered a few hours a day but required verbal prompting from a job coach, her mathematical skills were obviously deficient as she tried to buy a thirteen dollar compact disc when she only possessed five dollars, and an expert who had evaluated her gave his opinion that the victim was unable to give a knowing, voluntary, intelligent consent to having sexual relations with Petitioner.

Similarly, in Bowman, the victim was found competent to testify and was able to describe the sex acts performed on him by the defendant, but an expert concluded that the victim would never function independently and had an IQ of 36. Id. at 1054. Here, the victim was competent to testify and was able to describe the sex acts performed on her by Petitioner, but an expert concluded that the victim will never function independently, requiring consistent supervision, and has an overall IQ of 51. Also, like the victim's grandmother in Bowman, the victim's mother in this case described the victim as childlike.

Also, in Hudson, the investigating officer believed the victim to be about nine years old mentally. Id. at 148. The sexual assault team nurse found the victim to be "childlike and delayed," documenting that the victim appeared to be mentally challenged. Id. Additionally, the victim attended a school for educible mentally deficient children and had difficulty testifying as to the dates of the incidents. Id. The evidence here is even stronger. An expert concluded that the victim will never function independently, requiring consistent supervision, and has an overall IQ of 51. She also attended special education classes and participated in the Special Olympics. Moreover, her mother described her daughter as childlike and the victim's testimony reflects the mental ability of a young child.

Accordingly, the Fifth District Court properly reversed the trial court's erroneous conclusion that the State had not presented sufficient evidence to establish that the victim was mentally defective, or, in other words, that she suffered from a mental defect which rendered her temporarily or permanently incapable of appraising the nature of her conduct in the context of engaging in sexual intercourse with Petitioner.

Based on the foregoing facts and authorities, it remains the State's position that there is no express and direct conflict between Mathis and Dudley. However, if this Court does

retain jurisdiction, the State would assert that this Court should disapprove the interpretation of "mentally defective" relied upon by the Mathis court. As a matter of statutory interpretation, "mentally defective" cannot reasonably be read to mean a total lack of mental capacity, as the Mathis court seems to have concluded, analogizing mentally defective to insanity. The State's evidence proved the victim was mentally defective. The trial court's dismissal of the two convictions for sexual battery upon a mentally defective person was properly reversed and the convictions reinstated by the Fifth District Court of Appeal.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests this Honorable Court find that jurisdiction was improvidently granted or disapprove the interpretation of "mentally defective" adopted by the Mathis court, and affirm the Fifth District Court of Appeal's opinion reinstating Petitioner's convictions for sexual battery upon a mentally defective person.

CERTIFICATE OF SERVICE

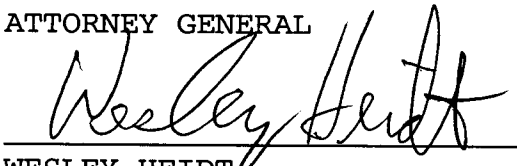
I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Respondent has been served via U.S. Mail to: Clyde M. Taylor, III, counsel for Petitioner, at Taylor & Taylor, P.A., 125-B King Street, St. Augustine, Florida 32084, this 12th day of July, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI.
ATTORNEY GENERAL



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West Reporter Image (PDF)

64 So.3d 746, 36 Fla. L. Weekly D1431

Briefs and Other Related Documents
Judges, Attorneys and Experts

District Court of Appeal of Florida,
Fifth District.
STATE of Florida, Appellant,
v.
Gilbert DUDLEY, III, Appellee.

No. 5D10-2863.
July 1, 2011.

Background: State appealed from decision of the Circuit Court, Volusia County, Charles M. Harris, Senior Judge, setting aside the jury's guilty verdicts against defendant and dismissing the charges against him.

Holding: The District Court of Appeal, en banc, Lawson, J., held that State's evidence was sufficient to support jury finding that victim was "mentally defective," as required for offense of sexual battery on mentally defective person; receding from *State v. Torresgrossa*, 776 So.2d 1009.

Reversed and remanded with directions; conflict certified.

West Headnotes

[1] KeyCite Citing References for this Headnote

37 Assault and Battery
37II Criminal Responsibility
37II(B) Prosecution
37k91.1 Weight and Sufficiency of Evidence
37k91.9 k. Indecent assault. Most Cited Cases

State's evidence was sufficient to support a jury finding that victim was "mentally defective," as required for offense of sexual battery on mentally defective person; victim, who was 21 years old, had mental and developmental age far below her physical age, victim repeatedly referred to defendant's sexual organ as his "popsicle" and testified to the times when defendant put his "popsicle" inside her, victim was in class for the mentally disabled who had IQs lower than 70, special education teacher testified that victim needed constant supervision as she was not capable of self-direction and had significant cognitive limitations, victim had mild cerebral palsy and had been diagnosed with bi-polar disorder, and defendant was fully aware of victim's mental condition; receding from *State v. Torresgrossa*, 776 So.2d 1009. West's F.S.A. § 794.011(1)(b), (4)(e).

[2] KeyCite Citing References for this Headnote

37 Assault and Battery
37II Criminal Responsibility
37II(A) Offenses
37k59 k. Indecent assault. Most Cited Cases

"Mentally deficient" cannot reasonably be read to mean a total lack of mental capacity for purposes

of offense of sexual battery on a mentally defective person; "deficient" means lacking in some quality or not up to a normal standard, and it does not mean devoid of or totally lacking. West's F.S.A. § 794.011(1)(b), (4)(e).

[3] KeyCite Citing References for this Headnote

⌐37 Assault and Battery
⌐37II Criminal Responsibility
⌐37II(A) Offenses
⌐37k59 k. Indecent assault. Most Cited Cases

With respect to offense of sexual battery on a mentally defective person, the statutory definition of "mentally deficient," that is, incapable of appraising the nature of his or her conduct, connotes significantly diminished judgment, but not a complete and total lack of mental awareness. West's F.S.A. § 794.011(1)(b), (4)(e).

***747** Pamela Jo Bondi, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellant.

Clyde M. Taylor, III, of Taylor & Taylor, PA, St. Augustine, for Appellee.

EN BANC

LAWSON, J.

The State timely appeals a final order setting aside the jury's guilty verdicts against Gilbert Dudley, III, and dismissing the charges against him. We reverse and remand with directions that the verdicts be reinstated and that the court proceed to sentencing. To the extent that this opinion is inconsistent with our prior panel decision in *State v. Torresgrossa*, 776 So.2d 1009 (Fla. 5th DCA 2001), we recede from *Torresgrossa*. We also certify conflict with the First District's decision in *Mathis v. State*, 682 So.2d 175 (Fla. 1st DCA 1996).

The State charged Dudley with two counts of sexual battery on a mentally defective person. In count I, the State alleged that on or about March 21, 2008, the Defendant penetrated or had union with the victim's vagina or anus. In count II, the State alleged that in 2007 the Defendant penetrated or had union with the victim's vagina or mouth. Both counts alleged that the victim was mentally defective, and that Dudley had reason to believe or had actual knowledge that the victim was mentally defective. *See* § 794.011(4)(e), Fla. Stat. (2007).

After the jury returned guilty verdicts on both counts, the trial court set aside the verdicts and dismissed the charges, finding that the State's evidence at trial was insufficient to support a jury finding that the victim was a "mentally defective" person as defined in section 794.011(4)(e), Florida Statutes. That statute defines "mentally defective" to mean "a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct." § 794.011(1)(b), Fla. Stat. (2007).

[1] Contrary to the trial judge's conclusion, the State's evidence was clearly sufficient to support a jury finding that the victim was mentally defective, as defined by the statute.

***748** First, the State presented testimony from the victim. It is clear from this testimony that the victim, who was twenty-one years old at the time of trial, has a mental and developmental age far below her physical age, and that her ability to appraise the nature of many things is severely limited. For example, the victim repeatedly referred to Dudley's sexual organ as his "popsicle," and testified to the times when Dudley put his "popsicle" inside her. She explained that she did not want to do this but that "he told me if I don't do it, he was gonna punch me." When asked why she did not immediately tell her mother about the incidents, she said that Dudley promised to take her to the park if she did not tell her mother. The victim's word choices and phraseology throughout the testimony reflect the mental ability of a young child.

Second, the victim's special education teacher, Ms. Hook, had worked with the victim for four or five years and also served as the victim's Special Olympics coach. Ms. Hook testified that the victim was in a class for the mentally disabled who have IQs lower than seventy. Ms. Hook testified that her students, including the victim, need constant supervision as they are not capable of self-direction, and have significant cognitive limitations. Ms. Hook recounted specific instances of the victim's limitations. For example, the victim does not understand the concept of differing valuations of money or the relative value of things. Ms. Hook explained that if the victim had a $5 bill, the victim could not understand why she could not use the bill to purchase a $13 CD. Similarly, Ms. Hook testified that the victim does not understand abstract concepts such as "in a little while" or "usual." She further testified that the victim could not rationally process and express her emotions, but would simply cry or stomp her feet if she did not like something.

Third, the victim's mother testified that her daughter has mild cerebral palsy, has been diagnosed with bi-polar disorder and was simply "not like everyone else." She explained that if the victim were ill, she would not know to take medication even if a doctor had provided her with it; that she cannot cook because she could burn the house down; that if she observed someone ill and incapacitated, she would not know to call "911" or otherwise seek help, but would probably just watch the person lie there. The mother further described her daughter's mind as "very childlike," explaining that she does not know how to count money; does not understand the basics of personal hygiene; is afraid of the dark; and, cannot be left alone for any extended period of time because of her need for constant monitoring. She explained that the victim will never be able to drive due to her limited mental capacity, must generally be separated from other children due to the concern that they would pick on her or persuade her to do inappropriate things, and that she cannot take a bus by herself. According to her mother, the victim is able to do laundry for the family, but only after much assistance, and is able to keep her room clean but needs prompting. The victim likes to watch Disney videos; and, she likes to shop and dance. The victim's room is decorated in a Tinkerbell theme. The victim has never had a paying job.

The mother put the victim on birth control in the form of Depo-Provera shots. The mother began taking the victim to get these shots after an incident with an emotionally handicapped young man which caused the mother to worry about her daughter being taken advantage of and getting pregnant. The victim has been committed to a mental institution four times.

***749** Finally, the State presented the testimony of Dr. Malcolm J. Graham, III, a psychologist who does evaluations for a number of different governmental agencies and who has been qualified as an expert witness in court many times. He testified at length as to the victim's mental limitations; opined that the victim is mentally retarded, in the moderate range; reported that the victim scored sixty-one on her verbal IQ scale, fifty on her performance IQ, and fifty-one on her full scale, putting her at less than one percentile. In other words, at least ninety-nine percent of the people who take the test scored at a higher intelligence level than the victim. Dr. Graham testified that the victim could not remember for five minutes even one of four words that he asked her to remember during a conversation; that she cannot name one single current event happening anywhere in the world; and, that she cannot perform even the simplest arithmetic calculations, such as 3 + 1. He opined that the victim will always need to be in a highly structured environment where she will be cared for, as she will never be able to function independently. Significantly, Dr. Graham testified that in his professional opinion the victim suffers from a mental defect that renders her "permanently incapable of appraising the nature of her conduct" in the context of engaging in sexual intercourse—the very definition of "mentally defective" contained in the statute pursuant to which the State prosecuted Dudley.

It was undisputed that Dudley was fully aware of the victim's mental condition. After becoming romantically involved with the victim's mother, Dudley moved in with the family and had become "like a father figure" to the victim.[FN1] At some point, Dudley lost his job, and then became the primary caregiver for the victim when her mother was at work. It was Dudley who had taken the victim to her appointment with Dr. Graham for a disability benefits evaluation; and, it was Dudley who initially gave Dr. Graham a full background and factual explanation of the victim's mental limitations, before Dr. Graham began his own testing and evaluation. Dudley also admitted to his two sexual encounters with the victim, although he testified that the victim "came on to" him both times. He also testified that he believes the victim can work and do some things for herself, and that he believes the victim to

be more intelligent than most others recognize.

FN1. Dudley had been an associate pastor at a church attended by the victim's family. The victim's mother and father had been experiencing marital challenges and the mother began marriage counseling with Dudley. The relationship between the victim's mother and Dudley had progressed from there. The mother ultimately divorced her husband, and Dudley moved in with the family.

It is unclear what procedural mechanism the trial judge was following when he sua sponte announced that he was setting aside the verdicts and dismissing the charges in this case. Dudley had never moved to dismiss the charges; the judge had denied Dudley's motions for judgment of acquittal at trial; and, there were no post-trial motions pending. Dudley was simply awaiting sentencing. In any event, "[t]he sufficiency of the evidence to support a particular criminal charge, whether evaluated by the trial court or by an appellate court, is a question of law." *Jones v. State*, 790 So.2d 1194, 1197 (Fla. 1st DCA 2001). Accordingly, we determine whether the evidence was sufficient to support the verdicts de novo. A jury's guilty verdict should not be set aside for a lack of evidence unless "there is no view of the evidence which the jury might take favorable [to the State] that can be sustained under the law." *Hunter v. State*, 8 So.3d 1052 (Fla.2008), *cert. denied*, ***750** --- U.S. ---, 129 S.Ct. 2005, 173 L.Ed.2d 1101 (2009) (quoting *Coday v. State*, 946 So.2d 988, 996 (Fla.2006), *cert. denied*, 551 U.S. 1106, 127 S.Ct. 2918, 168 L.Ed.2d 249 (2007)).

The parties cite to five relevant appellate decisions dealing with the sufficiency of the evidence to support a jury finding that a sexual battery victim was "mentally defective" at the time of the crime. Dudley argues for affirmance of the trial court's dismissal order citing *Mathis v. State*, 682 So.2d 175 (Fla. 1st DCA 1996) and *State v. Torresgrossa*, 776 So.2d 1009 (Fla. 5th DCA 2001). The State argues for reversal and reinstatement of the verdicts, citing *Hudson v. State*, 939 So.2d 146 (Fla. 4th DCA 2006), *Schimele v. State*, 784 So.2d 591 (Fla. 4th DCA 2001) and *Bowman v. State*, 760 So.2d 1053 (Fla. 4th DCA 2000). In our view, the facts from *Hudson*, *Schimele* and *Bowman* more closely match the facts in this case, and both *Mathis* and *Torresgrossa* are distinguishable.

In *Schimele*, the Fourth District found that the state had presented sufficient evidence that the alleged victim was mentally defective where a psychologist testified that the twenty-six year old mentally "retarded" victim was obviously mentally impaired based upon his "childlike speech," and other overt characteristics. The expert testified that the victim scored a fifty-three (in the "moderately impaired range") on the Wechsler Adult Intelligence Scale, the standard IQ test. In comparison, the victim in our case had a slightly lower overall score of fifty-one. Although the victim in *Schimele* was able to work three days a week, for three hours a day as a supermarket bagboy, he required a similar level of supervision and care as the victim in our case. He had a similarly "young developmental age," limited "personal care ability," and "almost no mathematical ability." The psychologist in *Schimele* testified that the victim in that case was "incapable of understanding the nature of his conduct and its ramifications" and "was not able to give a knowing, voluntary, intelligent consent to having sexual relations" because of his mental limitations. *Schimele*, 784 So.2d at 593. FN2

FN2. Similarly, in this case, Dr. Graham opined that the victim suffers from a mental defect that renders her permanently incapable of appraising the nature of her conduct in the context of engaging in sexual intercourse, that she is not capable of giving an intelligent, knowing and voluntary consent to engaging in sexual activity.

Bowman is also similar, holding that evidence of a low IQ score and comparable testimony from a school psychologist regarding the limited mental ability of the purported victim were sufficient to support a jury finding that the victim was mentally defective. Although the *Bowman* panel included fewer details regarding the mental ability of the victim in its opinion, the decision relates that the victim was in his early twenties but "behaves like a four or five year old in some respects, and a nine or ten year old in others." *Bowman*, 760 So.2d at 1053. The victim was unable to read or write, but could sign his name. *Id.* A school psychologist testified that a person like the victim "should not be

left to run an errand or cross the street on his own." *Id.* at 1055.

In *Hudson,* the Fourth District found the evidence sufficient to go to the jury on the issue of whether the victim was mentally defective in a sexual battery prosecution, even absent expert testimony, where the investigating detective testified that he believed the victim to be about seven to nine years old mentally, and the nurse who examined the twenty-six year old victim testified that the victim was "childlike and delayed," and "documented that [the victim] appeared to be mentally challenged." ***751** The evidence summarized in the *Hudson* opinion regarding that victim's mental limitations is less substantial than the evidence presented regarding the victim's mental limitations in our case.

Although examination of the sufficiency of the evidence on any issue is obviously a case-specific and fact-intensive inquiry, the relevant facts regarding the victim's mental capacity are close enough in our case to the facts found sufficient in *Schimele, Bowman* and *Hudson* that it would be difficult to affirm dismissal of the charges here without conflicting with those decisions from the Fourth District.

By contrast, in *Mathis* the First District reversed a conviction based upon the appellate panel's conclusion that the evidence was legally insufficient to permit a jury to find that the victim in that case was "mentally defective" on the date of the alleged sexual battery. *Mathis* is distinguishable for two reasons. First, the testimony in *Mathis* established the victim to be "right at the upper end of" the "trainable mentally handicapped range," and the mental capacity evidence regarding the victim was based upon observations made and testing done "fifteen months before the date of the alleged sexual battery." *Mathis,* 682 So.2d at 180. Because the evidence in *Mathis* suggested that the mental capacity of the victim would improve with time, the panel was properly concerned about the lack of evidence addressing the mental capacity of the victim as of the date of the charged crime. There is no similar concern in our case, because the witnesses testified regarding the victim's mental condition at the time of the crimes. Additionally, the victim's mental condition here is permanent.

Second, the *Mathis* panel expressed special concern regarding the fact that no expert opined that the victim suffered from " 'a mental disease or defect which render[ed] [her] temporarily or permanently incapable of appraising the nature of ... her conduct.' " *Id.* (quoting § 794.011(1)(b), Fla. Stat. (1993)). In our case, Dr. Graham gave that opinion.

Our prior panel decision in *Torresgrossa* is also readily distinguishable in that the victim in that case was measurably more advanced, in terms of her mental capacity, than the victim here. Although classified by the state's expert as mildly mentally retarded, the alleged victim in *Torresgrossa* held a high school diploma, had been a licensed driver, had held employment, had prior consensual sexual relationships with a previous boyfriend who she had considered marrying, and understood that the defendant was married at the time that she engaged in sex with him. *Torresgrossa,* 776 So.2d at 1010. She had obtained a prescription for birth control pills, and knew that their purpose was to ensure that she did not become pregnant when engaging in sex. Significantly, the state's expert in *Torresgrossa* conceded that he "thought [the victim's] sexual relations with her prior boyfriend were consensual." *Id.* at 1010–11. That concession itself would seem to preclude a finding that the victim was incapable of appreciating the nature of her conduct regarding sex.

Although both *Mathis* and *Torresgrossa* are factually distinguishable, we find the analysis in *Mathis* troubling in that it suggests an unreasonably narrow reading of the term "mentally deficient." In short, *Mathis* equates "mental deficiency" with "legal insanity," and further suggests that anyone with a sufficient mental capacity to competently testify in court cannot be found "mentally deficient." *Torresgrossa* could be read as approving of *Mathis* on that point. The Fourth District in *Bowman,* however, noted its disagreement with this portion of the *Mathis* panel's analysis, explaining:

> ***752** We do not see a problem, as the *Mathis* court may have, with a victim being found able to understand the moral obligation to testify truthfully, and still being mentally defective under the statutory definition. It is not unusual for a child who is actually or mentally five years old to sufficiently understand the moral obligation to tell the truth so as to be competent to testify. Telling the truth is a basic value of our society which is drummed into the heads of children as soon as they are able to reason. The fact that such a child is competent to testify, however, is not inconsistent

with being mentally defective under section 794.011(1)(b), Florida Statutes. Unlike telling the truth, the inappropriateness of the type of sexual activity occurring in *Mathis* or this case is not necessarily something which is normally discussed with a person who is mentally only five years old.

Bowman, 760 So.2d at 1055.

[2] [3] We agree with the Fourth District on this point. "Mentally deficient" cannot reasonably be read to mean a total lack of mental capacity, as the trial judge in our case seems to have concluded based upon language in *Mathis* and *Torresgrossa.* "Deficient" means "lacking in some ... quality" or "not up to a normal standard." *Merriam–Webster Dictionary* (2011), http:// www. merriam- webster. com/ dictionary/ deficient. It does not mean "devoid of" or "totally lacking." Similarly, the statutory definition of "mentally deficient," that is, "incapable of appraising the nature of his or her conduct," connotes significantly diminished judgment, but not a complete and total lack of mental awareness.

Accordingly, to the extent that *Mathis* can be read as equating "mental deficiency" with competence to testify, or to mean a total or complete lack of mental capacity or understanding, we disagree and conflict with *Mathis.* To the extent that *Torresgrossa* positively relied on *Mathis* as to this narrow point, we recede from *Torresgrossa.*

REVERSED AND REMANDED WITH DIRECTIONS; CONFLICT CERTIFIED.

ORFINGER, C.J., GRIFFIN, SAWAYA, PALMER, MONACO, TORPY, EVANDER, COHEN, and JACOBUS, JJ., concur.

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