

IN THE SUPREME COURT OF FLORIDA

MARCUS JAMAL GRAHAM,

Appellant/Petitioner,

vs.

CASE NO. SC15-1416
1st DCA CASE NO. 1D14-2474

STATE OF FLORIDA,

Appellee/Respondent.

_____ /

JURISDICTIONAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal in Graham v. State, 40 FLW D1569 (Fla. 1st DCA July 8, 2015). A copy of the decision is attached as an appendix to this Brief.

The district court wrote a brief opinion rejecting two (2) issues. Only the first issue is written in such a manner as to implicate this Court's discretionary jurisdiction. In the first issue, the district court rejected Mr. Graham's argument that his dual convictions for lewd molestation violated double-jeopardy when the charges arose from a single incident in which Graham purportedly touched the victim's breasts and buttocks [or the clothing covering them] without any temporal break between the touching conduct, during the same episode, and in the same location. The district court cited to, inter alia, Roberts v. State, 39 So.3d 372, 374 (Fla. 1st DCA 2010) in support of its conclusion. The court also certified that its decision was in direct conflict with two other cases out of the Fourth District Court of Appeal.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction in the instant case because the First District Court of Appeal certified that its decision was in direct conflict with two (2) decisions out of the Fourth District Court of Appeal.

The First District's opinion is in direct conflict with Cupas v. State, 109 So.3d 1174 (Fla. 4th DCA 2013) and Webb v. State, 104 So.3d 1153 (Fla. 4th DCA 2012). The Cupas and Webb decisions held that single-episode lewd touching conduct by which the defendant touches the same victim in the same physical location and without a meaningful temporal break does not make each touching a separate lewd molestation offense for double jeopardy purposes. In contrast, the First District held that the dual lewd molestation convictions do not violate double jeopardy because each touch is a distinct criminal act even though the touching conduct occurred during a single episode and involved no temporal break between touches.

This Court should exercise its discretion and grant review.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL'S
DECISION IN GRAHAM v. STATE, 40 FLW D1569
(FLA. 1ST DCA JULY 8, 2015) IS CERTIFIED TO BE
IN DIRECT CONFLICT WITH CUPAS v. STATE,
109 SO.3D 1174 (FLA. 4TH DCA 2013) AND WEBB
v. STATE, 104 SO.3D 1153 (FLA. 4TH DCA 2012).

Article V, s. 3(b)(4) of the Florida Constitution, and Fla. R. App. P.

9.030(a)(2)(A)(iv), authorize this Court to exercise its discretion to review a decision of a district court of appeal that is certified to be in direct conflict with a decision of another district court of appeal. This Court has a constitutional responsibility to resolve interdistrict conflict, and ensure the consistent application of the law throughout this State. See, Florida Star v. B.J.F., 530 So.2d 286, 288 (Fla. 1988).

Petitioner Graham has been convicted of two (2) counts of lewd molestation following a jury trial; and sentenced to concurrent 7-year terms of imprisonment to be followed by six (6) years of sex offender probation. He was acquitted of a third lewd molestation charge contained in Count Two. The offenses of conviction are proscribed at Fla. Stat. s. 800.04(5)(c)2 (2013) . The Count One allegations of the amended information alleged he had lewdly touched the identified victim's breasts

or the clothing over them. In Count Three, it was alleged he had lewdly touched the same victim's buttocks or the clothing covering them. Pertaining to Counts One and Three, the trial evidence indicated the alleged touching conduct occurred in a single incident, at a single location, and without any temporal break between the touching(s).

On appeal, he argued, inter alia, that his dual lewd molestation convictions violated double jeopardy because the practically similar touching acts occurred during a single incident in a single location without any meaningful temporal break. The district court affirmed both convictions,--holding that the alleged acts of touching the victim's breasts and buttocks were distinct criminal acts that warranted multiple punishments even though the touching conduct was similar in character, occurred almost simultaneously, and involved a single incident in a single location.

The First District correctly recognized Mr. Graham would have been entitled to have one of his convictions and sentences vacated had his appeal been decided by the Fourth District Court of Appeal —so it certified conflict with Cupas v. State, supra, and Webb v. State, supra. This Court is urged to grant discretionary review to resolve the above-described interdistrict conflict.

CONCLUSION

Petitioner Graham requests that this Court exercise its discretion and accept jurisdiction due to certified direct conflict of decisions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been furnished by electronic transmission to the Office of the Attorney General, at e-mail address crimapptl@myfloridalegal.com, and by U.S. Mail to Mr. Marcus J. Graham, DOC#J52605, Santa Rosa Correctional Institution, 5850 East Milton Rd., Milton, FL 32583-7914, on this 17th day of August, 2015.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the size and style of type used in this Brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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APPENDIX FOR
JURISDICTIONAL BRIEF OF APPELLANT

APPENDIX

DOCUMENT

A

Marcus J. Graham v. State, 40 FLW D1569 (Fla.
1st DCA July 8, 2015)

2015 WL 4111657

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
First District.

Marcus Jamal GRAHAM, Appellant,

v.

STATE of Florida, Appellee.

No. 1D14-2474. | July 8, 2015.

Synopsis

Background: Defendant was convicted in the Circuit Court for Duval County, Russell L. Healey, J., of two counts of lewd or lascivious molestation. Defendant appealed.

[**Holding:**] The District Court of Appeal, Rowe, J., held that defendant's convictions for two counts of lewd or lascivious molestation did not violate double jeopardy.

Affirmed.

Conflict certified.

West Headnotes (6)

[1] **Double Jeopardy**



The United States and Florida Constitutions contain double jeopardy clauses designed to prevent a person from receiving multiple punishments for the same criminal offense. U.S.C.A. Const.Amend. 14; West's F.S.A. Const.Art. 1, § 9.

Cases that cite this headnote

[2] **Double Jeopardy**



The District Court of Appeal reviews de novo whether a double jeopardy violation has occurred. U.S.C.A. Const.Amend. 14; West's F.S.A. Const.Art. 1, § 9.

Cases that cite this headnote

[3] **Double Jeopardy**



To determine whether the imposition of separate punishments for offenses occurring during the course of a single criminal episode violates double jeopardy, courts use the *Blockburger* test; however, there is no constitutional prohibition against multiple punishments for different offenses arising out of the same criminal episode as long as the legislature intended to authorize separate punishments. U.S.C.A. Const.Amend. 14; West's F.S.A. Const.Art. 1, § 9.

Cases that cite this headnote

[4] **Double Jeopardy**



Where there is no clear legislative intent and the offenses occurred during the same episode, the court must determine whether the offenses are predicated on more than one distinct act; if the offenses are predicated on multiple acts, then there is no double jeopardy violation. U.S.C.A. Const.Amend. 14; West's F.S.A. Const.Art. 1, § 9.

Cases that cite this headnote

[5] **Double Jeopardy**



Defendant's convictions for two counts of lewd or lascivious molestation did not violate double jeopardy; the lewd or lascivious molestation statute provided multiple, alternative ways to violate the statute, defendant's convictions were based on two distinct acts, and the touching of the victim's breasts and the touching of the victim's buttocks. U.S.C.A. Const.Amend. 14; West's F.S.A. Const.Art. 1, § 9; West's F.S.A. § 800.04(5)(a).

Cases that cite this headnote

[6] **Criminal Law**



The trial court's order prohibiting defendant from asking the victim or her mother whether the victim or mother had previously been the victim of sexual abuse was not an abuse of discretion, during prosecution for lewd or lascivious molestation; the probative value of the evidence testimony would be substantially outweighed by the prejudice it would likely cause.

Cases that cite this headnote

An appeal from the Circuit Court for Duval County. Russell L. Healey, Judge.

Attorneys and Law Firms

Nancy A. Daniels, Public Defender, and David A. Henson, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Justin D. Chapman, Assistant Attorney General, Tallahassee, for Appellee.

Opinion

ROWE, J.

*1 **Marcus Jamal Graham** appeals his convictions for two counts of lewd or lascivious molestation, arguing that his convictions violate double jeopardy and that the trial court improperly restricted his cross-examination of key witnesses. Because **Graham's** convictions are based on distinct acts and the trial court properly limited cross-examination, we affirm.

Graham was convicted of two counts of lewd or lascivious molestation for touching the victim's breasts and buttocks, or the clothing covering them, in violation of section 800.04(5) (a), Florida Statutes (2013). The testimony at trial established that there was no temporal break between the touchings and that they occurred during the same episode. Because the touchings occurred during a single criminal episode, **Graham** argues that his convictions violate double jeopardy. We disagree.

[1] [2] [3] [4] The United States and Florida Constitutions contain double jeopardy clauses designed to prevent a person from receiving multiple punishments for the same criminal offense. *State v. Drawdy*, 136 So.3d 1209, 1213 (Fla.2014). We review de novo whether a double jeopardy violation has occurred. *Id.* To determine whether the imposition of separate punishments for offenses occurring during the course of a single criminal episode violates double jeopardy, courts use the *Blockburger*¹ test. However, there is no constitutional prohibition against multiple punishments for different offenses arising out of the same criminal episode as long as the legislature intended to authorize separate punishments. *Valdes v. State*, 3 So.3d 1067, 1069 (Fla.2009); *Partch v. State*, 43 So.3d 758, 759–60 (Fla. 1st DCA 2010). Where, as in this case, there is no clear legislative intent and the offenses occurred during the same episode, the court must determine whether the offenses are predicated on more than one distinct act. *Sanders v. State*, 101 So.3d 373, 374 (Fla. 1st DCA 2012). If the offenses are predicated on multiple acts, then there is no double jeopardy violation. *Id.*

[5] Because the Florida sexual battery statutes and lewd or lascivious battery statutes may be violated in multiple, alternative ways, convictions for “sexual acts of a separate character and type requiring different elements of proof” do not violate double jeopardy because the acts are “distinct criminal acts that the Florida Legislature has decided warrant multiple punishments.” *Meshell*, 2 So.3d at 135; §§ 794.011(1)(h), 800.04(1)(a), Fla. Stat. (2013) (defining sexual activity and sexual battery as “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”). Similar to the sexual battery and lewd or lascivious battery statutes, the lewd or lascivious molestation statute also provides multiple, alternative ways to violate the statute. The statute proscribes the intentional touching “in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them” § 800.04(5)(a), Fla. Stat. (2013). Thus, the acts proscribed by the lewd or lascivious molestation statute are distinct criminal acts that warrant multiple punishments. *See Roberts v. State*, 39 So.3d 372, 374 (Fla. 1st DCA 2010).

*2 Here, **Graham** was convicted of two counts of lewd or lascivious molestation and the information and the jury verdict demonstrate that the charges were predicated on two distinct acts: touching of the victim's breasts, or the clothing covering them, and touching of the victim's buttocks, or the clothing covering them. For this reason, **Graham's** multiple

convictions for lewd or lascivious molestation do not violate double jeopardy. We recognize that this holding conflicts with the holdings in *Cupas v. State*, 109 So.3d 1174 (Fla. 4th DCA 2013), and *Webb v. State*, 104 So.3d 1153 (Fla. 4th DCA 2012); thus, we certify conflict with those decisions.

[6] **Graham** also asserts that the trial court erred when it prohibited defense counsel from cross-examining the victim and her mother about a prior incident of sexual abuse against the victim that occurred in Mississippi and from cross-examining the victim's mother about whether she was a victim of sexual abuse. **Graham** argues that these lines of questioning would have demonstrated that his innocent touches were misinterpreted by the victim. However, even if the prior incidents of sexual abuse of the victim and the

mother were marginally relevant, the probative value of the testimony would be substantially outweighed by the prejudice it would likely cause. *Ware v. State*, 124 So.3d 388, 391 (Fla. 1st DCA 2013). Thus, the trial court did not abuse its discretion by restricting the cross-examination of these witnesses about the prior incidents of sexual abuse.

We, therefore, **AFFIRM Graham's** convictions and sentences and **CERTIFY CONFLICT**.

OSTERHAUS and BILBREY, JJ., concur.

All Citations

--- So.3d ----, 2015 WL 4111657, 40 Fla. L. Weekly D1569

Footnotes

1 *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).