

IN THE SUPREME COURT OF FLORIDA

MARCUS JAMAL GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-1416

ON DISCRETIONARY REVIEW FROM

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0045489

LAUREN L. GONZALEZ
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 071578

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, MARCUS JAMAL GRAHAM, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, Graham v. State, 170 So.3d 141 (Fla. 1st DCA 2015), which is attached, but can also be found at 40 Fla. L. Weekly D1569.

SUMMARY OF ARGUMENT

This Court should exercise its discretionary jurisdiction by reviewing the certified conflict between the First District in the instant case and Cupas v. State, 109 So.3d 1174 (Fla. 4th DCA 2013) and Webb v. State, 104 So.3d 1153 (Fla. 4th DCA 2012), concerning whether a defendant can be convicted of multiple counts of lewd or lascivious molestation upon the same victim which occur during a single episode but which are predicated on distinct acts.

ARGUMENT

ISSUE I: WHETHER THIS COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION IN REVIEWING THE CERTIFIED CONFLICT IN THIS CASE WITH CUPAS V. STATE, 109 SO.3D 1174 (FLA. 4TH DCA 2013) AND WEBB V. STATE, 104 SO.3D 1153 (FLA. 4TH DCA 2012) (RESTATED)

1. Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

2. The instant case is the proper case for this Court to exercise its discretionary jurisdiction.

In the instant case, Petitioner was convicted of two counts of lewd or lascivious molestation for touching the victim's breasts and buttocks, or the clothing covering them. On appeal, Petitioner argued that his dual convictions violated double jeopardy because the touching occurred during a single criminal episode. The First District Court affirmed Petitioner's judgment and sentence.

The First District, relying upon Roberts v. State, 39 So.3d 372 (Fla. 1st DCA 2010) and Saunders v. State, 101 So.3d 373 (Fla. 1st DCA 2012), held that the information and jury verdict demonstrated that the charges were predicated on two distinct acts thus the dual convictions did not violate double jeopardy. In reaching this decision, the First District certified conflict with the Fourth District's 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) which held that dual convictions for similar conduct did violate double jeopardy.

CONCLUSION

Based on the foregoing discussions, the State agrees that this Honorable Court should exercise its discretionary review.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on October 1, 2015: David A. Henson, Esq., Assistant Public Defender, david.henson@flpd2.com

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Trisha Meggs Pate
TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

/s/ Lauren L. Gonzalez
By: LAUREN L. GONZALEZ
Assistant Attorney General
Florida Bar No. 071578
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 (VOICE)
(850) 922-6674 (FAX)
L15-1-09313

Attorneys for the State of Florida

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INDEX TO APPENDIX

A. Graham v. State, 170 So.3d 141 (Fla. 1st DCA 2015)

170 So.3d 141
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**

☞ Prohibition of Multiple Proceedings or Punishments

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] **Criminal Law**

☞ Review De Novo

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**

☞ Several offenses in one act; separate statutory offenses and legislative intent

Double Jeopardy

☞ Proof of fact not required for other offense

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**

☞ Several offenses in one act; separate statutory offenses and legislative intent

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**

☞ Sex offenses; obscenity

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

↔ Evidence as to acts, transactions, and occurrences to which accused is not a party

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

Attorneys and Law Firms

*142 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.

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 *143 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.” *State v. Meshell*, 2 So.3d 132, 135 (Fla.2009); §§ 794.011(1)(b), 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).

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.

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

OSTERHAUS and BILBREY, JJ., concur.

All Citations

170 So.3d 141, 40 Fla. L. Weekly D1569

Footnotes

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