IN THE SUPREME COURT OF FLORIDA

DIEGO TAMBRIZ-RAMIREZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC17-713
4th DCA Case No. 4D15-2957

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RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE

A jury convicted Petitioner of the following offenses:

> Count I, Burglary of a Dwelling with an Assault or Battery While Armed and Masked;
> Count II, Aggravated Assault with a Deadly Weapon While Masked; and
> Count III, Attempted Sexual Battery - Person 12 Years of Age or Older - Using Great Force or a Deadly Weapon.

Tambriz-Ramirez v. State, 213 So. 3d 920, 921 (Fla. 4th DCA 2017). Petitioner was sentenced to life in prison for the burglary, a consecutive fifteen years in prison for the aggravated assault, and a consecutive thirty years in prison for the attempted sexual battery. Id. On direct appeal, the Fourth District Court of Appeal found that Petitioner's sentence for attempted sexual battery exceeded the statutory maximum and remanded for resentencing. Tambriz-Ramirez v. State, 112 So. 3d 767, 767 (Fla. 4th DCA 2013). The trial court resentenced Petitioner to fifteen years in prison for the attempted sexual battery. Tambriz-Ramirez, 213 So. 3d at 921.

Petitioner filed a timely amended motion for postconviction relief that included a claim that Petitioner's trial attorney was ineffective for failing to raise a double jeopardy violation. Id. The trial court denied the claim and Petitioner appealed to the Fourth District Court of Appeal. Id. The Fourth District Court of Appeal affirmed the denial of

Petitioner's double jeopardy claim and certified conflict with four cases from the First District Court of Appeal and four cases from the Fifth District Court of Appeal. Id. at 925.

Petitioner sought this Court's discretionary jurisdiction based on certified conflict. On June 16, 2017, this Court accepted jurisdiction and ordered briefs on the merits.

STATEMENT OF THE FACTS

The Fourth District Court of Appeal described the facts of the offense as follows:

> Armed with a knife and using a shirt as a mask, [Petitioner] broke into the victim's home at night and attempted to sexually batter her. The victim testified that during the attack, [Petitioner] put the knife to her face and neck. The victim fought off the attacker and, after pulling off the mask, recognized [Petitioner], whom she knew. [Petitioner] ultimately confessed his guilt to police and sent letters to the victim before trial, apologizing and asking her to drop the charges.

Id. at 921. "The jury convicted [Petitioner] as charged on all counts and in a special interrogatory on the verdict form for Count 1 found that during the commission of the burglary he was armed or became armed with 'a deadly weapon.'" Id.

SUMMARY OF THE ARGUMENT

There is no double jeopardy violation because the offenses of aggravated assault and sexual battery require proof of an element that burglary with an assault or battery does not. Aggravated assault requires the use of a deadly weapon or the intent to commit a felony. Sexual battery requires penetration.

ARGUMENT

THERE IS NO DOUBLE JEOPARDY VIOLATION.

A. STANDARD OF REVIEW

The standard of review is de novo. See Roughton v. State, 185 So. 3d 1207, 1209 (Fla. 2016) ("The application of the statutory rule of construction based on undisputed facts is a legal issue, subject to de novo review.").

B. LAW

This Court recently set forth the applicable law as follows:

> The double jeopardy clauses, contained in the Fifth Amendment to the United States Constitution and article I, section 9 of the Florida Constitution, prohibit the imposition of multiple punishments for the same criminal offense. But the double jeopardy clauses do not prohibit multiple punishments for different offenses arising out of the same criminal transaction or episode if the Legislature intended to authorize separate punishments. The Double Jeopardy Clause presents no substantive limitation on the legislature's power to

> prescribe multiple punishments, but rather, seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense.
>
> Section 775.021(4)(a) requires that an offender who commits an act or acts which constitute one or more separate criminal offenses . . . be sentenced separately for each criminal offense even if those offenses are committed in the course of one criminal transaction or episode. [O]ffenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

Roughton, 185 So. 3d at 1209 (citations and internal quotation marks omitted).

Section 775.021(4)(b) of the Florida Statutes (2010), provides:

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Section 810.02 of the Florida Statutes (2010), provides:

> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon any person; or
>
> (b) Is or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon; or
>
> (c) Enters an occupied or unoccupied dwelling or structure, and:
>
> 1. Uses a motor vehicle as an instrumentality, other than merely as a getaway vehicle, to assist in committing the offense, and thereby damages the dwelling or structure; or
>
> 2. Causes damage to the dwelling or structure, or to the property within the dwelling or structure in excess of $1,000.

Section 784.011(1) of the Florida Statutes (2010) provides that an assault "is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent."

Section 784.021(1) of the Florida Statutes (2010) provides that aggravated assault is an assault "[w]ith a deadly weapon

without intent to kill" or "[w]ith an intent to commit a felony."

Section 794.011(1)(h) of the Florida Statutes (2010) defines sexual battery as the "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any object."

C. DISCUSSION

Respondent will discuss (1) the analysis conducted by the Fourth District Court of Appeal, (2) the analysis conducted by the conflict cases, and (3) the arguments offered by Petitioner.

1. The Fourth District Court of Appeal conducted a proper double jeopardy analysis.

The Fourth District Court of Appeal noted that Petitioner's claim is based on the contention that the aggravated assault and attempted sexual battery offenses are "subsumed within" the burglary offense. Tambriz-Ramirez, 213 So. 3d at 922-23. The Fourth District Court of Appeal also recognized that the analysis must be conducted "*without regard to the accusatory pleading or the proof adduced at trial*." Id. at 923 (quoting § 775.021(4)(a), Fla. Stat. (2009)). The Fourth District Court of Appeal was guided by this Court's recent Roughton decision:

> The Florida Supreme Court emphasized [that the analysis must be conducted without regard to the accusatory pleading or proof adduced at trial] in Roughton, where it held

> that, when considering a statute that proscribes conduct in the alternative (offenses that can be committed in more than one way), the analysis must consider the entire range of conduct prohibited by the statutes, not the specific conduct charged or proven at trial.

Tambriz-Ramirez, 213 So. 3d at 923.

Following these principles, the Fourth District Court of Appeal examined the statutory elements of burglary with an assault or battery while armed with a deadly weapon and aggravated assault with a deadly weapon. Id. at 923. The Fourth District Court of Appeal found that "[t]he statutory elements of aggravated assault include (a) use of a deadly weapon or (b) intent to commit a felony, and neither of these elements is subsumed within a burglary with an assault or battery." Id. Furthermore, the Fourth District Court of Appeal observed that "being or becoming armed with a dangerous weapon during a burglary, which can include mere *possession* of the weapon, is distinct from *using* a deadly weapon to commit an aggravated assault." Id. Therefore, the Fourth District Court of Appeal correctly concluded that "[a]ggravated assault is not necessarily included within a burglary with an assault or battery offense." Id.

The Fourth District Court of Appeal applied the same reasoning to conclude that attempted sexual battery is not

subsumed within the offense of burglary with an assault or battery offense:

> Finally, for analogous reasons, we reject appellant's claim that his attempted sexual battery is subsumed within his burglary with an assault or battery offense. See State v. Nardi, 779 So. 2d 596, 596 (Fla. 4th DCA 2001) ("[T]he offenses of attempted sexual battery and burglary of a dwelling with battery do not violate double jeopardy principles.").

Tambriz-Ramirez, 213 So. 3d at 925. The analysis involving the attempted sexual battery charge did not conflict with decisions of other district courts of appeal. See id.

The analysis of the Fourth District Court of Appeal was proper because it followed the plain language of section 775.021(4) by comparing the offenses "without regard to the accusatory pleading or the proof adduced at trial." See § 775.021(4), Fla. Stat. (2010). Furthermore, the analysis was proper because it followed the holding of this Court's Roughton decision that "a double jeopardy analysis must - in accordance with section 775.021(4) - be conducted without regard to the accusatory pleading or the proof adduced at trial, even where an alternative conduct statute is implicated." See Roughton, 185 So. 3d at 1211.

2. The conflict cases did not conduct a proper double jeopardy analysis.

The eight conflict cases all found a double jeopardy violation or a potential double jeopardy violation where the defendant was convicted of aggravated assault with a firearm and burglary with an assault or battery with a firearm. See Dykes v. State, 200 So. 3d 162, 163 (Fla. 5th DCA 2016) (finding a potential double jeopardy violation); Hankins v. State, 164 So. 3d 738 (Fla. 5th DCA 2015) (finding a double jeopardy violation); Smith v. State, 154 So. 3d 523, 524 (Fla. 1st DCA 2015) (finding a double jeopardy violation); McGhee v. State, 133 So. 3d 1137, 1138 (Fla. 5th DCA 2014) (finding a double jeopardy violation); Green v. State, 120 So. 3d 1276, 1278 (Fla. 1st DCA 2013) (finding a double jeopardy violation); Estremera v. State, 107 So. 3d 511, 512 (Fla. 5th DCA 2013) (finding a double jeopardy violation); White v. State, 753 So. 2d 668, 669 (Fla. 1st DCA 2000) (finding a double jeopardy violation); Baldwin v. State, 790 So. 2d 434, 435 (Fla. 1st DCA 2000) (finding a double jeopardy violation).

None of the eight conflict decisions conducted an independent double jeopardy analysis by comparing the elements of aggravated assault with a firearm to burglary with an assault or battery with a firearm. Instead, all the conflict decisions

cited to previously decided cases for the proposition that a double jeopardy violation exists. See Dykes, 200 So. 3d at 163; Hankins, 164 So. 3d at 738; Smith, 154 So. 3d at 524; McGhee, 133 So. 3d at 1138; Green, 120 So. 3d at 1278; Estremera, 107 So. 3d at 512; White, 753 So. 2d at 669; Baldwin, 790 So. 2d at 435.

Furthermore, all the conflict decisions relied on authority that that was repudiated. The two earliest conflict decisions relied upon Henderson v. State, 727 So. 2d 284 (Fla. 2d DCA 1999) in finding a double jeopardy violation. See White, 753 So. 2d at 669; Baldwin, 790 So. 2d at 435. In Henderson, the Second District Court of Appeal found a double jeopardy violation where the defendant was convicted of aggravated assault with a firearm and burglary with an assault while armed. Henderson, 727 So. 2d at 286. However, eleven months later, the Second District Court of Appeal, en banc, receded from Henderson and found that no double jeopardy violation exists. Washington v. State, 752 So. 2d 16, 18 (Fla. 2d DCA 2000). Thus, the first two conflict decisions, White and Baldwin, are faulty because they mistakenly relied on Henderson after the Second District Court of Appeal receded from Henderson in Washington. See Washington, 752 So. 2d at 16 (decision released on Jan. 12, 2000); White, 753 So. 2d at 668 (decision released on Mar. 9,

2000); Baldwin, 790 So. 2d at 434 (decision released on Mar. 6, 2000). As for the other six conflict decisions, each one relied on the faulty White decision or a subsequent case that relied on the White decision. See Estremera, 107 So. 3d at 512 (relying on White); Green, 120 So. 3d at 1278 (relying on White and Estremera); McGee, 133 So. 3d at 1138 (relying on Green and White); Smith, 154 So. 3d at 524 (relying on Green and White); Hankins, 164 So. 3d at 738 (relying on McGee); Dykes, 200 So. 3d at 163 (relying on McGee and Estremera).

Notably, all but one of the eight conflict decisions were decided prior to this Court's decision in Roughton. This is significant because the Roughton decision changed the double jeopardy analysis when an "alternative conduct statute" is implicated. See Roughton, 185 So. 3d at 1211 ("We recede from our prior decision in Gibbs and hold that a double jeopardy analysis must - in accordance with section 775.021(4) - be conducted without regard to the accusatory pleading or the proof adduced at trial, even where an alternative conduct statute is implicated."). Aggravated assault is an "alternative conduct statute." See § 784.021, Fla. Stat. (2010) (defining an aggravated assault as an assault "[w]ith a deadly weapon without intent to kill" or "[w]ith an intent to commit a felony").

Thus, the eight conflict decisions are dubious because (1)

none of the decisions conducted an independent comparison of the elements; (2) all the decisions were based on authority that was repudiated; and (3) all but one of the decisions predate this Court's Roughton decision. If the decisions had applied a proper double jeopardy analysis, the First and Fifth District Courts of Appeal would have reached the same conclusion as the Fourth District Court of Appeal: there is no double jeopardy violation because "each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial." See § 775.021(4)(a), Fla. Stat. (2010).

3. Petitioner's arguments lack merit.

Petitioner advances three arguments to show that the decision of the Fourth District Court of Appeal is incorrect. These arguments are without merit.

Petitioner first argues that sexual battery, aggravated assault, and burglary with an assault or battery are degree variants of the same offense. Petitioner relies on this Court's decision in Valdes v. State, 3 So. 3d 1067 (Fla. 2009). In Valdes, this Court held that the double jeopardy prohibition against convictions for crimes that are "degrees of the same offense as provided by statute" prohibits "separate punishments only when a criminal statute provides for variations in degree

in the same offense, so that the defendant would be punished for violating two or more degrees of a single offense." Id. at 1076 (citation omitted). Petitioner's argument fails because the burglary, assault, and sexual battery are not different degrees of "the same offense." See State v. Reardon, 763 So. 2d 418, 420 (Fla. 5th DCA 2000) ("the two offenses [burglary with a battery and aggravated battery] are not degrees of the same crime"). The crimes are different offenses, located in different chapters of the Florida Statutes, that criminalize different conduct. Compare § 810.02, Fla. Stat. (2010) with § 784.021, Fla. Stat. (2010) and § 794.011, Fla. Stat. (2010).

Petitioner's second argument contends that that the assault or battery element of burglary with an assault or battery should be viewed separately from the other elements such that Petitioner was improperly convicted of both simple and aggravated forms of assault and battery. However, it is not proper to parse out and compare only certain elements of an offense in a double jeopardy analysis. The intent of the Legislature is to convict and sentence for "each criminal offense" committed. § 775.021(4)(b), Fla. Stat. (2010). Although different offenses may share elements in common; the offenses are separate for double jeopardy purposes if each offense requires an element that the other does not. See §

775.021(4)(a), Fla. Stat. (2010) ("offenses are separate if each offense requires proof of an element that the other does not"). Petitioner's reliance is misplaced on State v. Brown, 633 So. 2d 1059 (Fla. 1994). In Brown, this Court held that the defendant could not be convicted of both armed robbery and use of a firearm during the commission of a felony. Id. at 1060-61. Unlike the instant case, Brown did not involve a simple and an aggravated form of a crime. Furthermore, in Brown, this Court found "no distinction in the statutory elements of" the two crimes. Id. at 1060. The instant case is meaningfully different because each offense has an element that the other offenses do not.

Petitioner's final argument is a complaint that Petitioner improperly received cumulative punishments "based on the same conduct." However, "[t]he Double Jeopardy Clause presents no substantive limitation on the legislature's power to prescribe multiple punishments, but rather, seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." Roughton, 185 So. 3d at 1209 (citation omitted). Because Petitioner was convicted of offenses that all have different elements, Petitioner was not improperly punished for the same conduct. See § 775.021(4)(a), Fla. Stat. (2010)

("offenses are separate if each offense requires proof of an element that the other does not").

CONCLUSION

Therefore, this Court should affirm the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY (1) that this brief was prepared in Courier New font, 12 point, and double spaced and (2) that a true and accurate copy of the foregoing was served on Rocco Carbone, III, 320 High Tide Drive, Suite 100, St. Augustine, FL 32080 at rocco@ric3law.com on November 17, 2017.

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CERTIFICATE OF TYPEFACE COMPLIANCE

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