

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

KENDAL PIERRE COBB,

Appellant,

v.

Case No. 5D13-4432

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed January 30, 2015.

Appeal from the Circuit Court
for Orange County,
Anthony H. Johnson, Judge.

James S. Purdy, Public Defender, and
Edward J. Weiss, Assistant Public
Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General, Daytona
Beach, for Appellee.

ORFINGER, J.

Kendal P. Cobb appeals his conviction of lewd act upon a child, which was alleged to be in violation of section 800.04(1), Florida Statutes (2012). He contends, and the State concedes, that the information neither referenced a statute that establishes a crime,

nor set forth the essential elements of any substantive crime.¹ The State also concedes that the error is fundamental. The parties differ only on the relief to which Mr. Cobb is entitled. The State argues that a new trial is appropriate, whereas Mr. Cobb argues that he is entitled to be discharged.

We conclude that discharge is appropriate. When a conviction is based on a non-existent crime, a retrial is appropriate only on any lesser offenses instructed on at trial. See State v. Gibson, 682 So. 2d 545, 546 (Fla. 1996); see also State v. Brady, 685 So. 2d 984 (Fla. 5th DCA 1997) (holding when defendant convicted of non-existent crime, remedy is retrial only on lesser offenses on which jury was instructed). Those lesser offenses not instructed on at trial cannot be the basis for a retrial. Gibson, 682 So. 2d at 546. Here, no lesser offenses were submitted to the jury at trial. Hence, Mr. Cobb is entitled to discharge.

REVERSED and REMANDED.

BERGER and LAMBERT, JJ., concur.

¹ An earlier version of section 800.04(1), Florida Statutes (1998), provided that “[a] person who: (1) Handles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner . . . without committing the crime of sexual battery, commits a felony of the second-degree” That section of the statute was amended in 1999 to set forth definitions only and no substantive crimes.