

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

JEROME MCCRAY,

Appellant,

v.

Case No. 5D20-566

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed October 16, 2020

3.850 Appeal from the Circuit Court
for Volusia County,
Sandra C. Upchurch, Judge.

Jerome McCray, Bristol, pro se.

No Appearance for Appellee.

WALLIS, J.

Appellant, Jerome McCray, appeals the trial court's denial of his Motion for Postconviction Relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm five of the six grounds Appellant raised on appeal without further discussion. However, we reverse the denial of Appellant's remaining claim based on a double jeopardy violation.

The State charged Appellant with: count I, lewd or lascivious molestation by a person over eighteen years of age to a victim under twelve years of age, in violation of section 800.04(5), Florida Statutes (2016); count II, attempted lewd or lascivious molestation by a person over eighteen years of age to a victim under twelve years of age, in violation of sections 800.04(5) and 777.04(1), Florida Statutes (2016); and count III, lewd or lascivious conduct by a person over eighteen years of age, in violation of section 800.04(6), Florida Statutes (2016). The State's evidence at trial established that the victim was lying on her grandmother's living room couch while her grandmother ran errands. Appellant approached the victim, got on top of her, and began touching the victim's breasts under her clothes, which formed the basis for count I, and kissing the victim's neck, which formed the basis for count III. The jury ultimately found Appellant guilty on all charges. On appeal, Appellant argues that his convictions for both counts I and III constitute a double jeopardy violation.

We find this case to be controlled by State v. Paul, 934 So. 2d 1167 (Fla. 2006), receded from, in part and on other grounds by Valdes v. State, 3 So. 3d 1067 (Fla. 2009). In Paul, the Florida Supreme Court addressed a factually similar situation and included the following discussion prior to finding a double jeopardy violation:

The first criminal episode occurred in the living room when Paul first entered the home. Specifically at issue are two counts: (1) count I-lewd and lascivious molestation by touching the victim's genital area or the clothing covering it in violation of section 800.04(5)(a); and (2) count V-lewd and lascivious conduct by kissing the victim's neck in violation of section 800.04(6)(a). In order for multiple convictions to be permitted under these two counts pursuant to section 775.021(4)(a), i.e., the 'same elements' test, each offense is considered 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.*' §

775.021(4)(a), Fla. Stat. (2005) (emphasis added). Therefore, we must review the necessary elements of each violation under the statute itself. In comparing the elements of sections 800.04(5)(a) and 800.04(6)(a), we hold the same elements test will not permit multiple convictions. Specifically, section 800.04(6)(a)(1) defines 'lewd or lascivious conduct' as any intentional touching of 'a person under 16 years of age in a lewd or lascivious manner,' while section 800.04(5)(a) defines 'lewd or lascivious molestation' as the intentional touching 'in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator.' § 800.04, Fla. Stat. (1999). In other words, any violation of subsection (5)(a), which prohibits the lewd touching of particular body parts of a person under sixteen years of age, will also violate subsection (6)(a), which simply prohibits any lewd touching of a person under sixteen years of age. Thus, one cannot say 'each offense has an element that the other does not.' While subsection (5)(a) has an element that subsection (6)(a) does not, the converse is not true-that (6)(a)(1) has an element (5)(a) does not. Therefore, dual convictions and punishments are not permitted for these violations.

934 So. 2d at 1173–74.

Similar to Paul, Appellant's acts of touching the victim's breasts in violation of section 800.04(5) and kissing the victim's neck in violation of section 800.04(6), were a part of the same criminal episode. Therefore, a conviction under each statute cannot be upheld in this case. See id.; Cruz v. State, 941 So. 2d 1245 (Fla. 5th DCA 2006). Thus, we reverse the judgment and sentence and remand with instructions for the trial court to vacate Appellant's conviction and sentence for a violation of section 800.04(6) in count III.

AFFIRMED in PART; REVERSED in PART; AND REMANDED with Instructions.

COHEN and HARRIS, JJ., concur.