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

STATE OF FLORIDA,

Petitioner,

v. Case No. 5D20-658

JAY DEAN DAGOSTINO,

Respondent.

_____/

Opinion filed September 18, 2020

Petition for Certiorari Review of Order from the Circuit Court for Seminole County, Debra S. Nelson, Judge.

Phil Archer, State Attorney, and Stewart G. Stone, Assistant State Attorney, Sanford, for Petitioner.

Blaise Trettis, Public Defender, and Lanise P. Mackhanlall, Assistant Public Defender, Sanford, for Respondent.

PER CURIAM.

Petitioner, the State of Florida, filed this petition for writ of certiorari seeking review of the February 10, 2020 order authorizing the impaneling of a twelve-person rather than six-person jury for Respondent, Jay Dean Dagostino's, trial. The size of the jury in this and all criminal cases is governed by section 913.10, Florida Statutes (2019), and Florida Rule of Criminal Procedure 3.270, which both provide that there shall be twelve-person

juries to try all capital cases and six-person juries for all other criminal cases. While the legislature labeled one of the charges against Respondent to be a "capital case," the Florida Supreme Court has repeatedly stated that, for purposes of determining jury size, a "capital case" specifically and only means that the defendant possibly faces capital punishment, i.e., the death penalty, if convicted. Because Respondent could not be sentenced to death for any of the crimes for which he was being tried, this is not a "capital case"; thus, a six-person jury was mandatory. Given the mandatory language of the controlling statute and rule of procedure, combined with the pronouncements of the Florida Supreme Court, the trial court was required to impanel a six-person jury and had no discretion to impanel a jury of any other size. Accordingly, we grant the petition.

Respondent is charged with committing sexual battery upon a person less than twelve years of age by a person of eighteen years of age or older (Count One) and lewd or lascivious molestation of a person less than twelve years of age by a person of eighteen years of age or older (Count Two). Respondent requested and the trial court ordered a twelve-person jury, exercising what the court felt was its discretion, because Respondent was on trial for what the legislature declared to be a "capital offense."

Section 913.10 states: "Twelve persons shall constitute a jury to try all capital cases, and six persons **shall** constitute a jury to try all other criminal cases." (Emphasis added). Rule 3.270 states: "Twelve persons shall constitute a jury to try all capital cases, and 6 persons **shall** constitute a jury to try all other criminal cases." (Emphasis added). Both the statute and the rule use the term "shall," which "is normally meant to be mandatory in nature." *S.R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977). "Based on its plain and ordinary meaning, the word 'shall' in a statute usually has a mandatory

connotation." *Izaguirre v. Beach Walk Resort*, 272 So. 2d 819, 820 (Fla. 1st DCA 2019) (citing *Steinbrecher v. Better Constr. Co.*, 587 So. 2d 492, 494 (Fla. 1st DCA 1991)).

There is nothing in the controlling statute or rule to suggest that "shall" is simply a suggestion which the trial court may accept or reject; it is clearly used in its usual mandatory sense. Thus, the size of the jury for Respondent's trial is not dependent upon the trial court's non-existent discretion; rather, it depends solely upon whether Respondent is on trial for a capital case.

Although Count One is legislatively classified as a capital felony by section 794.011(2)(a), Florida Statutes (2018), it is not a crime for which capital punishment, i.e., the death penalty, can be imposed. "A capital offense is one that is punishable by death. In Florida, murder in the first degree is the only existing capital offense." *Rowe v. State*, 417 So. 2d 981, 982 (Fla. 1982). *See also Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) (holding that the Eighth Amendment prohibits death penalty for rape or sexual battery, even of a child). Even if there may be good arguments as to why a twelve-person jury should be impaneled to try cases involving sexual battery of a child, "[t]hese are issues . . . for resolution in the supreme court in its prospective rule-making capacity." *Palazzolo v. State*, 754 So. 2d 731, 737 (Fla. 2d DCA 2000).

Given the mandatory language of both the statute and the rule, as the ensuing trial does not involve a true capital case, Respondent and the State will be entitled to a six-person, not twelve-person, jury. *See, e.g.*, *State v. Hogan*, 451 So. 2d 844, 845 (Fla. 1984); *Cooper v. State*, 453 So. 2d 67, 68 (Fla. 1st DCA 1984). We grant the petition, quash the order impaneling a twelve-person jury, and remand the case to the trial court for further proceedings consistent with this opinion, namely a trial with a six-person jury.

PETITION GRANTED, ORDER QUASHED, AND MATTER REMANDED.

ORFINGER, EDWARDS, and TRAVER, JJ., concur.