# FIRST DISTRICT COURT OF APPEAL
# STATE OF FLORIDA

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No. 1D19-1315

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REGGIE EUGENE ALLEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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On appeal from the Circuit Court for Bay County.
Christopher N. Patterson, Judge.

June 29, 2020

B.L. THOMAS, J.

Appellant appeals his judgment and sentence, arguing the trial court erred by not instructing the jury on a necessarily lesser included offense for Count I, regardless of whether evidence supported the instruction. We affirm.

*Facts*

Appellant was charged by Amended Information with three counts of sexual battery and one count of lewd or lascivious exhibition. In Count I, Appellant was charged with committing capital sexual battery on a person less than twelve years of age on or between March 25, 2010 and March 24, 2012. In Count II, Appellant was charged with lewd or lascivious exhibition on a

person less than sixteen years of age on or between March 25, 2010 and March 24, 2012. In Count III, Appellant was charged with sexual battery on a person less than twelve years of age on or between March 25, 2012 and March 24, 2014. In Count IV, Appellant was charged with sexual battery on a person twelve years of age or older between March 25, 2014 and March 24, 2016.

Appellant lived with his girlfriend and his girlfriend's daughter, the victim. The victim testified at trial that Appellant had put his mouth on her vagina over twenty times, but there were three incidents that stood out specifically. When the victim was nine years old, she was watching television in the living room when Appellant pulled down her underwear, put his mouth on her vagina, and began masturbating in front of her. When the victim was eleven, Appellant again sexually battered her. After the victim told her mother that Appellant touched her inappropriately, Appellant temporarily moved out of the house but returned a few weeks later. When the victim was thirteen, Appellant sexually battered the victim for a third time.

A jury trial was held, and both the defense and the State questioned the witnesses for specifics on the victim's age and the exact dates that the allegations occurred. Appellant requested a jury instruction of sexual battery as a lesser included offense to the capital sexual battery charge (Count I). However, the State argued that it was illogical to give a lesser included offense for a victim over twelve years old when it was undisputed that the victim was nine or ten years old during the dates alleged for Count I. The trial court denied the request for the jury instruction, holding that it had discretion to determine which instructions to give to the jury based on the facts adduced at trial. The trial court also held it had the power to determine what constituted a necessarily lesser included offense.

On Count I, the jury was instructed as to the lesser included offenses of lewd or lascivious battery on a victim less than sixteen years of age and battery. The jury found Appellant guilty as charged on all four counts. Appellant was sentenced to life imprisonment for sexual battery on a person less than twelve years old (Counts I and III), fifteen years for exhibition (Count II), and thirty years for sexual battery (Count IV). The sentences for

Counts II to IV were to run concurrently with the sentence for Count I.

*Analysis*

Appellant argues the trial court erred by denying his motion to instruct the jury on sexual battery as a category one, necessarily lesser included offense of capital sexual battery. Appellant argues the jury could have found that the sexual battery occurred when the victim was twelve years of age or older because the victim was uncertain as to the times of year the batteries occurred and was inconsistent about where she lived when the batteries occurred. We find this argument unpersuasive in light of the additional counts based on the later dates of sexual offenses, including Count IV – sexual battery. We also find the argument unpersuasive in light of the instructions on Count I, which required the State to prove that the victim was under twelve years of age. *See* § 794.011(2)(a), Fla. Stat. (2018).

Appellant also argues that the trial court's failure to instruct the jury on a necessarily lesser included offense constitutes per se reversible error. The State asserts that even if the trial court erred, the error would be harmless because Appellant is not entitled to an opportunity for a jury pardon when he was convicted of the greater offense.

This Court has previously criticized the jury-pardon doctrine and certified the question to the supreme court. *See Riley v. State*, 25 So. 3d 1 (Fla. 1st DCA 2008), *review dismissed*, *State v. Riley*, 26 So. 3d 1288 (Fla. 2009); *see also Knight v. State*, 267 So. 3d 38 (Fla. 1st DCA 2018), *review granted*, 286 So. 3d 147 (Fla. 2019). The supreme court recently receded from the jury pardon doctrine to "more closely align Florida with the federal courts and other jurisdictions . . . ." *Knight v. State*, 286 So. 3d 147, 153-54 (Fla. 2019).

The supreme court held:

> [I]n *State v. Wimberly*, 498 So. 2d 929 (Fla. 1986), we relied on "the jury's right to exercise its 'pardon power'" as part of the rationale for our interpretation of Florida Rule of Criminal Procedure 3.510(b) and our holding that,

> under that rule, "[t]he trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense." *Id.* at 932. To be clear, in our decision today we do not recede from *Wimberly*.

*Id.* at 154.

In *Wimberly*, the supreme court held that "[t]he trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offense is a necessarily lesser included offense, an instruction must be given." 498 So. 2d at 932. However, the supreme court explained that, "[t]he requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is bottomed upon a recognition of the jury's right to exercise its 'pardon power.'" *Id.* (citing *State v. Baker,* 456 So. 2d 419, 422 (Fla. 1984)).

We cannot assume the Florida Supreme Court intentionally overruled itself *sub silentio*, so we are bound by *Wimberly* but note its rationale may not be consistent with *Knight*. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("[T]his Court does not intentionally overrule itself sub silentio.").[1]

However, nothing in *Wimberly* and *Knight* appears to preclude the trial court from determining whether the lesser included offense constituted a category one necessarily lesser included offense. Trial courts are required to give a requested instruction on a necessarily lesser included offense "[o]nce the judge determines that the offense is a necessarily lesser included offense." *Wimberly*, 498 So. 2d at 932. Although sexual battery is included in the schedule of lesser included offenses as a necessarily lesser included offense, its inclusion does not preclude the trial

[1] The supreme court also held that "[w]here a court encounters an express holding from [the supreme court] on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply [the supreme court's] express holding in the former decision until such time as [the supreme court] recedes from the express holding." *Puryear*, 810 So. 2d at 905.

court from contesting the legal correctness of the instructions. *In re Standard Jury Instructions in Criminal Cases--Instructions 7.8, 7.8(a), 11.1--11.6(a)*, 190 So. 3d 1055 (Fla. 2018)[2]; *Williams v. State*, 957 So. 2d 595, 599 (Fla. 2007) ("However, the Schedule of Lesser Included Offenses included in the Florida Standard Jury Instructions is not the final authority on lesser included offenses.").

On its face, the offense of sexual battery cannot constitute a necessarily lesser included offense of capital sexual battery. "Necessarily lesser included offenses are those offenses in which the statutory elements of the lesser included offense are *always* subsumed within those of the charged offense." *Sanders v. State*, 944 So. 2d 203, 206 (Fla. 2006) (emphasis added).

In the present case, the statutory elements of sexual battery are not always subsumed within the elements of capital sexual battery. *See id.* Sexual battery requires the victim be between twelve and eighteen years of age whereas capital sexual battery requires the victim be less than twelve years of age. §§ 794.011(2)(a),(5), Fla. Stat. Therefore, under the definition of a necessarily lesser included offense set forth in *Sanders*, sexual battery is not a necessarily lesser included offense to capital sexual battery as the elements regarding the age of the victim from the lesser offense are not always subsumed within those of the charged offense of capital sexual battery. *See Lowery v. State*, 276 So. 3d 381, 392 (citing *Sanders*, 944 So. 2d at 206). Accordingly, the trial court did not err by failing to give the requested instruction because sexual battery is not a necessarily lesser included offense to capital sexual battery.

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[2] Although the supreme court authorized the publication and use of the standard jury instruction, it "express[ed] no opinion on their correctness and remind[ed] all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions." *In re Standard Jury Instructions in Criminal Cases--Instructions 7.8, 7.8(a), 11.1--11.6(a)*, 190 So. 3d at 1056.

In light of the supreme court's recent abrogation of the jury pardon doctrine in *Knight* but continued support of *Wimberly*, we ask the Florida Supreme Court to resolve the following question, which we certify to be of great public importance:

> IS THE SCHEDULE OF LESSER INCLUDED OFFENSES PROMULGATED BY THE FLORIDA SUPREME COURT IN 2018 IN ERROR IN CLASSIFYING SEXUAL BATTERY (§ 794.011(5)) AS A NECESSARILY LESSER INCLUDED OFFENSE OF CAPITAL SEXUAL BATTERY (§ 794.011(2)(A), FLA. STAT. (2018))?

AFFIRM; QUESTION OF GREAT PUBLIC IMPORTANCE CERTIFIED.

WOLF and ROBERTS, JJ., concur.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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Andy Thomas, Public Defender, Greg Caracci, Assistant Public Defender, and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and David Welch, Assistant Attorney General, Tallahassee, for Appellee.