DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

TAVARIS DAVIS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D16-1383

[June 28, 2017]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jack Schramm Cox, Judge; L.T. Case No. 502015CF007988A.

Carey Haughwout, Public Defender, and Emily Ross-Booker, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Rachael Kaiman, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

The defendant appeals from his conviction on only Count V, aggravated assault with a firearm. He argues that the trial court should have granted his motion for judgment of acquittal on that count because the alleged victim was a one-and-a-half year old child, and no competent evidence existed that the child experienced fear, an essential element of assault. *See* § 784.011(1), Fla. Stat. (2015) ("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*.") (emphasis added).

The state concedes that, pursuant to case law, this court should reverse the defendant's conviction on only Count V and remand for the trial court to vacate the defendant's conviction and sentence on that count. *See Pray v. State*, 571 So. 2d 554, 555 (Fla. 4th DCA 1990) ("There was no evidence of the five month old infant victim's perceptions or feelings and thus there was inadequate proof of an assault."). We accept the state's concession.

The defendant also appeals from his sentences on the other five counts for which he was convicted: (I) home invasion robbery with a firearm against victim one; (II) third degree grand theft, as a lesser included offense of robbery with a firearm, against victim two; (III) aggravated assault with a firearm against victim three; (IV) aggravated assault with a firearm against victim two; and (VI) false imprisonment while in possession of a firearm against victim one. He argues that the trial court committed fundamental error by not explaining the sentences it imposed, even though the sentences fell within statutory limits. He also requests that we certify a question of great public importance as to this argument. Without further discussion, we affirm as to this argument and deny the request to certify a question of great public importance. *See Alfonso-Roche v. State*, No. SC16-1010, 2016 WL 3271894 at *1 (Fla. June 15, 2016) (denying petition for review of certified question of great public importance on related sentencing issue).

Reversed and remanded to vacate conviction and sentence on Count V; sentences affirmed on Counts I, II, III, IV, and VI; request to certify question of great public importance denied.

WARNER and FORST, JJ., concur.
GERBER, J., concurs with an opinion.

GERBER, J., concurring.

Based on the state's concession that this court should reverse the defendant's conviction on only Count V, I am willing to concur in the majority's decision to accept that concession.

However, our acceptance of the state's concession under the evidence presented in this case should not be read as an acceptance that a very young child is incapable of experiencing and demonstrating "a well-founded fear . . . that such violence is imminent," an essential element of assault. *See* § 784.011(1), Fla. Stat. (2015) ("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.*") (emphasis added).

Victim three testified he was holding the child when the defendant ran past him. The defendant pointed a gun at victim three's head. When victim three was asked whether the defendant pointed the gun at the child, victim three answered, "She was in my arms, so she was pretty close so it

could have hit her." Victim three testified he was in fear that both he and the child could be shot. Victim one testified that immediately after the incident, the adult victims were hysterical, screaming, and crying, and the child also was crying.

Was the child crying because that is what one-and-a-half year old children do from time to time? Or was the child crying because the child's innate sense of fear was alerted by the defendant's violent actions and the adult victims' reactions of hysteria, screaming, and crying?

While I recognize that a one-and-a-half year old child's cognitive and communicative abilities are limited, we do not know at what point in a child's development that a child experiences fear. Thus, I write separately to emphasize that our acceptance of the state's concession under the evidence presented in this case should not be read as an acceptance that a very young child is incapable of experiencing and demonstrating "a well-founded fear . . . that such violence is imminent," an essential element of assault. *See* § 784.011(1), Fla. Stat. (2015).

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Not final until disposition of timely filed motion for rehearing.