NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

J.F.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D18-1619
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Opinion filed December 11, 2019.

Appeal from the Circuit Court for Lee County; Robert Branning, Judge.

Howard L. Dimmig, II, Public Defender, and Joanna Beth Conner, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kelly O'Neill, Assistant Attorney General, Tampa, for Appellee.

LaROSE, Judge.

J.F. appeals an order finding him delinquent of lewd or lascivious conduct. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A); 9.145(b)(1). The State charged J.F. with attempted sexual battery on a child less than twelve years of age. Because lewd or lascivious conduct is not a lesser included offense of the charged crime, we reverse.

Background

In an amended delinquency petition, the State alleged that J.F. committed the delinquent act of attempted sexual battery on a child less than twelve years of age, a second-degree felony. §§ 794.011(2)(b), Fla. Stat. (2015) ("A person less than 18 years of age who commits sexual battery upon . . . a person less than 12 years of age commits a life felony."); 777.04(4)(c), Fla. Stat. (2015) ("[I]f the offense attempted . . . is a life felony . . . the offense of criminal attempt . . . is a felony of the second degree . . . .").

The parties presented conflicting evidence at the adjudicatory hearing. The victim testified that while she was retrieving clothes from her room, J.F. entered the room, pushed her face down on the bed, pushed his hand down on her back, pulled her underwear down, and told her, "Don't move, it won't go in." The victim described J.F.'s "private area" touching her "private area . . . in the back." An analysis of T.M.'s underwear uncovered epithelial and sperm DNA. J.F. was not the source.

J.F. denied assaulting, much less touching, anyone. He stated that he was watching a movie in the victim's bedroom; she entered and told him she had to grab some clothes. "So like, you know, her being a girl I didn't want to see like the stuff that she was grabbing or whatever like her [purse] and stuff, so it's like I'm going to get up and turn my back."

Apparently, J.F. and the victim were alone for somewhere between two and five minutes. The victim's mother then entered the room; J.F. went into a closet and the victim ran to the bathroom.

At the conclusion of the hearing, the trial court ruled as follows:

Okay. The allegation, the charge that's been made is sexual assault by a person under the age of 18 against a victim under the age of 12. . . . [I]t's interesting that there are places where both sides, State and Defense, agree on points, and obviously they disagree on others.

[T]he victim . . . did testify, and based on the questions that we heard in court, and the cross-examination that had to occur, that her testimony has been in summary consistent with her testimony with CPT, and her story to Detective Morel that evening.

It's also of note is [sic] that the testimony by [J.F.] has been consistent. And it's of note that in the minutes that this had to occur . . . what is agreed on is that at some point in time [J.F.] and the victim were in the room with no other persons present.

What is also interesting to note is that every one [sic] seems to agree that [J.F.] was by the wall or near the closet at the time that the child's mother entered the room.

So you've got a situation where multiple acts are alleged to have occurred, and in a vacuum of not knowing when they might be discovered, the Defendant would have gotten up and chosen to stand by the closet already formulating a defense.

As agreed on by both counsel, there is no scientific or objective evidence that would give this Court any indication either way of what happened. . . .

In summary, this is question of timing, of nuance, and definitely a situation where the truth or at least the decision has to be done in a field that is somewhat mirky [sic] with the facts, and how they have been related to the Court.

[J.F.], I will not find you guilty of the petition charged. I am going to, however, find you guilty of a lesser included offense 800.04 subsection six, lewd conduct. You are adjudicated of the same. It is a third degree felony.[1]

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[1]Despite the oral pronouncement of adjudication, the disposition order, rendered more than three months later, contains a handwritten notation indicating that the trial court had reconsidered and elected to withhold adjudication. Neither party complains of this seemingly sua sponte modification.

Following the hearing, J.F. sought rehearing, arguing that the trial court erred "in finding [J.F.] guilty of an offense that is neither a Category 1 [necessary] lesser included offense, nor a Category 2 [permissive] lesser included offense," where the allegations in the charging document fail to include elements of lewd or lascivious conduct. J.F.'s counsel "concede[d]" that "the only [necessary lesser included offense] is battery." The trial court denied rehearing and J.F. timely appealed.

Analysis

As he did in the trial court, J.F. claims that he could not be adjudicated delinquent for lewd or lascivious conduct because it was not a lesser included offense to the charged crime. The State concedes that J.F. was adjudicated improperly of "a crime not charged in the charging instrument." We agree.

I. Impropriety of lewd or lascivious conduct adjudication

A conviction on a charge not contained in the charging document is a denial of due process. L.C.G. v. State, 91 So. 3d 197, 198 (Fla. 2d DCA 2012) ("It is generally a denial of due process of law to convict a defendant of an uncharged crime."); see, e.g., N.H.M. v. State, 974 So. 2d 484, 485 (Fla. 2d DCA 2008) (holding that petition alleging robbery by force was insufficient to find juvenile committed battery as a permissive lesser included offense).

"A relevant exception to the general rule includes convictions for lesser-included offenses—those which are either necessarily included because their 'constituent elements are included within the elements of the greater offense,' or whose 'elements are included in the accusatory pleading and sustained by the evidence.' " L.C.G., 91 So. 3d at 198 (quoting D.L. v. State, 491 So. 2d 1243, 1244 (Fla. 2d DCA 1986)); see also Fla. R. Crim. P. 3.510(b) ("On an . . . information on which the

defendant is to be tried for any offense the jury may convict the defendant of . . . any offense that as a matter of law is a necessarily included offense or a lesser included offense of the offense charged . . . .").

There is a distinction between necessary and permissive lesser included offenses:

> Lesser included offenses fall into two categories: necessary and permissive. 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. A permissive lesser included offense exists when "the two offenses appear to be separate [on the face of the statutes], but the facts alleged in the accusatory pleadings are such that the lesser [included] offense cannot help but be perpetrated once the greater offense has been."

Sanders v. State, 944 So. 2d 203, 206 (Fla. 2006) (alterations in original) (citation omitted) (quoting State v. Weller, 590 So. 2d 923, 925 n.2 (Fla. 1991)).

The amended delinquency petition simply alleged that J.F., while "under the age of eighteen years, did unlawfully attempt to commit a sexual battery upon T.M., a child less than 12 years of age, by anal and/or vaginal penetration."

The elements of the alleged offense are three-fold: (1) the defendant attempted to commit an act upon the victim in which the sexual organ of the defendant penetrated or had union with the anus/vagina/mouth of the victim; (2) the victim was less than 12 years of age at the time of the offense; and, (3) the defendant was under age 18 at the time of the offense. §§ 794.011(2)(b), 777.04; cf. Miller v. Dugger, 565 So. 2d 846, 848 (Fla. 1st DCA 1990) ("Section 794.011(1)(h), Florida Statutes (1987), defines sexual battery as the oral, anal, or vaginal penetration by, or union with, the sexual organ of another. An attempt involves two elements: (1) the specific intent to commit the crime, and (2) a separate, overt, ineffectual act done towards the

commission of the crime. . . . The elements of attempted sexual battery are (1) the specific intent to commit sexual battery, and (2) a separate overt, ineffectual act done toward the commission of sexual battery." (citations omitted)).

The statute under which J.F. was adjudicated provides that an individual who "[i]ntentionally touches a person under 16 years of age in a lewd or lascivious manner . . . commits lewd or lascivious conduct." § 800.04(6)(a), Fla. Stat. (2015). As is obvious, lewd or lascivious conduct contains an element not included in the offense of sexual battery on a child, namely, touching in a lewd or lascivious manner. Consequently, lewd or lascivious conduct is not a necessary included offense.

The State also acknowledges that lewd or lascivious conduct is not a permissive lesser included offense; the facts alleged in the amended delinquency petition are not "such that the lesser [included] offense cannot help but be perpetrated once the greater offense has been." Sanders, 944 So. 2d at 206 (quoting Weller, 590 So. 2d at 925 n.2); see also Khianthalat v. State, 974 So. 2d 359, 361 (Fla. 2008) ("Upon request, a trial judge must give a jury instruction on a permissive lesser included offense if the following two conditions are met: '(1) the indictment or information must allege all the statutory elements of the permissive lesser included offense; and (2) there must be some evidence adduced at trial establishing all of these elements.' We recently reiterated this longstanding rule of law by stating that '[a]n instruction on a permissive lesser included offense is appropriate only if the allegations of the greater offense contain all the elements of the lesser offense and the evidence at trial would support a verdict on the lesser offense.' " (citation omitted) (first quoting Jones v. State, 666 So. 2d 960, 964 (Fla. 3d DCA 1996), then quoting Williams v. State, 957 So. 2d 595, 599 (Fla. 2007))). The amended delinquency petition did not allege that the act was

committed in a lewd or lascivious manner and the State presented no evidence on this point at the hearing. Cf. Egal v. State, 469 So. 2d 196, 197 (Fla. 2d DCA 1985) ("The term 'lewd and lascivious' has been referred to as generally and usually involving 'an unlawful indulgence in lust, eager for sexual indulgence.' " (quoting Chesebrough v. State, 255 So. 2d 675, 678 (Fla. 1971))).

Garcia v. State, 976 So. 2d 676 (Fla. 2d DCA 2008), is instructive. There, the defendant was charged with capital sexual battery and requested a jury instruction on lewd or lascivious molestation as a permissive lesser included offense. Id. at 677. The trial court refused to give the instruction. Id. We approved of the trial court's ruling, explaining that Mr. Garcia was not entitled to the requested instruction because the charging document did not allege that he touched the victim in a lewd or lascivious manner, an essential element of that offense. Id. at 677-78. For, "[a]lthough a particular act of sexual battery might also subsume the intentional touching (of the specified anatomical areas) element of the lewd or lascivious molestation statute, it does not follow that the particular act was necessarily committed in a 'lewd or lascivious manner.' " Id. at 678.

As in Garcia, the charging document against J.F. omits an essential element of lewd or lascivious conduct. Cf. Riley v. State, 25 So. 3d 1, 3 (Fla. 1st DCA 2008) ("[L]ewd or lascivious molestation is not a permissive lesser included offense of capital sexual battery where, as here, the information does not allege that the touching was in a lewd or lascivious manner."). Consequently, we reverse the order withholding adjudication for the delinquent act of lewd or lascivious conduct.

II. The appropriate remedy

Despite the State's concession, the parties dispute the appropriate remedy. J.F. argues for discharge. The State counters that the "proper remedy is to remand to the trial court to determine whether evidence was sufficient to find J.F. committed battery." The State has the better argument.

Simple battery is a necessary lesser included offense to attempted sexual battery on a child less than twelve years of age. Fla. Std. Jury Instr. (Crim.) Schedule of Lesser Included Offenses, § 794.011(2)(b); see also Khianthalat, 974 So. 2d 359, 362 (Fla. 2008) ("[I]n a prosecution for sexual battery on a child eleven years of age or younger, lack of consent is always an element because of the conclusive presumption that a child that age cannot consent. Thus, because lack of consent is an element of sexual battery under subsection (2)(a), the offense always includes a charge of simple battery as a necessarily lesser-included offense . . . . " (quoting Khianthalat v. State, 935 So. 2d 583, 586 (Fla. 2d DCA 2006))). Consequently, the trial court should have considered battery as a necessary lesser included offense. See State v. Montgomery, 39 So. 3d 252, 259 (Fla. 2010) ("At trial, the jury must be instructed on [necessary] lesser included offenses . . . ."); Bryant v. State, 932 So. 2d 408, 410 (Fla. 2d DCA 2006) ("[F]ailure to give a requested jury instruction on a necessarily lesser-included offense is per se reversible error.").

In N.H.M., 974 So. 2d at 485, we reversed the juvenile's adjudication for battery as a permissive lesser included offense to robbery, the delinquent act alleged in the delinquency petition. In remanding the case, we instructed that the trial court "may consider whether the evidence was sufficient to find N.H.M. committed an assault. Assault is a necessary lesser-included offense of robbery." Id. at 486. Further, we

observed that "[t]he elements of assault were specifically alleged in the petition, and N.H.M.'s counsel conceded that the court could find N.H.M. guilty of assault when the court indicated it was considering an adjudication for battery." Id. at 486-87. Similarly, here, defense counsel conceded that battery was a necessary lesser included offense.

We reject J.F.'s claim that he is entitled to discharge. Florida Standard Jury Instruction 3.4 provides, in part, that if the jury "decide[s] that the main accusation has not been proved beyond a reasonable doubt, [the jury] will next need to decide if the defendant is guilty of any lesser included crime." The finder-of-fact, the trial court in our case, must proceed with a review of the evidence to determine whether the elements of the charged offense have been proven beyond a reasonable doubt. In doing so, the fact finder begins with the charged offense and works through any lesser included offenses in declining order of gravity for each of the offenses. This systematic application of the law to the facts necessarily ceases upon a finding of guilt for the most severe offense. Accordingly, the trial court's adjudication on an offense that was neither a necessary nor permissive lesser included offense prevented it from conducting a complete and comprehensive determination as to whether J.F. committed any lesser included delinquent act. Certainly, it is not within our purview to do so in the first instance.[2] Cf. Farneth v. State, 945 So. 2d 614, 617 (Fla. 2d DCA 2006) ("A

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[2]Section 924.34, Fla. Stat. (2015), provides as follows:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.

fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact."). On remand, the trial court may determine whether, based upon the evidence presented at the adjudicatory hearing, J.F. committed any lesser included offense, including battery. See N.H.M., 974 So. 2d at 487 n.1 ("We do not mandate this result.").

Reversed and remanded with instructions.

CASANUEVA and KELLY, JJ., Concur.

However, the statute is inapposite here, as we are not deciding that the evidence fails to prove the offense of lewd or lascivious conduct. Rather, as explained above, we reverse because the offense for which J.F. was found delinquent was not a lesser included offense. It is not proper for this court, in the first instance, to find J.F. delinquent of a necessary lesser included offense, when the trial court, in the first instance, failed to do so.