Third District Court of Appeal

State of Florida

Opinion filed July 17, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-1666
Lower Tribunal No. 12-220-A-M

Benjamin Aquino,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Monroe County, Ruth Becker, Judge.

Eugene F. Zenobi, Criminal Conflict and Civil Regional Counsel, Third Region, and Roberta G. Mandel and Silvia Maria Gonzalez, Assistant Regional Counsels, for appellant.

Ashley Moody, Attorney General, and Jeffrey R. Geldens, Assistant Attorney General, for appellee.

Before SCALES, HENDON, and MILLER, JJ.

HENDON, J.

The defendant, Benjamin Aquino, appeals from his conviction and sentence

for lewd or lascivious conduct by a person eighteen years or over involving a victim under sixteen years of age, in violation of section 800.04(6)(a) & (b), Florida Statutes (2012).[1] The defendant contends that (A) trial counsel's failure to move for a judgment of acquittal based on the sufficiency of the evidence constitutes fundamental error, and (B) trial counsel provided ineffective assistance of counsel by failing to move for a judgment of acquittal based on the sufficiency of the evidence and by objecting to the State's request to instruct the jury on the lesser offense of attempted lewd or lascivious conduct. For the reasons that follow, we affirm.

I. Facts

The defendant was charged by information with one count of lewd or lascivious conduct. Specifically, the information states that the defendant, a person eighteen years or older, between July 1, 2012 and September 2, 2012, "did unlawfully and intentionally touch C.E.M., a person less than 16 years of age, in a

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[1] Section 800.04(6)(a) and (b) provides:

> (6) **LEWD OR LASCIVIOUS CONDUCT.—**
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> (a) a person who:
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> 1. Intentionally touches a person under 16 years of age in a lewd or lascivious manner; or
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> 2. Solicits a person under 16 years to commit a lewd or lascivious act
>
> commits lewd or lascivious conduct.
>
> (b) An offender 18 years of age or older who commits lewd or lascivious conduct commits a felony of the second degree . . . .

lewd or lascivious manner {or} did solicit C.E.M. to commit a lewd or lascivious act, by grabbing victim and forcing her to sit on his lap and forcibly kissing her neck, contrary to Florida Statute 800.04(6)(a) and (b)."

At the jury trial, the State called C.E.M. ("the victim") and others to testify against the defendant. The victim testified that the defendant and her father were neighbors, and she was friends with the defendant's son, Jonathan. On September 2, 2012, when she was fourteen years old, she walked over to the defendant's home around 11:00 p.m. because her father told her earlier that evening that Jonathan wanted to talk to her. When she arrived, the defendant told her that Jonathan was sleeping, and she entered to confirm that Jonathan was indeed sleeping. The defendant, who was sitting on a couch, grabbed the victim's arm, pulled her onto his lap, and began to kiss her neck while his hands were midway on her thigh. The victim sat on the defendant's lap for about thirty seconds before getting off. The victim thought about leaving, but did not because she remembered a conversation she had with the defendant about sharp knives that were on the wall of his home. The defendant then moved from the couch to a loveseat, and he called her over. Despite being scared, the victim sat next to him on the loveseat. The defendant then told the victim, "You're a beautiful girl. You're not a baby anymore. You're a grownup." The defendant then asked the victim if she knew that he liked her, and in response, the victim said, "No." The victim was wearing a skirt and a tank top

with a bathing suit underneath, and the defendant then began to play with the hem of the victim's skirt and asked her to allow him to see her bathing suit. She "swatted his hand away because it felt weird," but she lifted the strap of her tank top and exposed the strap of her bathing suit because she thought if he could see the color of her bathing suit, he would then leave her alone. He also asked the victim if he could have a picture of her. The victim then got "really uncomfortable" and began to exit. As she was exiting, the defendant asked her if she was going to tell anybody, and the victim said, "No."

The victim also testified as to an incident that occurred about two months prior to the September 2nd incident. While at the defendant's home, the defendant wanted to teach his son, Jonathan (who was then about ten years old), how to kiss a girl. The victim testified that the defendant wanted to use her "like a little guinea pig," and the defendant tried to kiss the victim, but she covered her mouth with her hand.

After the State rested, trial counsel moved for a judgment of acquittal, but the motion was not based on the sufficiency of the evidence. Following the denial of the motion, the defendant testified on his own behalf. He testified that the victim did not come over to his home on September 2, 2012 at approximately 11:00 p.m., nothing occurred between him and victim, and the victim was lying.

During the charge conference, the State requested instructions on the lesser charges of battery and of attempted lewd or lascivious conduct. Defense counsel

objected to the instruction on attempted lewd or lascivious conduct. In response to trial counsel's objection, the trial court stated that the evidence was that the defendant grabbed the victim's arm, put her on his lap, and kissed her neck, and, if the jury believed the victim, the crime was completed. The State then agreed to proceed only with the lesser charge of battery.

The jury found the defendant guilty of lewd or lascivious conduct, and the trial court sentenced the defendant to five years in prison followed by ten years of probation. The defendant's appeal followed.

II. Issues

As stated earlier, the defendant contends that (A) trial counsel's failure to move for a judgment of acquittal based on the sufficiency of the evidence constitutes fundamental error, and (B) trial counsel provided ineffective assistance of the counsel by not moving for a judgment of acquittal based on the sufficiency of the evidence and by objecting to the State's request to instruct the jury on the lesser offense of attempted lewd or lascivious conduct.

III. Analysis

(A) Failure to move for a judgment of acquittal based on the sufficiency of the evidence

In Monroe v. State, 191 So. 3d 395 (Fla. 2016), the Florida Supreme Court addressed the standard for fundamental error based on an unpreserved challenge to the sufficiency of the evidence:

> We have even more narrowly applied the fundamental error doctrine to alleged errors of insufficient evidence. There are only two instances in which an unpreserved challenge to the sufficiency of the evidence can be reviewed: (1) the mandatory review by this Court of the evidence by which a capital defendant was convicted and sentenced to death; and (2) when there is insufficient evidence that a defendant committed any crime. Challenges to the sufficiency of the evidence inherently question the conclusions of the fact-finder, a process that we, as an appellate court, are reluctant to undertake. Appellate courts should more closely concern themselves with the legal sufficiency of the evidence, rather than the weight assigned to or the credibility of the evidence before the trial court. Therefore, when an appellate court conducts a sufficiency review, it deferentially reviews all of the evidence in the record in the light most favorable to the government to determine whether a rational trier of fact could have reached the verdict.

Id. at 401-02 (citations omitted); see also F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003) (holding that as to the second exception set forth in Monroe, the failure to move for a judgment of acquittal constitutes fundamental error only if "the evidence is insufficient to show that a crime was committed at all").

Pursuant to the standard jury instruction, the trial court instructed the jury as follows: "The words 'lewd' and 'lascivious' mean the same thing and mean a wicked, lustful, unchaste, licentious or sensual intent on the part of the person doing an act." Based on this definition, there was sufficient evidence from which a jury could determine that the defendant committed the offense of lewd or lascivious conduct. Based on the victim's testimony, the defendant, a fifty-six-year-old person, grabbed the arm of the fourteen-year-old victim while no one else was present in the area, pulled her onto his lap, and then began to kiss her neck while his hand was on

her thigh. While this was occurring, the fourteen-year-old victim felt scared. After she got off of his lap, he called her over, and she sat down next to him, and he made the following comments to her: "You're a beautiful girl. You're not a baby anymore. You're a grownup." He also inquired into whether she knew that he liked her. The victim's testimony, if believed by the jury, was sufficient to show that the defendant committed the offense of lewd or lascivious conduct. Thus, trial counsel's failure to move for a judgment of acquittal based on the sufficiency of the evidence does not constitute fundamental error.

(B) Ineffective Assistance of Counsel

"Although a defendant may raise a claim of ineffective assistance of trial counsel on direct appeal, in order to obtain relief on direct appeal, he must demonstrate ineffective assistance of counsel which is clear on the face of the record." Watkins v. State, 224 So. 2d 256, 258 (Fla. 3d DCA 2017) (citations omitted); see also Desire v. State, 928 So.2d 1256, 1257 (Fla. 3d DCA 2006) ("As a general rule, claims of ineffective assistance of counsel are not ordinarily cognizable on direct appeal. The exception is when the error is apparent on the face of the record, which is rarely the case."); Corzo v. State, 806 So. 2d 642, 645 (Fla. 2d DCA 2002) ("The general rule is that a claim of ineffective assistance of counsel may not be raised on direct appeal. On rare occasions, the appellate courts make an exception to this rule when the ineffectiveness is obvious on the face of the appellate record,

the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable."). When a claim of ineffective assistance of trial counsel is not clear on the face of the record, the claim can be presented in a postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850. See Derisma v. State, 14 So. 3d 262, 263 (Fla. 4th DCA 2009).

In the instant case, as the defendant's claim of ineffective assistance of counsel is not apparent on the face of record, we do not address the claim on direct appeal and affirm his conviction and sentence for lewd or lascivious conduct. However, we do so without prejudice to the defendant raising his claim of ineffective assistance of counsel in an appropriate 3.850 motion.

IV. Conclusion

Based on the above analysis, we affirm the defendant's conviction and sentence for lewd and lascivious conduct without prejudice to the defendant raising his claim of ineffective assistance of counsel in an appropriate 3.850 postconviction motion.

Affirmed without prejudice.