

# Third District Court of Appeal

## State of Florida

Opinion filed August 5, 2020.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D19-180  
Lower Tribunal No. 18-165-A-K

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**Miguel Pestano,**  
Appellant,

vs.

**The State of Florida,**  
Appellee.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge.

Carlos J. Martinez, Public Defender, and James A. Odell, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Christina L. Dominguez, Assistant Attorney General, for appellee.

Before EMAS, C.J., and HENDON and GORDO, JJ.

GORDO, J.

Appellant, Miguel Pestano appeals from a conviction and sentence imposed after a jury found him guilty of one count of sexual battery. Because Pestano's acts were part of a single criminal episode, we conclude there was no fundamental error and affirm the conviction and sentence.

On the night of the incident, Pestano approached the victim on a bicycle as she was walking toward a Key West marina. The victim was wearing a boot over her broken foot and he offered to help her carry her belongings, including a backpack and her cellphone. He then rode away from the victim with her belongings while she struggled to keep up. Pestano told the victim his boat was nearby and offered to let her stay on his boat with him and his girlfriend rather than hobble the rest of the way to the marina. After an exchange in which the victim told him she was not interested in being alone with him or having sex, she agreed. The victim boarded Pestano's kayak, which started filling up with water before they reached the boat, and she ended up swimming in a state of panic toward the boat. There was no one else on the boat.

The victim didn't realize that Pestano had left her belongings on dry land until she reached the boat. She was unable to change into dry clothes or use her cellphone to call for help so she wrapped herself in towels and fell asleep. The victim woke up as Pestano began performing oral sex on her. She told him to stop and closed her legs. She became terrified of him, but fearing having to swim to dry land in shark

infested waters, did not leave. The victim cried and repeatedly refused him, but he continued to attack her throughout the night, penetrating her with his penis three to four times. It was dark, there was no clock on the boat and the victim was unable to gauge how much time passed between attacks.

The State charged Pestano with two counts of sexual battery: Count I for sexual battery by penile penetration or union with the victim's vagina and Count II for sexual battery by oral penetration or union with the victim's vagina. The jury found him guilty as to Count I and not guilty as to Count II.

On appeal, Pestano argues the trial court erred by allowing the State to present multiple instances of sexual battery in support of a single charge. "Because this argument is being made for the first time on appeal, the issue is reviewed for fundamental error." Cherfrere v. State, 277 So. 3d 611, 614 (Fla. 4th DCA 2019) (citing State v. Kettell, 980 So. 2d 1061, 1068 (Fla. 2008)) ("[U]npreserved claims of error cannot be raised on appeal absent fundamental error."). "Fundamental error is error that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Id. (quoting Krause v. State, 98 So. 3d 71, 73 (Fla. 4th DCA 2012)).

Pestano contends that permitting the State to present evidence of multiple instances of sexual battery in support of a single charge creates the potential for a non-unanimous verdict. He argues that each unwanted sexual act is distinct and

must be charged by separate counts in the information. “In determining what qualifies as a distinct act for purposes of deciding whether multiple acts can be charged in a single count, the spatial and temporal aspects of the multiple occurrences must be analyzed . . . .” Binns v. State, 979 So. 2d 439, 442 (Fla. 4th DCA 2008) (quoting Eaddy v. State, 789 So. 2d 1093, 1095 (Fla. 4th DCA 2001)). “The proper analysis to determine whether offenses arise from the same criminal episode requires consideration of the following factors: 1) whether separate victims are involved; 2) whether the crimes occurred in separate locations, and 3) whether there has been a temporal break between the incidents.” Judd v. State, 839 So. 2d 830, 831 (Fla. 4th DCA 2003) (quoting Russo v. State, 804 So. 2d 419, 420–21 (Fla. 4th DCA 2001)).

In this case, the evidence at trial showed that multiple acts of penile penetration involved the same victim, occurred in the same location and occurred continuously over the course of a few hours. The acts were not definitively temporally separated, but rather part of an ongoing criminal episode. As such, we conclude there was nothing improper about the way Pestano was charged. While we note that multiple punishments are not conclusively prohibited where the same victim is sexually battered multiple times in one criminal episode, such is only the case where acts are distinct and temporally separated. Graham v. State, 207 So. 3d 135, 141 (Fla. 2016) (“Blockburger ultimately provides . . . where the defendant is

convicted multiple times under the same statute for acts that occurred during the course of a single criminal episode, a ‘distinct acts’ test is used . . . .”); Schwenn v. State, 898 So. 2d 1130, 1132 (Fla. 4th DCA 2005) (“[T]he fact that the same victim is sexually battered in the same manner more than once in a criminal episode by the same defendant does not conclusively prohibit multiple punishments.” (quoting Saavedra v. State, 576 So. 2d 953, 957 (Fla. 1st DCA 1991))); State v. Dell’Orfano, 651 So. 2d 1213, 1216 (Fla. 4th DCA 1995) (“Where it is reasonable and possible to distinguish between specific incidents or occurrences, . . . then each should be contained in a separate count of the accusatory document.”).

Based on the factual circumstances of this case, in which Pestano sexually battered the same victim multiple times during one criminal episode, we determine there was no fundamental error affecting the validity of the jury’s unanimous verdict.

Affirmed.