Nixon

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Nathan Ira Nixon — PETITIONER
(Your Name)

VS.

State of Florida — RESPONDENT(S)

PROOF OF SERVICE

I, Nathan Ira Nixon, do swear or declare that on this date, 4/20/2023, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Office of the attorney General
First District Court of appeal
Tallahassee, Fla. 32399

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4/20, 2023

(Signature)

Nixon

Appendix A

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-242

NATHAN I. NIXON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition Alleging Ineffective Assistance of Appellate Counsel—Original Jurisdiction.

April 6, 2022

B.L. THOMAS, J.

Nathan Nixon was charged with three counts of sexual battery on a person less than twelve years old, based on acts alleged to have occurred in 2002. Petitioner abused the nine-year-old victim—his daughter—multiple times during a two-week period. He performed oral sex on her, had the victim perform oral sex on him, and attempted to engage in sexual intercourse with her.

At trial, the victim testified that she lived with Petitioner from the ages of two to ten. Other than occasional visits from her two younger stepbrothers, the victim lived alone with Petitioner. The victim suffered from cervical cancer as a child, which she

Appendix "A"

Nixon

Appendix A

contracted at birth. Her doctor said it was not terminal, but Petitioner told her that she would die by the age of five. Once she turned five, Petitioner told her that she would die at the age of seven. Then upon turning seven, Petitioner told her that she would die at the age of nine.

The victim further testified that Petitioner started talking to her about sex around the age of seven or eight. She was just short of ten years old when Petitioner committed these crimes. The victim then detailed the sexual abuse Petitioner subjected her to.

The victim went into foster care when she was around ten years old. She did not immediately disclose the abuse, because Petitioner was the "only person she had" in her life. When she was eleven, the victim disclosed the abuse to her counselor at the children's home, and law enforcement was contacted.

But the victim did not hear from law enforcement again until she was twenty-five years old, when she was contacted by the United States Marshals Service (Marshals). During the intervening fourteen years, she had never spoken to Petitioner. The Marshals asked for her assistance in locating Petitioner. The victim managed to get in contact with Petitioner through Petitioner's son. Petitioner had fled to Mexico. He was apprehended in 2017 and extradited to the United States.

Petitioner told law enforcement that he fled in 2003. He admitted that he talked to the victim when she was eight-years old about sex "to educate her," so she would be able to capture a man and become more sexually active at an early age due to her health concerns. But he denied having any type of sexual contact with the victim, and he alleged that she had twisted the discussion.

A jury found Petitioner guilty of three counts of lewd and lascivious battery, a lesser-included offense. The court sentenced him to thirty years in prison.

On direct appeal, Petitioner's counsel argued that the trial court fundamentally erred by instructing the jury on lewd and lascivious battery, that defense counsel was ineffective in not objecting to the instruction and not moving for a judgment of acquittal notwithstanding the verdict, and that the trial court

Appendix "A"

Nixon

Appendix A

erred by allowing the victim to testify that Petitioner repeatedly told her that she would die at a young age. This Court per curiam affirmed Petitioner's judgment and sentence. *Nixon v. State*, 299 So. 3d 1038 (Fla. 1st DCA 2020).

Petitioner also sought relief in the lower court by filing a postconviction motion under Florida Rule of Criminal Procedure 3.800(a), in which he argued that his sentences were illegal because he was convicted of the uncharged offenses of lewd or lascivious battery. He argued that the instructions and conviction were inappropriate and illegal because lewd or lascivious battery applies only when the victim is between 12 and 16 years old, but the information and evidence showed the victim was 9 or 10 years old. The lower court denied his claim, and this Court affirmed the lower court's order, again without opinion. *Nixon v. State*, 327 So. 3d 266 (Fla. 1st DCA 2021).

Petitioner now argues that his appellate counsel was ineffective for failing to raise certain arguments in his direct appeal. Claims of ineffective assistance of appellate counsel are reviewed under the same criteria applicable to claims of ineffective assistance of trial counsel. *Wickham v. State*, 124 So. 3d 841, 863 (Fla. 2013) ("The standard of review for ineffective appellate counsel claims mirrors the *Strickland* standard for ineffective assistance of trial counsel."). To prevail, a defendant must establish that counsel's performance was deficient *and* prejudicial; if one prong fails, it is unnecessary to consider the other prong. *State v. Barnes*, 24 So. 3d 1244, 1248 (Fla. 1st DCA 2009). To establish deficiency, a defendant must show that counsel's performance was unreasonable under "prevailing professional norms." *Id.* To establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* Further, to show prejudice, a petition must show that the failure or deficiency compromised "the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision." *Johnson v. Wainwright*, 463 So. 2d 207, 209 (Fla. 1985). Petitioner cannot prevail under either prong as his claims are without merit.

Appendix "A"

Nixon

Appendix A

Petitioner claims that appellate counsel should have argued that his convictions for the uncharged crime of lewd or lascivious battery amounted to fundamental error for two reasons. First, he asserts that the information did not charge the theory of encouraging, enticing, or forcing any person under sixteen years old to engage in any act involving sexual activity. Because of the jury's general verdict, it is impossible to determine whether Petitioner was convicted of uncharged offenses. Second, he argues that appellate counsel was ineffective for failing to argue that because lewd or lascivious battery applies only when the victim is twelve-to-sixteen years old, and the information specifically charged that the victim was nine, the instructions and conviction on lewd or lascivious battery were illegal.

These arguments fail. Petitioner was charged with sexual battery on a person less than twelve years old under section 794.011(2)(a), Florida Statutes. "[A] lewd and lascivious battery is a permissive lesser-included offense to sexual battery." *Osborn v. State*, 177 So. 3d 1034, 1036 (Fla. 1st DCA 2015). An instruction on a permissive lesser-included offense is permitted and appropriate 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. *Williams v. State*, 957 So. 2d 595, 599 (Fla. 2007).

A person can commit lewd or lascivious battery in two ways: (a) by engaging in sexual activity with a person between twelve and sixteen years old, or (b) by encouraging, forcing, or enticing any person less than sixteen years old to engage in any other act involving sexual activity. § 800.04(4), Fla. Stat. (2002). The definitions of sexual battery and sexual activity under the relevant statutes are identical. *See Williams*, 957 So. 2d at 599 ("The definitions of 'sexual battery' in chapter 794 and 'sexual activity' in chapter 800 are identical, both described in pertinent part as 'oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object.'"). The age of the victim is the only distinguishing element. Here, the information charged that the victim was under twelve years old. Thus, the information charging violations of section 794.011(2)(a) included the charge of lewd or lascivious battery under section 800.04(4)(b) because the charged offense

Appendix "A"

Nixon

Appendix A

subsumed the conviction offense. Thus, the information sufficiently supports the conviction of lewd or lascivious battery.

Petitioner's convictions are legal, and appellate counsel was not ineffective for failing to raise a meritless argument. *See Zack v. State*, 911 So. 2d 1190, 1204 (Fla. 2005) (holding that appellate counsel is not ineffective for failing to raise a meritless issue on direct appeal).

In ground three, Petitioner claims that appellate counsel should have argued that the general verdicts were unlawful. Petitioner notes that on count one, the jury found him guilty of union and penetration, but union was not charged. Further, on counts two and three, there is no finding of union or penetration. Thus, it is not clear if he was convicted of an uncharged crime. And he argues that this amounts to fundamental error, and appellate counsel should have raised the issue.

This claim also lacks merit. On count one, the information alleged that Petitioner's penis penetrated the oral cavity of the victim; count two alleged that the Petitioner's tongue penetrated the victim's vagina; and count three alleged that Petitioner's penis came into union with the victim's vagina. On count one, the jury found Petitioner guilty of lewd or lascivious battery, a lesser-included offense, and made special findings that Petitioner's penis penetrated and had union with the victim's mouth during the commission of the crime. The jury also found Petitioner guilty of lewd and lascivious battery without special findings, on counts two and three.

Petitioner relies on *Eaton v. State*, 908 So. 2d 1164 (Fla. 1st DCA 2005), but this reliance is misplaced. In *Eaton*, this Court reversed when the defendant was charged with sexual battery by penetration and the trial court instructed the jury that it could find the defendant guilty as charged based on union or penetration. *Id.* at 1165. This Court held that "where an offense can be committed in more than one way, the trial court commits fundamental error when it instructs the jury on an alternative theory not charged in the information." *Id.*

The decision in *Eaton* is distinguishable. This Court dealt with uncharged *alternative* theories of guilt on the primary offense

Appendix "A"

Nixon

Appendix A

in *Eaton*. But here, the jury found Petitioner guilty of lesser-included offenses. Lewd or lascivious battery as a lesser-included offense could be established by sexual union or penetration. *See* § 800.04(4)(b), Fla. Stat. (2002). Penetration requires entry, and union only means contact. *Baker v. State*, 804 So. 2d 564, 566 (Fla. 1st DCA 2002). Because a penetration by its nature includes contact, a finding of guilt on a lesser-included offense based on union, even where penetration was charged, is not illegal.

The jury could lawfully have found Petitioner guilty of lewd or lascivious battery under section 800.04(4)(b). Because the verdicts were appropriate given the lesser-included offenses, appellate counsel was not ineffective for failing to raise this meritless argument. *See Zack*, 911 So. 2d at 1204.

Thus, the Court denies the petition alleging ineffective assistance of appellate counsel on the merits.

ROWE, C.J., and OSTERHAUS, J., concur.

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

Nathan I. Nixon, pro se, Petitioner.

Ashley Moody, Attorney General, Tallahassee, for Respondent.

Appendix "A"

Nixon

~~E, Is, Appendix~~

~~Case No., SC22-945~~

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

June 30, 2022

CASE NO.: 1D22-0242
L.T. No.: 38-2003-CF-000438-A

Nathan I. Nixon	v.	State of Florida
Appellant / Petitioner(s),		Appellee / Respondent(s)

BY ORDER OF THE COURT:

The motion for rehearing en banc filed by the petitioner on April 22, 2022, is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Hon. Ashley Moody, AG

Nathan Ira Nixon

th

KRISTINA SAMUELS, CLERK

DISTRICT COURT OF APPEAL · FIRST DISTRICT · STATE OF FLORIDA

Appendix "B"

Nixon

Appendix

6-28-2021

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR LEVY COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO.: 38-2003-CF-000438-A

vs.

NATHAN I. NIXON,

Defendant.

ORDER DENYING MOTION TO CORRECT ILLEGAL SENTENCE

THIS CAUSE comes before the Court upon Defendant's "Motion for Post Conviction Relief 3.800(a) to Correct an Illegal Unlawful Sentence's [sic]," filed February 10, 2021, pursuant to Fla. R. Crim. P. 3.800(a). Upon consideration of the motion and the record, this Court finds and concludes as follows:

1. On March 29, 2019, Defendant was found guilty after a jury trial of three counts of Lewd or Lascivious Battery. *See* Verdict. Disposition was continued until a later date. On May 15, 2019, after a disposition hearing, the court sentenced Defendant to a total of 30 years imprisonment in the Department of Corrections. *See* Judgment and Sentence. Defendant filed an appeal. On July 30, 2020, the First District Court of Appeal per curium affirmed the judgment and sentence. *See* Mandate.

2. Defendant argues that his sentence is illegal because the offense of Lewd or Lascivious Battery was not included in the Information and is not a lesser included offense of Sexual Battery on a Person Less than 12 Years of Age.

As Defendant acknowledges, the Florida Supreme Court recognized in *Williams v. State*, 957 So.2d 595 (Fla. 2007) that the crime of lewd or lascivious battery, prohibited by section

Appendix "D"

Nixon

Appendix

800.04(4), may be a permissive lesser included offense of sexual battery. Defendant relies on *Pittman v. State*, 22 So.3d 859 (Fla. 3d DCA 2009) to support his argument that lewd or lascivious battery cannot be a lesser included offense of sexual battery. In *Pittman*, the Third District Court of Appeal held that it was improper for the State to announce on the day of trial that it intended to seek a jury instruction on lewd or lascivious battery as a lesser-included offense of sexual battery. *Id.* In reaching this determination, the Court noted that the age of the victim was not alleged in the information and the defendant was prejudiced because he intended to present a defense of consent, which could undermine a sexual battery charge but not a lewd or lascivious battery charge. *Id.* Thus, the allegations of the greater offense, as stated in the information, did not contain all of the elements of the lesser included offense in accordance with the rule set forth in *Brown v. State*, 206 So.2d 377, 380 (Fla. 1968), *overruled, in part, on other grounds. Id.*

This case is distinguishable from *Pittman*. The Information alleges that the victim was 9 years of age at the time sexual activity[1] took place between Defendant and the victim. *See* Information. There were no objections to the inclusion of an instruction on lewd or lascivious battery as a lesser included offense by either Defendant or his attorney. *See* Trial Transcript at 86 (lines 4-25) – 88 (lines 1-10); *see also* Trial Transcript at 94 (lines 8-25) – 101 (lines 1-5). At trial, counsel for Defendant argued that Defendant did not commit the alleged offenses and that the State failed to meet its burden of proof. *See* Trial Transcript at 114 (lines 20-25) – 119 (lines 1-2).

[1] The definitions of "sexual battery" as defined by § 794.011(1)(h) and "sexual activity" as defined by § 800.04(1)(a) are identical.

Appendix "D"

Nixon

Appendix

The Information alleges all of the elements of the lesser offense, the evidence at trial supported a verdict on the lesser offense, and there has been no demonstration of prejudice by Defendant. Therefore, the inclusion of lewd or lascivious battery as a lesser included offense was both permissible and proper. Accordingly, the sentence is legal and the claim raised is without merit.

Based on the foregoing, it is **ORDERED AND ADJUDGED** that:

Defendant's motion is hereby **DENIED**. Defendant may appeal this decision to the First District Court of Appeal within thirty (30) days of this Order's effective date.

DONE AND ORDERED on this 28th day of June 2021.

JAMES M. COLAW,
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copy of the foregoing Order was furnished by U.S. Mail/inter-office delivery, on this 28th day of June 2021, to the following:

Nathan I. Nixon – DC# G09091
Okaloosa Correctional Institution
3189 Colonel Greg Malloy Road
Crestview, FL 32539

Glenn Bryan, Assistant State Attorney
State Attorney's Office

Appendix "D"

Wendy L. Thurow
W. Thurow, Judicial Assistant