No.

IN THE SUPREME COURT OF THE UNITED STATES

ROY E. TERRELL, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ROY E. TERRELL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D2023-0575

[April 3, 2024]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Robert B. Meadows, Judge; L.T. Case No. 312018CF001157A.

Carol Stafford Haughwout, Public Defender, and Gary Lee Caldwell, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Paul Patti, III, Senior Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. See Guzman v. State, 350 So. 3d 72 (Fla. 4th DCA 2022).

GROSS, GERBER and CONNER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

May 8, 2024

ROY E. TERRELL, Appellant(s) v. STATE OF FLORIDA, Appellee(s).	**CASE NO. - 4D2023-0575** L.T. No. - 312018CF001157A

BY ORDER OF THE COURT:

ORDERED that Appellant's April 15, 2024 motion for rehearing and certification is denied.

Served:
Attorney General-W.P.B.
Gary Lee Caldwell
Paul Patti, III
Palm Beach Public Defender

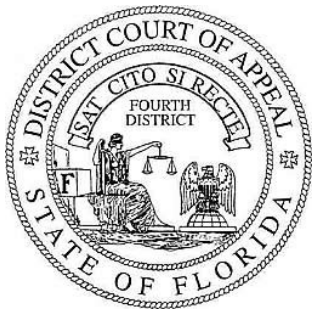
KR

I HEREBY CERTIFY that the foregoing is a true copy of the court's order.

4D2023-0575 May 8, 2024

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal

4D2023-0575 May 8, 2024



ARGUMENT

I. FUNDAMENTAL ERROR OCCURRED BECAUSE THE JURY INSTRUCTIONS RETROACTIVELY APPLIED A VERSION OF THE SEXUAL BATTERY STATUTE ENACTED AFTER THE DATES ALLEGED IN THE AMENDED INFORMATION.

Count 1 alleged that, between dates in 2013 and 2016, Appellant "did on one or more occasion unlawfu1Iy, being then 18 years of age or older, commit sexual battery upon [alleged victim], who was then less than 12 years of age, in violation of Florida Statute 794.011(2)." R 129. Count 3 alleged that, between those same dates, Appellant "did on one or more occasion unlawfully, while in a position of familial or custodial authority to [alleged victim], then a child 12 years of age or older but less than 18 years of age, to engage in an act which constitutes sexual battery with that child, in violation of Florida Statute 794.011(8)(b)." R 129.

During the alleged time periods, the Legislature defined "sexual battery" 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; however, sexual battery does not include an act done for a bona fide medical purpose." §§

794.011(1)(h), Fla. Stat. (2012); 794.011(1)(h), Fla. Stat. (2019) (emphasis added).

In 2022, the Legislature expanded the activity covered by the sexual battery statute.

It redefined "sexual battery" as "oral, anal, or female genital ~~vaginal~~ penetration by, or union with, the sexual organ of another or the anal or female genital ~~vaginal~~ penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." Ch. 2022-165, § 4 Laws of Fla. (alterations in original). It also renumbered this paragraph from (1)(h) to (1)(j). *See* § 794.011(1)(j), Fla. Stat. (2022).

At the same time, the Legislature created the following definition of "female genitals" in section 794.011(1): "(b) 'Female genitals' includes the labia minora, labia majora, clitoris, vulva, hymen, *and* vagina." Ch. 2022-165 (underlining in original; italics added). *See* § 794.011(1)(b), Fla. Stat. (2022).

Thus, under the current statute, the state need not prove vaginal penetration if it proves penetration under the expanded list set out in the foregoing definition.

At Appellant's February 2023 trial, the prosecutor prepared the jury instructions which were discussed at the charge conference. T 454 ("MR. LONG [ASA]: And just for the record, as I wrote these, I have no objection to my own suggestions."). In the charge conference, there was no substantive discussion of the instructions on sexual battery, and no objection was made to the state's proposed instructions on sexual battery. T 453-60.

The court then instructed the jury on sexual battery using the elements of the 2022 statute rather than the elements of the crime as it existed at the time of the alleged crimes at bar:

> Count 1, Sexual battery on a child under 12 by a perpetrator 18 or older. To prove the crime of sexual battery upon a person less than 12 years of age, the State must prove the following three elements beyond a reasonable doubt: One, A, Roy Terrell committed an act upon or with [alleged victim] in which the sexual organ of the Defendant penetrated or had union with the anus, female genitals, or mouth of the victim. Or B, Roy Terrell committed an act upon or with [alleged victim] in which the anus or female genitals of [alleged victim] were penetrated by an object. Two, at the time, [alleged victim] was less than 12 years of age. Three, at the time, Roy Terrell was 18 years of age or older.
>
> …
>
> Female genitals includes the labia minora, the labia majora, clitoris, vulva, hymen and vagina.

T 529 (emphasis added); R 201.

> Count 3, sexual battery on a child familial or custodial authority. To prove the crime of engaging in an act that constitutes sexual battery upon or with a child 12 years of age or older, but younger than 18 years of age by a person in a familial or custodial authority, the State must prove the following three elements beyond a reasonable doubt: Roy Terrell engaged in any act that constituted sexual battery. Two, at the time, [alleged victim] was 12 years of age or older, but younger than 18 years of age. Three, at the time, Roy Terrell was in a position of familial or custodial authority to [alleged victim].
>
> Sexual battery means, A, the sexual organ of Roy Terrell penetrated or had union with the anus, female genitals or mouth of [alleged victim] or B, the anus or female genitals of [alleged victim] were penetrated by an object.
>
> …
>
> Female genitals includes the labia minora, the labia majora, clitoris, vulva, hymen and vagina.

T 531-32 (emphasis added); R 207-08.

Thus, without objection, the jury was instructed on the expanded 2022 elements of the crime rather than the elements at the time covered by the amended information.

The state then relied on these instructions in final argument. T 470-72.

Despite the absence of an objection, fundamental error occurred.

Fundamental error

An erroneous instruction on the elements of the offense charged violates the Due Process and Jury Clauses of the state and federal constitutions. Art. I, §§ 9, 16, 22, Fla. Const.; Amend. VI, XIV, U.S. Const.

Such error amounts to fundamental error requiring reversal even in the absence of an objection at trial: "the giving of an inaccurate definition of a disputed element of the crime can rise to the level of fundamental error where the inaccurate definition reduces the State's burden of proof on an essential element of the charged offense. *Kennedy v. State*, 59 So. 3d 376, 381 (Fla. 4th DCA 2011) (citing *Reed v. State*, 837 So. 2d 366, 368-69 (Fla. 2002))." *Woolman v. State*, 292 So. 3d 530, 535-36 (Fla. 2d DCA 2020) (finding fundamental error due to erroneous instruction on "custodial authority" element of charge of sexual battery while in position of familial or custodial authority). *See also Schminky v. State,* 305 So. 3d 640 (Fla. 3d DCA 2020) (same; erroneous instruction on knowledge element of attempted murder of law enforcement officer).

The error is fundamental even if the erroneous instruction is not used in final argument and, in fact, even if counsel correctly states the law to the jury:

> The state argues that the error was not fundamental because the parties did not rely on the erroneous instruction during closing argument. We rejected this argument in *Garrido v. State*, 97 So. 3d 291, 295 (Fla. 4th DCA 2012), where we wrote that "[a]s the jury must follow the law as set forth by the trial court, the fact that the prosecutor and defense counsel correctly state the law during closing does not cure the trial court's reading of an erroneous instruction."

Salmon v. State, 267 So. 3d 25, 30 (Fla. 4th DCA 2019).

> The court erroneously instructed the jury on the elements of sexual battery

"[I]t is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed." *State v. Smith*, 547 So. 2d 613, 616 (Fla. 1989). "[T]he repeal or amendment by subsequent legislation, of a preexisting criminal statute does not become effective, either as repeal or as an amendment of such preexisting statute, in so far as offenses are concerned that have been already committed prior to the taking effect of such repealing or amending law." *Raines v.*

State, 42 Fla. 141, 28 So. 57, 58 (1900). *See also Smiley v. State*, 966 So. 2d 330 (Fla. 2007) (holding that substantive statute expanding right of self-defense by abolishing common-law duty to retreat before using deadly force could not apply retroactively under article X, section 9 of state constitution).

Moreover, a criminal statute may not be retroactively applied if "different, or less evidence, is required to convict an offender, than was required, when the act was committed." *Carmell v. Texas*, 529 U.S. 513, 524 (2000) (quoting and following *Calder v. Bull*, 3 U.S. 386, 390 (1798)). Retroactive application in these circumstances violates the Ex Post Facto and Due Process Clauses of the state and federal constitutions. Art. I § 10, Fla. Const.; Art. I, § 10, U.S. Const.. The 2022 statute which requires different evidence or less evidence to prove sexual battery than did the statute in effect at time of the alleged crimes in the amended information.

In summary, the 2022 definition of the crime of sexual battery does not apply to this case. Instruction on its elements misstated the elements of the crime, amounting to fundamental error occurred. The convictions and sentences for sexual battery should be reversed.

Finally, reversal of the sexual battery conviction for count 3 requires resentencing as to the molestation charges (counts 2 and 4), as it affects the scoresheet as to those offenses. *See Theophile v. State*, 78 So. 3d 574, 582 (Fla. 4th DCA 2011) ("We reverse and remand with directions to vacate the defendant's conviction for robbery with a firearm, recalculate the scoresheet to reflect the absence of this primary offense, and resentence the defendant on the remaining charge of possession of a concealed firearm using a corrected scoresheet."); *Ewing v. State*, 56 So. 3d 67, 68 (Fla. 2d DCA 2011).

IV. APPELLANT'S CONVICTIONS AND SENTENCES SHOULD BE REVERSED BECAUSE HE WAS CONVICTED BY A SIX-PERSON JURY.

Florida allows trial by a jury of six in non-capital cases. Art. I, § 22, Fla. Const.; § 913.10, Fla. Stat. Pursuant to this state constitutional provision, Appellant was tried by a trial by a jury of six rather than twelve. Appellant contends that the federal constitution requires a jury of twelve, so that fundamental error occurred because he was deprived of this right. He acknowledges contrary authority, as discussed below.

Before jury selection, defense counsel objected to trial by a jury of six, and asked for a jury of twelve, arguing that it was a constitutional right, while recognizing that there is contrary case law. T 5-6. The court denied the request. T 6. Counsel renewed the objection before the jury was sworn. T 185-86.

Williams v. Florida, 399 U.S. 78 (1970), held that state court juries as small as six were constitutionally permissible, despite the determination in *Thompson v. Utah,* 170 U.S. 343, 349-50 (1898), that the jury guaranteed by the Sixth Amendment consists "of twelve persons, neither more nor less."

Thompson held that the Sixth Amendment enshrined the right to a jury of twelve as provided at common law. *Id.* at 349-50. In addition to the authorities cited there, one may note that Blackstone stated that the right to a jury of twelve is even older, and more firmly established than, the unqualified right to counsel in criminal cases. 4 William Blackstone, *Commentaries on the Laws of England*, ch. 27 ("Of Trial and Conviction").[2] Blackstone traced the right back to ancient feudal right to "a tribunal composed of twelve good men and true," and wrote that "it is the most transcendent privilege which any subject can be enjoy or wish for, that he cannot be affected in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 Blackstone, ch. 23 ("Of the Trial by Jury").[3]

Thus, at the time of the amendment's adoption, the essential elements of a jury included "twelve men, neither more nor less." *Patton v. United States*, 281 U.S. 276, 288 (1930).

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[2] Found at https://lonang.com/wp-content/download/Blackstone-CommentariesBk4.pdf

[3] Found at https://lonang.com/wp-content/download/Blackstone-CommentariesBk3.pdf

Williams itself has now come into question in light of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which concluded that the Sixth Amendment's jury requirement encompasses what the term "meant at the Sixth Amendment's adoption." *Id.* at 1395. (Of course, the requirement that the jury be composed of men has been overturned by a subsequent amendment – the Equal Protection Clause of the Fourteenth Amendment. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994)).

In this case, Appellant did not receive a trial by a jury as the term was meant at the Sixth Amendment's adoption, or at the time of the Fourteenth Amendment for that matter, as he was not tried by a jury of twelve. The undersigned acknowledges that this Court has rejected this argument in, *e.g.*, *Guzman v. State*, 350 So. 3d 72 (Fla. 4th DCA 2022). The issue is now pending on certiorari in the United State Supreme Court in several cases, including the Guzman case itself, which is Supreme Court case 25-5173. The Supreme Court has requested a response from the state.

The error is structural, as the conviction arose from a sheer denial of this fundamental right. A new trial should be ordered.