FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 5D2023-1810
LT Case No. 2014-301631-CFDB

JASON W. ATTRIDE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Volusia County.
Leah R. Case, Judge.

Jason William Attride, Mayo, pro se.

James Uthmeier, Attorney General, Tallahassee, and Rebecca Rock McGuigan, Assistant Attorney General, Daytona Beach, for Appellee.

June 17, 2025

PER CURIAM.

AFFIRMED.

MAKAR, BOATWRIGHT, and PRATT, JJ., concur.

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

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Jason W. Attride,

Appellant(s),

v.

State of Florida,

Appellee(s).

Case No.: 5D2023-1810
L.T. No.: 2014-301631-CFDB

Date: July 30, 2025

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing, filed July 2, 2025 (mailbox date), is denied.

I hereby certify that the foregoing is (a true copy of) the original Court order.

5D2023-1810 7/30/2025

SANDRA B. WILLIAMS, CLERK

Panel: Judges Makar, Boatwright and Pratt

cc:

Criminal Appeals DAB Attorney General
Jason W. Attride
Rebecca Rock McGuigan

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

v.

JASON WILLIAM ATTRIDE,

Defendant.
_____/

CASE NO.: 2014 [illegible] CFDBTI

ORDER ON DEFENDANT'S RULE 3.800 (B), FLA. R. CRIM. P. AMEND MOTION TO CORRECT SENTENCING ERROR

This matter came before the Court upon Defendant's *pro se* "Rule 3.800 (b), Fla. R. Crim. P. Amend Motion to Correct Sentencing Error," filed on November 6, 2023, with a prison date stamp of November 1, 2023. The Court, having reviewed the motion, the court file and having been otherwise advised in the matter, hereby finds as follows:

In grounds one and two, Defendant's argument concerns claims that the sexual predator designation imposed at sentencing is erroneous. The State will be directed to respond by separate order.

In ground three; Defendant argues that through court appointed counsel's negligence of omitting critical and or material evidence of the recantation of the State's alleged victim, frustrated his ability to demonstrate the fundamental error that the recantation and or partial recantation made by the alleged victim shows. Defendant states that his conduct alleged by the State does not constitute the lesser offense of attempted lewd and lascivious child molestation or the original charge of lewd and lascivious molestation. Defendant's claim is not cognizable in a motion to correct sentencing error and therefore dismissed.

In ground four, Defendant argues that the C.P.T. forensic child interview of the victim is critical material inculpatory evidence which the State's entire prosecution and or judgment rests.

Defendant states that because a resentence proceeding is a new proceeding the Court is not limited by the evidence originally presented. He states that he was hindered during his resentencing hearing because he was unable to effectively demonstrate his claim because it required the unedited version of the interview which he did not have. Defendant's claim is not cognizable in a motion to correct sentencing error and therefore dismissed.

In ground five, Defendant argues that the Court's failure to conduct a de novo sentencing resulted in procedural and or actual prejudice, and unfairly limited his avenues at resentencing that would have been available had the court conducted a de novo resentencing. Defendant's motion is without merit. The record reflects that Defendant entered a negotiated plea and therefore, the remedy was for the State to agree to resentence Defendant to a legal sentence or for Defendant to proceed to trial, and here the State agreed to a legal sentence. *See, e.g., Wallen v. State*, 877 So. 2d 737, 738 (Fla. 5th DCA 2004) (quoting *Barthel v. State,* 862 So. 2d 28 (Fla. 2d DCA 2003) (holding where illegal sentence was imposed pursuant to plea bargain, state must be given option of either agreeing to resentencing to legal sentence or proceed to trial on original charges); *Tarlbert v. State,* 766 So. 2d 457 (Fla. 5th DCA 2000) (holding where defendant received illegal sentence under unconstitutional guidelines pursuant to a plea bargain, state has option of proceeding to trial or agreeing to have legal sentence imposed); *Clay v. State,* 750 So. 2d 153 (Fla. 1st DCA 2000) (holding if state does not agree to re-sentencing defendant to legal sentence, state should be allowed to withdraw plea and matter may proceed to trial on original charges)). Ground five is denied.

In ground six, Defendant argues that the Court erroneously and / or unfairly charged him with the court costs associated with resentencing when the State was at fault for previously

imposing an illegal sentence which led to his resentencing. The Court informs Defendant that no new costs were imposed at his resentencing hearing. The cost listed on his Order/Final Judgment for Charges, Costs, & Fees were assessed during his initial sentencing. Thus, this ground is without merit and denied.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. Grounds One and Two – the State will be directed to respond by separate order;
2. Grounds Three and Four are **DISMISSED**;
3. Ground Five and Six are **DENIED**.

DONE AND ORDERED in Daytona Beach, Volusia County, Florida, this 28 day of November 2023.

LEAH R. CASE
CIRCUIT JUDGE

Copies To:

Jason William Attride, D.C. #V53532, Mayo Correctional Institution, 8784 US Highway 27 West, Mayo, Florida 32066-3458

The Office of the State Attorney, eservicevolusia@sao7.org

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA CASE NO.: 2014 301631 CFDB

v.

JASON WILLIAM ATTRIDE,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW PLEA

This matter came before the Court upon "Defendant's Pro Se Motion to Withdraw the Plea After Sentencing and for Court to Appoint Counsel to Assist Defendant in Preparing This Motion," filed on May 23, 2023. The Court, having reviewed the motion and the court file and having been otherwise advised in the matter, hereby finds as follows:

PROCEDURAL HISTORY

On March 31, 2014, the State charged Defendant by information with lewd or lascivious molestation, person 18 years of age or older and a victim less than 12 years of age, a violation of section 800.04(5)(b), Florida Statutes. On June 21, 2016, the Stated filed an amended information adding count two, felony failure to appear. On October 16, 2017, Defendant entered a negotiated plea to 12 years of incarceration in the Department of Corrections followed by 15 years of sexual offender probation on count one; and time served on count two. On the same date, the Court adjudicated Defendant guilty and sentenced him pursuant to the negotiated plea.

Defendant appealed his judgment and sentence to the Fifth District Court of Appeal. On April 10, 2019, the appellate court dismissed Defendant's appeal for lack of jurisdiction. After several motions and hearings, on March 22, 2021, Defendant filed his first motion for post-conviction relief. On March 24, 2021, Defendant filed an amended motion for post-conviction

relief. The Defendant continued to file several *pro se* motions. On April 13, 2021, the Court entered an Order to Show Cause directing Defendant to show cause as to why this Court should not find that Defendant engaged in prohibited conduct – filing false, frivolous pleading with reckless disregard for the truth. Defendant's motion for post-conviction relief was held in abeyance during the pendency of the show cause determination. Then, on July 9, 2021, Defendant filed a motion for correction of an illegal sentence. On July 14, 2021, Defendant filed a response to the Court's show cause order. On July 22, 2021, while his motion for post-conviction relief was still held in abeyance, Defendant filed a second amended motion for post-conviction relief. After several more *pro se* motions and notices to the Court, on September 29, 2021, Defendant filed his third amended motion for post-conviction relief. Several more *pro se* motions followed while Defendant was represented by counsel.

On March 31, 2023, the Court considered Defendant's response to the Court's show cause order and informed Defendant that he will not be sanctioned and cancelled the show cause hearing. On the same date, the Court entered an order granting Defendant's motion for correction of an illegal sentence in-part and set the matter for an evidentiary hearing. On April 24, 2023, the Court held the evidentiary hearing and re-sentenced Defendant to 12 years' incarceration in the Department of Corrections followed by 3 years of sex offender probation on count one. Because Defendant completed his sentence on count two that count was not at issue during his resentencing hearing. The Court declared Defendant a sexual predator and entered an order accordingly. The instant motion to withdraw plea followed. Then, on May 22, 2023, Defendant filed a notice of appeal.

CONCLUSIONS OF LAW

"Pursuant to rule 3.170(*l*), once a sentence has been imposed, a defendant must demonstrate manifest injustice or prejudice in order to withdraw a guilty plea." *Altersberger v. State*, 216 So. 3d 621, 627 (Fla. 2017). "To make such a showing under rule 3.170(*l*), a defendant must establish the same criteria that would be required of him in a Rule 3.850 motion for postconviction relief." *Rabess v. State*, 115 So. 3d 1079, 1081 (Fla. 4th DCA 2013). Defendant must show that counsel's performance was deficient and, but for Counsel's deficiency, Defendant would have proceeded to trial. *See generally Bacon v. State*, 738 So. 2d 973 (Fla. 4th DCA 1999).

> Counsel's effectiveness is determined according to the totality of the circumstances. Therefore, in determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial.

Grosvenor v. State, 874 So. 2d 1176, 1181–82 (Fla. 2004). (*internal citations omitted*).

ANALYSIS AND RULING

GROUNDS ONE AND TWO

In grounds one and two, Defendant argues that he was convicted of a non-existent offense that he did not agree to, resulting in an invalid plea. Defendant states that first degree lewd and lascivious child molestation has already been determined to be a non-existent offense because it does not exist under Florida law.

In the Court's order on Defendant's motion to correct an illegal sentence, the Court agreed that Defendant's sentence exceeded the statutory maximum and resentenced him to 12 years of incarceration followed by 3 years of sex offender probation, within the statutory maximum. Therefore, Defendant's claim is without merit. Additionally, because the Court imposed a sentence

within the statutory maximum, Defendant's contention that he did not agree to the newly imposed sentence is of no consequence. The proper procedure when a defendant enters a negotiated plea and the plea is illegal, pursuant to a motion to correct sentencing error, the trial court shall impose a legal sentence within the statutory maximum if the State agrees. However, if the State does not agree to resentencing, the defendant should be permitted to withdraw his plea and proceed to trial.

> *See Sedell v. State,* 224 So. 3d 885, 887 (Fla. 2d DCA 2017) ("On remand, the court should impose sentencing on counts two and three within the statutory maximum of fifteen years if the State *agrees* to resentencing. If the State does not agree, then [defendant] should be permitted to withdraw his plea"); *see also Wilson v. State,* 669 So. 2d 1071, 1072 (Fla. 4th DCA 1996) ("[O]n remand, the *state* should have the option of having the trial court impose a sentence not to exceed 40 years in prison or vacate the plea and proceed to trial. The state and defendant sought to enter a bargain, but the proposed sentence was an illegal one. The defendant is entitled to be relieved of this illegal sentence, but the state should not then be held to the bargain, unless it accedes to the lesser sentence, or a new [legal] plea bargain can be reached.").

Grounds one and two are moot.

GROUND THREE

In ground three, Defendant's argument that he was prejudiced by standby counsel's negotiation of his sentence is without merit. "[A] defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel. Such a defendant cannot thereafter complain that the quality of his defense was a denial of "effective assistance of counsel." *Behr v. Bell,* 665 So. 2d 1055, 1056–57 (Fla. 1996). Thus, ground three is without merit.

GROUND FOUR

In ground four, Defendant argues that trial counsel failed to advise him of the available defense that the State's own evidence shows a complete absence of the essential elements required to sustain a conviction for the crime charged. Defendant states that the evidence only shows a "split second hug" between a father and his daughter. Additionally, Defendant contends

that the inconsistent statements of the child victim require that his conviction be set aside. Defendant also contends that trial counsel should have filed a motion to dismiss based on his available defense of the inconsistencies of the child victim.

Defendant's claims are without merit. contrary to Defendant's contention the evidence showed more than a split-second hug between a father and a daughter. The record reflects that the Court granted the State's motion to present similar fact testimony from other victims that Defendant previously abused, which corroborated the in-court and out of court testimony of the child victim in this case. *See* Appendix A, Order Granting Motion to Introduce Evidence. Furthermore, the inconsistencies referenced to by Defendant goes to the weight of the evidence, not the sufficiency of the evidence as to count one. Regarding Defendant's contention that trial counsel should have filed a motion to dismiss, Defendant's own pleadings in the record reflect that material facts were in dispute and therefore, the filing of a pre-trial motion to dismiss by trial counsel would have been futile. *See* Appendix B, Defendant's Third Amended Rule 3.850 motion. As such, ground four is without merit.

GROUND FIVE

In this ground, Defendant argues that trial counsel was ineffective for failing to advise defendant of an available defense to count two, failure to appear, because the State's only evidence was two handwritten letters Defendant wrote from the county jail. Defendant alleges that he was homeless and suffering from mental illness as his defense of why he failed to appear. The record reflects that Defendant was sentenced to time served on count two during his first sentencing, and as a result, during is resentencing there was no sentence impose as to that count. Thus, this claim is moot. *See Andujar-Ruiz v. State*, 320 So. 3d 228, 229 (Fla. 2d DCA 2021) (*citing Raines v. State*,

14 So. 3d 244, 246 (Fla. 2d DCA 2009) ("[A] sentence cannot be challenged after it has been fully served and has expired because any sentencing issue is moot thereafter.").

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion to withdraw plea is **DENIED**.

DONE AND ORDERED in Volusia County, Daytona Beach, Florida, this 25th day of July 2023.

LEAH R. CASE
CIRCUIT JUDGE

Copies To:

Jason William Attride, D.C. #V53532, Wakulla Correctional Institution, 110 Melaleuca Drive Crawfordville, Florida 32327-4963

The Office of the State Attorney, eservicevolusia@sao7.org

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO: 2014-301631-CFDB

STATE OF FLORIDA

vs.

JASON WILLIAM ATTRIDE,

Defendant.
_____/

Order Granting Motion to Introduce Evidence

THIS CAUSE was heard by the Court on the State's Motion to Admit Child Hearsay and the Defendant's Motion in Limine seeking to prohibit introduction of evidence of prior child molestation. The Court, having heard arguments of counsel and being fully advised in the premises, finds as follows:

1. On March 13, 2014, the Defendant was charged with Lewd or Lascivious Molestation on a Victim Less than Twelve Years of Age, pursuant to Section 800.04(5)(b).

2. The State alleges that between July 1, 2013 and September 30, 2014, the defendant did intentionally touch [redacted] (his minor daughter) in a lewd and lascivious manner, contrary to 800.04(5)(b), *Fla. Stat.* (2013). The state alleges that the victim was 8, turning 9 years old, at the time of the incident. The state further contends that defendant did force or entice [redacted] to put her mouth on defendant's penis or the clothing covering it.

3. The state seeks to introduce in evidence child hearsay testimony taken from [redacted] during a forensic interview conducted by Shaundrea Plummer of the Child Protection Team on November 20, 2013. This interview was preserved by video and audio recording. The defense objects to the admission of this evidence contending that it is hearsay and, thus, inadmissible.

The recorded testimony of the child victim is clearly hearsay but may be admitted under 90.803(23), *Fla. Stat.* (2014). That provision provides:

> "(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with an age of 16 or less describing any act of sexual abuse against a child, is admissible in evidence in any civil or criminal proceeding if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provides sufficient safeguards of reliability."

To determine the trustworthiness and reliability of a hearsay statement by a child victim, trial courts must consider the totality of circumstances surrounding the making of the statement, including the time, content and circumstances of the statement. *Idaho v. Wright*, 497 U.S. 805 (1990). That is, the trial court should consider:

> "the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim and any other factor deemed appropriate." *State v. Townsend*, 635 So.2d 949 (Fla. 1994).

The trial judge may also consider whether the victim's statement was made at the first opportunity following the alleged incident, whether the statement was spontaneous or elicited in response to questions from an adult, whether the statement consisted of a child-like description of the act, the mental state of the child at the time of the statement, the terminology of the child, the ability of the child to distinguish between reality and fantasy, the possibility of undue influence on the child by participants in a domestic dispute, and contradictions in the description or accusations. *Townsend*, at 958. However, the trial court may not rely on corroborating evidence when determining whether the child's hearsay statements are reliable. *Rodriguez v. State*, 77 So.3d 649 (Fla. 3d DCA 2011).

Here, the court conducted an extensive hearing on the admissibility of the child hearsay statement in question. In addition, the Court has carefully reviewed the recording in its entirety, listening closely to the questions and responses captured on the recording. The court paid particular attention to the phrasing of the questions and answers, the suggestiveness of the questions and the terminology of the child victim in describing the incident. This court specifically finds that the phrasing of the questions was neither suggestive nor inappropriate. The questions were mostly open ended and properly focused on the victim's specific responses. Although the victim was only 9 years old at the time of her statement, she demonstrated that she understands the difference between the truth and a lie. In fact, when the victim spontaneously reported these events to her mother with little prompting, her mother told her she would get in trouble if she lied.

Although the child and her expressions and mannerisms can only be seen near the end of the video, the this court carefully considered her testimony, including her vocabulary, expressions, slang and her demeanor in assessing her credibility and the reliability of her testimony. Her speech, mannerisms and terminology are consistent with an 8 year old of normal intelligence, average maturity and socialization. Further, her child-like description of the events and her terminology are consistent with her age and maturity and adds greatly to the reliability and trustworthiness of the statements. Although she did not immediately report the events at the first opportunity, her reporting was not occasioned by an unreasonably long delay, approximately 3-4 months to report. More importantly, due to the nature of the events, her delay is not surprising and adds to the credibility of description of these traumatic events.

The court is aware that the defendant denies that the incident ever occurred and further contends that the child's mother is somehow behind the child's false accusations. After careful review of the child's description of the incident and the context in which it was made, the court can detect no ulterior or improper motivation by the child to fabricate her statements, get her father - the defendant, in trouble or gain any advantage in a domestic dispute through her accusations. To the contrary, she also described otherwise normal relations between the defendant and the victim and the victim's brother, including discipline for taking cookies when they shouldn't. The court also finds that the phrasing of answers by the child was appropriate to her reported age and maturity of 9 years old. In reaching these conclusions, this court specifically considered that the story told by the victim was only told to the victim's mother and not told to her school teachers or to any others. In addition, the court heard evidence of family law proceedings and DCF proceedings involving the defendant and the mother but, again, could detect no improper or ulterior motive by the mother or the victim to fabricate the accusations.

The court also considered the testimony of the child's mother, [redacted] Regarding the events in question, the mother testified that on Halloween, 2013 her daughter who was 8 years old in the second grade at the time, said that she needed to tell her mother something about her "daddy". The daughter told her mother that her daddy - the defendant, made her put her mouth on his pee pee. Her daughter said they were alone in the house, cleaning up when the events occurred. Her daughter also reported that the defendant explained during the act that "this is something your boyfriend is going to want you to do when you start dating at 14". Her daughter also said that the defendant told her not to tell or he couldn't see her anymore. The next morning, the mother reported the incident to Port Orange Police Department and they referred her to the Child Advocacy Center. A few weeks later, her daughter gave a statement to the CPT investigator.

4. Based on this testimony and the specific finding of the court referenced above, this Court concludes that the statements made by the child victim in the CPT interview and by the victim to her mother are sufficiently reliable and trustworthy and, therefore, admissible evidence pursuant to 90.803(23).

5. The State also seeks to introduce evidence of prior acts of child molestation by the defendant to corroborate the testimony of the minor victim in this case, as provided in 90.404 (2)(b), Fla. Stat. (2014). Specifically, the state seeks to introduce the testimony of [redacted] the defendant's younger sister, an[redacted] the younger sister of a female friend, both of whom allege that the defendant sexually molested them in the past. The defense objects to the admission of this evidence claiming that such testimony and acts are too remote in time and too factually dissimilar to be relevant to the issues in this case and has filed a Motion in Limine to exclude such evidence from the trial.

6. Section 90.404(2)(b)(1) provides that "[I]n a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."

7. In *McLean v. State*, 934 So.2d 1248 (Fla. 2006), the Florida Supreme Court held that Section 90.404(2)(b) "comports with the requirements of due process of law when used as a conduit for evidence that corroborates the victim's testimony that the crime occurred rather than to prove the identity of the alleged perpetrator." *McLean*, 934 So.2d at 1251. The Florida Supreme Court stated that because the statute is qualified by the phrase "may be considered for its bearing on any matter to which it is relevant," relevancy remains the threshold question. See Section 90.402, *Fla. Stat.* (2005) ("All relevant evidence is admissible, except as provided by law.")." *McLean* at 1259. Furthermore, the Florida Supreme Court stated that "[u]nder the Florida Evidence Code, chapter 90, Florida Statutes, '[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.' 90.403. Thus, relevancy remains the threshold consideration for the admission of the evidence and even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. § 90.403, Fla. Stat. (2006); citing *McLean v. State*, 934 So.2d 1248 (Fla.2006).

8. The *McLean* Court determined that the similarity of the prior act to the charged offense must be considered in determining relevancy. "The less similar the prior acts, the less relevant they are to the charged crime, and therefore the less likely they will be admissible." *Id.* Similarity also effects probative value. "The less similar the prior acts, the more likely that the probative value of this evidence will be substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." *Id.*

9. But, the similarity of the collateral act of molestation is not just a consideration; it is the *critical* consideration when conducting an appropriate weighing under section 90.403. As the *McLean* court further explained:

> "In assessing whether the probative value of evidence of previous molestations is substantially outweighed by the danger of unfair prejudice, the trial court should evaluate: (1) the similarity of the prior acts to the act charged regarding the location of where the acts occurred, the age and gender of the victims, and the manner in which the acts were committed; (2) the closeness in time of the prior acts to the act charged; (3) the frequency of the prior acts; and (4) the presence or lack of intervening circumstances." *McLean* at 1259.

This list is not exclusive. The trial courts should also consider other factors unique to the case, such as:

> . . . "whether the evidence of the prior acts will confuse or mislead jurors by distracting them from the central issues of the trial. Also . . . whether the evidence is needlessly cumulative of other evidence bearing on the victim's credibility, the purpose for which this evidence may be introduced. Further . . . the trial court must

guard against allowing the collateral-crime testimony to become a feature of the trial." *McLean* at 1262.

10. In the instant case, the court has reviewed the testimony of defendant's younger sister, C.D., from a deposition taken on July 31, 2014. In it, she testified that when she was 8 years old and her mother was away at work, the defendant told her to get down on all fours while he grabbed her by her hips from behind and grinded on her butt. This occurred while they were alone in the defendant's room, with their clothes on and repeated every couple of months. The defendant told her not to tell anyone. [redacted] also recalled that the defendant French kissed her on another occasion. These incidents occurred in 1992 [redacted] was born in 1984 and was 8 years old at the time) and the defendant was approximately 14 years old.

11. In assessing the probative value of [redacted] testimony, the Court considered the similarity between [redacted] molestation by the defendant and the defendant's alleged conduct in the instant case. Defendant molested [redacted] almost 22 years before the allegations in this case. Although remoteness in time does not *require* exclusion, the evidence still must be otherwise similar to the facts of this case to be relevant and admissible. *Heuring v. State,* 513 So.2d 122 (Fla.1987) (evidence of sexual battery that occurred twenty years prior to the trial was not too remote in time); *Anderson v. State*, 549 So.2d 807 (Fla. 5th DCA 1989) (evidence of defendant's sexual abuse of stepdaughter 18 years before trial was not too remote in time) and *Burke v. State*, 835 So.2d 286 (Fla. 5th DCA 2002) (prior child molestation 22 years before molestation in question was no too remote in time). But here, the evidence is not sufficiently similar to support its admission. The incident involving [redacted] is not just remote in time but, more importantly, the defendant was himself an adolescent of 14 years and not an adult at the time of that molestation. Even accepting [redacted] description as accurate, the events she described are entirely different from those described by our victim. The manner, scope, duration, and frequency of the molestation was entirely different - [redacted] molestation replicated a sexual position, albeit fully clothed, different in character and involvement from the instant case. In addition, [redacted] molestation 22 years ago was repeated every couple of months whereas the alleged molestation here was limited to 1 occasion.

There are, of course, some similarities in [redacted] description. She and our victim were identical in age at the time of the molestation. The defendant was in a custodian relationship in both cases when the molestation occurred. The molestations occurred after the defendant got the victim alone. However, these general similarities are not enough to mitigate the significant prejudice to the defendant by the admission of prejudicial and dissimilar evidence. Accordingly, the court finds such evidence too remote in time and dissimilar in facts to support admission in this case. Therefore, the Defendant's Motion in Limine is hereby granted with regard to [redacted] testimony.

12. The court has also reviewed the deposition testimony of [redacted] taken on July 31, 2015. [redacted] testified that the defendant was dating her older sister and on one occasion was "watching her" for her sister at his apartment. At the time, [redacted] was 8 years old and, based on her birth date in 1989, this incident occurred in 1997. The defendant brought her into his bedroom and had her touch his penis and put it in her mouth. She does not believe he ejaculated.

Sometime later but while she was still 8, the defendant invited her over to his mother's house, where he was living. He said that he had something for her and she rode her bike the few blocks to his house. When she arrived, he brought her to his bedroom, pulled down her pants, bent her over the bed and tried to have anal and vaginal sex. He also put his penis in her mouth and had her rub lubricant on his penis. Again, she does not believe that he ejaculated. At the time of both incidents, the defendant would have been approximately 18.

13. [redacted] version of events is disturbingly similar to this case. Although the defendant was considerably younger 17 years ago, he was an adult. More importantly, the victim was of identical age. Both the current conduct and the prior acts occurred in a generally custodial relationship and occurred after the defendant got the victim alone. The defendant's acts as described by [redacted] are substantially similar in manner, duration and frequency.

After comparing the allegations of the instant case with the similar fact testimony from [redacted] and carefully weighing the probative value of this evidence against the danger of unfair prejudice, the Court expressly finds that the collateral prior acts described by [redacted] were proven by clear and convincing evidence, their probative value is outweighed by the danger of unfair prejudice to the defendant and allowing the testimony of [redacted] concerning the Defendant's prior molestation should not lead the jury to convict the Defendant not for the crime charged, but on the collateral offenses. Accordingly, the court finds the facts and circumstances described by [redacted] her testimony to be sufficiently similar and relevant to those of the instant case to support the admission of [redacted] testimony under 90.404.

For these reasons, it is ORDERED AND ADJUDGED that:

The hearsay statements of the child victim recorded on video during the CPT interview and as told to her mother are sufficiently reliable and trustworthy to permit admission under 90.803(23). Accordingly, the State's Motion to Admit Child Hearsay is hereby **granted.**

Regarding the similar fact evidence, the incidents described by [redacted] are too remote in time and too dissimilar in nature, duration and frequency to permit admission under 90.404. However, the incidents described by [redacted] are sufficiently similar and relevant to warrant admission in the instant case. Accordingly, the Defendant's Motion in Limine is hereby **granted** as to [redacted] testimony but **denied** as to [redacted] testimony.

DONE AND ORDERED in Chambers, at Daytona Beach, Volusia County, Florida, this the 15 day of June, 2016.

TERENCE R. PERKINS
CIRCUIT JUDGE

Conformed copies to:

State Attorney – Tammy Jaques – jaquest@sao7.org
Public Defender - Scott Swain, Esquire – swain.scott@pd7.org

 800.04. Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age.

(1) Definitions. As used in this section:

(a) Coercion means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.

(b) Consent means intelligent, knowing, and voluntary consent, and does not include submission by coercion.

(c) Female genitals includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

(d) Sexual activity means the oral, anal, or female genital penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

(e) Victim means a person upon whom an offense described in this section was committed or attempted or a person who has reported a violation of this section to a law enforcement officer.

(2) Prohibited defenses. Neither the victim s lack of chastity nor the victim s consent is a defense to the crimes proscribed by this section.

(3) Ignorance or belief of victim s age. The perpetrator s ignorance of the victim s age, the victim s misrepresentation of his or her age, or the perpetrator s bona fide belief of the victim s age cannot be raised as a defense in a prosecution under this section.

(4) Lewd or lascivious battery.

(a) A person commits lewd or lascivious battery by:

1. Engaging in sexual activity with a person 12 years of age or older but less than 16 years of age; or

2. Encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.

(b) Except as provided in paragraph (c), an offender who commits lewd or lascivious battery commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) A person commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 if the person is an offender 18 years of age or older who commits lewd or lascivious battery and was previously convicted of a violation of:

1. Section 787.01(2) or s. 787.02(2) when the violation involved a victim who was a minor and, in

the course of committing that violation, the defendant committed against the minor a sexual battery under chapter 794 or a lewd act under this section or s. 847.0135(5);

2. Section 787.01(3)(a)2. or 3.;

3. Section 787.02(3)(a)2. or 3.;

4. Chapter 794, excluding s. 794.011(10);

5. Section 825.1025;

6. Section 847.0135(5); or

7. This section.

(5) Lewd or lascivious molestation.

(a) A person who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation.

(b) An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a life felony, punishable as provided in s. 775.082(3)(a)4.

(c) 1. An offender less than 18 years of age who commits lewd or lascivious molestation against a victim less than 12 years of age; or

2. An offender 18 years of age or older who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age

commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) An offender less than 18 years of age who commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(e) A person commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 if the person is 18 years of age or older and commits lewd or lascivious molestation against a victim 12 years of age or older but less than 16 years of age and the person was previously convicted of a violation of:

1. Section 787.01(2) or s. 787.02(2) when the violation involved a victim who was a minor and, in the course of committing the violation, the defendant committed against the minor a sexual battery under chapter 794 or a lewd act under this section or s. 847.0135(5);

2. Section 787.01(3)(a)2. or 3.;

3. Section 787.02(3)(a)2. or 3.;

4. Chapter 794, excluding s. 794.011(10);

5. Section 825.1025;

6. Section 847.0135(5); or

7. This section.

(6) Lewd or lascivious conduct.

(a) A person who:

1. Intentionally touches a person under 16 years of age in a lewd or lascivious manner; or

2. Solicits a person under 16 years of age 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, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) An offender less than 18 years of age who commits lewd or lascivious conduct commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(7) Lewd or lascivious exhibition.

(a) A person who:

1. Intentionally masturbates;

2. Intentionally exposes the genitals in a lewd or lascivious manner; or

3. Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity

in the presence of a victim who is less than 16 years of age, commits lewd or lascivious exhibition.

(b) An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) An offender less than 18 years of age who commits a lewd or lascivious exhibition commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(8) Exception. A mother's breastfeeding of her baby does not under any circumstance constitute a violation of this section.

HISTORY:
S. 1, ch. 21974, 1943; s. 1, ch. 26580, 1951; s. 780, ch. 71-136; s. 66, ch. 74-383; s. 1, ch. 75-24; s. 40, ch. 75-298; s. 291, ch. 79-400; s. 5, ch. 84-86; s. 1, ch. 90-120; s. 5, ch. 93-4; s. 6, ch. 99-201; s. 1, ch. 2000-246; s. 5, ch. 2005-28; s. 3, ch. 2008-172, eff. Oct. 1, 2008; s. 3, ch. 2008-182, eff. July 1, 2008; s. 6, ch. 2014-4, effective October 1, 2014; s. 7, ch. 2022-165, effective October 1, 2022.

Editor's notes.

Section 3, ch. 2008-182 reenacted (5)(b) without change to incorproate amendments to a stautory section referenced therein.

Amendments.

The 2005 amendment by s. 5, ch. 2005-28, effective September 1, 2005, substituted ŧlife felony ŧ for ŧfelony of the first degree ŧ and ŧs. 775.082(3)(a)4.ŧ for ŧs. 775.082, s. 775.083, or s. 775.084 ŧ in (5)(b).

The 2008 amendment by s. 3, ch. 2008-172, effective October 1, 2008, deleted (7)(b), which pertained to lewd or lascivious exhibition, and made related redesignations.

The 2014 amendment rewrote (4), which formerly read: ŧLewd or lascivious battery. ŷ A person who: (a) Engages in sexual activity with a person 12 years of age or older but less than 16 years of age; or (b) Encourages, forces, or entices any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity commits lewd or lascivious battery, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084 ŧ and added (5)(e).

The 2022 amendment by s. 7, ch. 2022-165, redesignated former (1)(c) as (1)(a); added (1)(c); redesignated former (1)(a) and (1)(d) as (1)(d) and (1)(e); and substituted ŧfemale genital ŧ for ŧvaginal ŧ twice in (1)(d).

Notes to Decisions

C 777.04. Attempts, solicitation, and conspiracy.

(1) A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt, ranked for purposes of sentencing as provided in subsection (4). Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.

(2) A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation, ranked for purposes of sentencing as provided in subsection (4).

(3) A person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in subsection (4).

(4) (a) Except as otherwise provided in ss. 104.091(2), 379.2431(1), 828.125(2), 849.25(4), 893.135(5), and 921.0022, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is ranked for purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944 one level below the ranking under s. 921.0022 or s. 921.0023 of the offense attempted, solicited, or conspired to. If the criminal attempt, criminal solicitation, or criminal conspiracy is of an offense ranked in level 1 or level 2 under s. 921.0022 or s. 921.0023, such offense is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) If the offense attempted, solicited, or conspired to is a capital felony, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) Except as otherwise provided in s. 893.135(5), if the offense attempted, solicited, or conspired to is a life felony or a felony of the first degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) Except as otherwise provided in s. 104.091(2), s. 379.2431(1), s. 828.125(2), or s. 849.25(4), if the offense attempted, solicited, or conspired to is a:

1. Felony of the second degree;

2. Burglary that is a felony of the third degree; or

3. Felony of the third degree ranked in level 3, 4, 5, 6, 7, 8, 9, or 10 under s. 921.0022 or s. 921.0023,

the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a felony of the third

degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(e) Except as otherwise provided in s. 104.091(2), s. 379.2431(1), s. 849.25(4), or paragraph (d), if the offense attempted, solicited, or conspired to is a felony of the third degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(f) Except as otherwise provided in s. 104.091(2), if the offense attempted, solicited, or conspired to is a misdemeanor of the first or second degree, the offense of criminal attempt, criminal solicitation, or criminal conspiracy is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(5) It is a defense to a charge of criminal attempt, criminal solicitation, or criminal conspiracy that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant:

(a) Abandoned his or her attempt to commit the offense or otherwise prevented its commission;

(b) After soliciting another person to commit an offense, persuaded such other person not to do so or otherwise prevented commission of the offense; or

(c) After conspiring with one or more persons to commit an offense, persuaded such persons not to do so or otherwise prevented commission of the offense.

HISTORY:
S. 8, sub-ch. 11, ch. 1637, 1868; RS 2594; GS 3517; RGS 5403; CGL 7544; s. 701, ch. 71-136; s. 1, ch. 72-245; s. 1, ch. 73-142; s. 12, ch. 74-383; s. 5, ch. 75-298; s. 1, ch. 83-98; s. 2, ch. 86-50; s. 170, ch. 91-224; s. 4, ch. 93-406; s. 14, ch. 95-184; s. 1195, ch. 97-102; s. 17, ch. 97-194; s. 2, ch. 2002-214; s. 2, ch. 2003-59; s. 204, ch. 2008-247, eff. July 1, 2008.

Editor's notes.

Former s. 776.04.

Amendments.

The 2003 amendment by s. 2, ch. 2003-59, effective July 1, 2003, in (4)(a) inserted "370.12(1)"; in (4)(d) inserted "s. 370.12(1)"; and in (4)(e) inserted "s. 370.12(1)."

The 2008 amendment by s. 204, ch. 2008-247, effective July 1, 2008, updated internal references in (4)(a), (d), and (e) in light of the renumbering of former chapter 370.

Notes to Decisions