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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO. 77,834

vs.

FRANCISCO HERNANDEZ,

Respondent.

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal; Petitioner was the prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. In this Brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as the State, and the Respondent, as Mr. Hernandez.

The following symbols will be used throughout this Brief:

"R"	Record on Appeal
"AR"	Additional Record
"IB"	Petitioner's <u>Initial Brief</u> before this Court

All emphasis in this Brief is supplied by the Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as they relate to the two issues raised and presented with the following addition and correction:

The Fourth District Court of Appeal in Hernandez v. State, 575 So.2d 1321 (Fla. 4th DCA 1991), granted the Respondent a new trial based on several grounds. The Petitioner has challenged only two of the grounds. The two unchallenged grounds include first the Fourth District's holding that the trial court should not have permitted two police officers and one teacher to testify as to the victims' veracity as such testimony invaded the province of the jury and brought legitimacy to the victims' accusations. The Fourth District concluded that they could not say beyond a reasonable doubt that the error did not affect the jury's verdict. Id., at 1322. Second, the Fourth District held that the trial court erred by allowing the State to cross-examine Mr. Hernandez as to an alleged prior act of similar misconduct and allowing another witness to testify to the act in rebuttal. Id., at 1322-1323.

The Respondent will "answer" only the two issues raised by the Petitioner. Apparently and presumably the Petitioner concedes the Fourth District correctly decided the two issues above by not challenging them herein.¹

¹The Respondent acknowledges that once conflict jurisdiction is accepted, this Court is free to review the entire case. Trushin v. State, 425 So.2d 1126 (Fla. 1982). However, this surely requires that the moving party requests a review of all issues. As noted, the Petitioner has not requested review of two issues

SUMMARY OF THE ARGUMENT

POINT I

The Fourth District Court of Appeal correctly held that the commission of one lewd act whether done in the presence of one or more children constitutes but one offense under F.S., §800.04 (4). In so holding, the Fourth District correctly determined that the crime of lewd act focuses on the act itself. Additionally, lewd act is defined as "doing any lewd or lascivious act in the presence of any child under the age sixteen years." The language "any child" ambiguously defines the permissible unit of prosecution, i.e., whether the legislature intended to permit multiple convictions and punishments for the doing of one lewd act albeit in the presence of more than one child. Decisions of this Court, as well as federal courts, have held that the article "any" fails to unambiguously define the unit of prosecution in singular terms. Hence, this ambiguity must be construed in favor of the Respondent against turning a single lewd act into multiple convictions and sentences.

POINT II

The trial court incorrectly and misleadingly instructed the jury on the crime charged, lewd assault. The instruction was obviously confusing, as the jury after deliberating for over two

which entitle the Respondent to a new trial. Hence, even if this Honorable Court agrees with the Petitioner on either or both of her arguments, Respondent will still be entitled to a new trial based upon the unchallenged errors. (Respondent has purposely placed this matter in a footnote as admittedly it is argumentative).

hours requested a re-instruction on lewd assault. Pursuant to their request, the trial court instructed not on lewd assault, but lewd act. The Fourth District concluded that as to the initial misleading and inaccurate instruction, the Respondent waived any objection. However, as to the re-instruction, the Fourth District correctly held the trial court committed fundamental and reversible error. Decisions of this Court have held it is the duty of a trial court to correctly instruct the jury on the elements of the crime charged. Failure to so instruct constitutes fundamental error. Silence in the face of such an error by defense counsel does not constitute a waiver. It is essential to a fair trial that a jury be able to reach a verdict based upon an instruction on the crime charged, and not be left to its own devices to determine what constitutes the offense charged.

POINT I

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE RESPONDENT WAS IMPROPERLY CONVICTED OF TWO COUNTS OF LEWD ACT WHEREIN ONLY ONE SUCH ACT WAS COMMITTED IN THE PRESENCE OF TWO CHILDREN. (restated).

The issue raised herein concerns the allowable unit of prosecution for lewd act under F.S., §800.04 (4). Lewd act is defined as one who "knowingly commits any lewd or lascivious act in the presence of any child under the age of sixteen years." The Petitioner contends that the language "any child" demonstrates that the legislature intended to authorize multiple prosecutions and punishments arising out of a single lewd act if more than one child is present. The caselaw does not support the Petitioner's argument.

It is the legislature, and not the courts, which define the allowable unit of prosecution for a criminal offense. Crandon v. United States, 110 S.Ct. 997, 1002 (1990); Bell v. United States, 349 U.S. 81, 75 S.Ct. 620 (1955). Thus, it is incumbent upon the legislature to clearly set forth within the statute the allowable unit of prosecution. In Bell, the defendant was charged with the simultaneous interstate transportation of two women in violation of the Mann Act, which makes it unlawful to transport interstate "any woman or girl" for immoral purposes. The issue was whether the defendant had committed one or two offenses. The Supreme Court concluded that the statute was ambiguous and held: "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single

transaction into multiple offenses..." 349 U.S. at 84, 75 S.Ct. at 622.

In Grappin v. State, 450 So.2d 480 (Fla. 1984), this Court reviewed the decision of the Second District Court of Appeal which had held that a defendant could be charged with five counts of theft as a result of his simultaneously stealing five firearms. State v. Grappin, 427 So.2d 760 (Fla. 2d DCA 1983). In reaching its decision, the Second District noted that F.S., §812.014 (2)(b)(3) defines grand theft as the unlawful taking of "a firearm." The district court concluded that because the legislature had used the article "a" in reference to "a firearm," the legislature thereby intended to allow separate prosecutions and punishments for the taking of each individual firearm. In contrast, the Court noted that if the statute had listed the unlawful taking of "any firearm," the legislative intent would be ambiguous, and such ambiguity would be resolved in favor of the accused by prohibiting multiple prosecutions and punishments. State v. Grappin, supra, at 763. This Honorable Court agreed with the Second District's reasoning, and adopted it by holding:

We find that the use of the article "a" in reference to "a firearm" in section 812.014 (2)(b)(3) clearly shows that the legislature intended to make each firearm a separate unit of prosecution. The construction which this Court and the district court placed on this statute is consistent with federal court decisions construing similar federal statutes. Federal courts have held that the term "any firearm" is ambiguous with respect to the unit of prosecution and that several firearms taken at the same time must be treated as a single offense with multiple convictions and punishments being precluded. (citations

omitted). On the other hand, the phrase "a firearm" has been held to express a legislative intent to allow separate prosecutions for each firearm. (citation omitted).

The "a"/"any" test was relied upon this Court in State v. Watts, 462 So.2d 813 (Fla. 1985). In Watts, the defendant, a state prisoner, was found in possession of two knives. He was charged with two counts under F.S., §944.47, which makes it unlawful for a state prisoner to be in possession of "any" weapon. Pursuant to the "a"/"any" test set forth in Grappin, supra, this Court held that the defendant could not be charged and convicted of two counts for possessing the two knives.

In Schmitt v. State, 563 So.2d 1095 (Fla. 4th DCA), juris. accepted, 569 So.2d 444 (Fla. 1990),² the defendant was charged with seven counts of possessing seven photographs depicting various acts of sexual conduct by minor children contrary to F.S., §827.071 (5). This statutory offense makes it unlawful for any person to knowingly possess "any" photograph...he knows to include sexual conduct by minor children. The Fourth District relying upon this Court's decision in State v. Watts, supra, held that the article "any" demonstrated that the legislature intended that possession of several photographs should be treated as a single offense with multiple convictions and punishments precluded. Id., at 1101. Six of the defendant's convictions were therefore vacated and set aside.

²According to Schmitt's appellate counsel, the issue(s) being considered by this Court in Schmitt do not relate to the issue of the allowable unit of prosecution discussed herein.

Applying the above authorities to the instant case, the Petitioner's argument is without merit that the statutory language "any child" within the lewd act statute demonstrates the legislative intent to allow multiple prosecutions and punishments for each child present during the commission of one lewd act. If the legislature had preceded child with the article "a" Petitioner's argument would have merit. However, the article "any" does not clearly express the allowable unit of prosecution in singular terms. Grappin v. State, supra, at 481. Instead, the article "any" may be said to fully encompass plural activity. See, United States v. Kingsley, 518 F.2d 665, 667 (8th Cir. 1975). As noted above, when the legislature does not clearly set forth the allowable unit of prosecution, the ambiguity must be resolved in favor of the accused against turning a single act into multiple offenses. Thus, committing one lewd act, whether in the presence of one or ten children, constitutes but one offense under F.S., §800.04 (4) for which one punishment may be imposed.

Accordingly, the Fourth District correctly held that Mr. Hernandez could be convicted of only one count of lewd act for his one act of masturbating in the presence of two children. Hernandez v. State, 575 So.2d 1321, 1323 (Fla. 4th DCA 1991). Accord, Lifka v. State, 530 So.2d 371, 373 f.n. 1 (Fla. 1st DCA 1988). This construction of F.S., §800.04 (4) is consistent not only with this Court's decisions, but also with federal court decisions construing criminal statutes involving the article "any."

The Petitioner's request that this Court approve and adopt the

holding in Bergen v. State, 552 So.2d 262 (Fla. 2d DCA 1989), wherein the court upheld the defendant's five convictions for lewd act for masturbating in front of five children must be rejected. The Second District's holding is in direct conflict with this Court's decisions in Grappin and Watts as to statutory effect of the article "any."

Lastly, the Respondent agrees with the Petitioner that the lewd act statute was designed to protect children. However, it does not necessarily follow that the legislature thereby intended to authorize multiple prosecutions and punishments for a single act. As to lewd act, it is the act itself which the legislature sought to prohibit whether it be done in the presence of one or more children. Hernandez, supra; Lifka, supra.³ Courts are not permitted to construe a statute in a way that it believes may best accomplish a statutory purpose. Instead, when it comes to imposition of criminal penalties, a court must look for "a clear indication that [the legislature] intended to authorize multiple punishments for a single [act]. Brown v. United States, 623 F.2d 54, 58 (9th Cir. 1980). As held by the United States Supreme Court in Bell v. United States, supra, unless the legislature has fixed the punishment for an offense clearly and without ambiguity, the ambiguity is to be resolved against turning a single transaction into multiple offenses.

³On the other hand, as to the offense of lewd assault, both the Fourth District and First District agreed that for each child assaulted a separate prosecution and conviction was allowable. Unlike lewd act, lewd assault focuses on the victim, i.e., whether the victim was put in fear of imminent harm.

The interpretation and application of F.S., §800.04 (4) by the Fourth District in vacating one of Respondent's lewd act convictions and sentences must be affirmed.

POINT II

THE FOURTH DISTRICT CORRECTLY HELD THE TRIAL COURT COMMITTED FUNDAMENTAL AND REVERSIBLE ERROR BY NOT CORRECTLY INSTRUCTING THE JURY ON THE CRIME CHARGED. (restated).

The Petitioner contends that Mr. Hernandez either waived or invited the trial court's error in failing to correctly instruct the jury on the crime charged in Count I, lewd assault.⁴ An examination of the facts and caselaw demonstrates that Petitioner's argument is without merit.

During the initial jury instructions, the trial court incorrectly and misleadingly included in its instruction on lewd assault, the offense of lewd act. (R. 470-471). The Petitioner correctly notes that Respondent's trial counsel, Mr. Megias, advised the trial court he did not want a curative instruction by stating "I'd rather not have a emphasis placed on it." (R. 471). The jury began its deliberations at 2:35 P.M. (R. 473). They returned twice with questions, the last time at 4:50 P.M. requesting a re-instruction on lewd assault. (R. 475). Pursuant to their request, the trial court instructed the jury as follows:

Before you can find the defendant guilty of lewd act, the State must prove the following two elements beyond a reasonable doubt: J.M. was under the age of sixteen years. Hernandez knowingly committed a lewd or lascivious act in the presence of J.M. (R. 477) (emphasis added).

⁴The Petitioner invoked the discretionary jurisdiction of this Honorable Court by alleging conflict of decisions. While it appears that the only express and direct conflict of decisions involves those discussed in Point I, supra, the issue raised herein is within this Court's discretion to review or not review. See, Trushin v. State, 425 So.2d 1126 (Fla. 1982).

As evidenced by the re-instruction, the trial court gave the jury the definition of lewd act, which of course was not the crime charged in Count I. As to this error, neither the State nor Mr. Hernandez objected.

In considering all of the trial court's instructions, the Fourth District held:

We also conclude that the trial court committed fundamental error in failing to correctly re-instruct the jury on lewd assault. The State concedes that the trial court's initial instruction incorrectly combined both lewd act and lewd assault. But, the defense counsel waived any objection to the initial instruction and requested the trial court not to re-instruct the jury. However, after the initial instruction, the jury requested a re-instruction on lewd assault. Thereafter, the trial court instead of instructing the jury as to lewd assault instructed them only as to lewd act....Failure to give a complete and accurate instruction is fundamental error, reviewable in the absence of an objection. (citation omitted). Hernandez v. State, 575 So.2d at 1323.

Accordingly, the Fourth District held that defense counsel had waived any objection to the trial court's initial inaccurate and misleading instruction. This holding is in accord with this Court's recent decision in Armstrong v. State, 566 So.2d 1369 (Fla. 1990), wherein it was held that defense counsel's affirmative request for the abbreviated short form version of the standard instruction on excusable homicide waived his subsequent claim on appeal that the trial court erred in giving his requested instruction.

However, as to the re-instruction wherein the jury was not instructed at all as to the crime charged, the Fourth District held

this was fundamental reversible error. In numerous cases, this Court has held that failing to instruct on the crime charged is fundamental error.

In State v. Jones, 377 So.2d 1163 (Fla. 1979), the defendant was charged with first degree murder. The jury was instructed on premeditated murder, and felony murder, but the court did not define the underlying felony of robbery. This omission was brought to the trial court's attention by the prosecutor, at which time defense counsel simply remained silent. This Court held:

In the present case there was a complete failure to give any instruction on the elements of the underlying felony of robbery. This was fundamental error. It is essential to a fair trial that the jury be able to reach a verdict based upon the laws and not be left to its own devices to determine what constitutes the underlying felony. Id., at 1165. (emphasis added).

Likewise, in Franklin v. State, 403 So.2d 975 (Fla. 1981), this Court held that defense counsel's failure to request the trial court to instruct on the underlying felony for felony murder "does not relieve a trial court of the duty to give all charges necessary to a fair trial of the issues." Id., at 976. (emphasis added).

The duty of a trial court to intelligently and correctly instruct the jury on the crime charged has long been held to be an inherent and indispensable requisite of a fair and impartial trial. Gerds v. State, 64 So.2d 915, 916 (Fla. 1953). In Robles v. State, 188 So.2d 789 (Fla. 1966), this Court held that the jury "must be adequately instructed on the essential elements of the crime charged." See, also, Williams v. State, 366 So.2d 817 (Fla. 3d

DCA), cert. den., 375 So.2d 912 (Fla. 1979) (the trial court failed to instruct the jury on the crime charged held reversible fundamental error despite the defendant's failure to object).

As noted above, after the Court's re-instruction neither the State nor the defense objected. The Petitioner urges this Court to presume that the Respondent waived his due process right to have the jury instructed on the crime charged because of his earlier response to the inaccurate instruction and his silence. First, courts must presume that a defendant did not waive his rights. See, e.g., North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757 (1979). Secondly, silence, does not constitute a waiver for correct jury instructions on the crime charged. Ray v. State, 403 So.2d 956, 961 (Fla. 1981); State v. Jones, supra; Franklin v. State, supra.

The significant fact is that the jury instruction error herein involves the complete failure of the trial court to instruct on the crime charged. It is not simply a situation involving an inaccurate instruction as was the case in Morris v. State, 557 So.2d 27 (Fla. 1990) relied upon by the Petitioner. In Morris, this Court found the jury instruction on felony murder by aggravated child abuse to be inaccurate, but determined that the error was harmless beyond a reasonable doubt. Id., at 29. In Parker v. Dugger, 537 So.2d 969 (Fla. 1988), the judge inadvertently omitted during his oral instructions the definition of first degree felony murder. However, a complete definition was included within the written instructions, which were given to the

jury, and the jury was told they should review the written instructions if they had any doubt on the instructions. This Court held that the written instructions, as well as the evidence establishing that the murder was premeditated, as opposed to a felony murder, rendered the error harmless beyond a reasonable doubt. Sub judice, the jury first received an inaccurate instruction on lewd assault, followed by no instruction, and the record does not establish that correct written instructions were given to the jury. In Roman v. State, 475 So.2d 1228 (Fla. 1985), also relied upon by the Petitioner, the defendant argued that the trial court had erred in failing to give an instruction he himself had never requested.

It is essential to a fair trial that a jury be instructed on the crime charged. This was not done in the instant case, and Mr. Hernandez did not waive or invite the error. The Fourth District correctly concluded that reversible error was committed. This ruling should be affirmed.

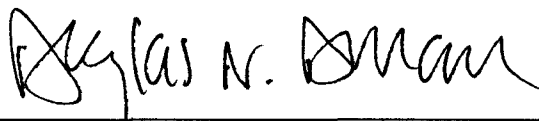
CONCLUSION

Based upon the foregoing arguments and authorities cited herein, the Respondent respectfully requests that the two rulings of the Fourth District Court of Appeal before this Court be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent has been furnished by mail to Sarah B. Mayer, Office of the Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, this 20 day of October, 1991.

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