SEX CRIMES/CHILD ABUSE CASE LAW UPDATES FOR JANUARY 2018

By Dennis Nicewander
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Hyre v. State, 2018 WL 472833 (Fla.App. 2 Dist., 2018)

General findings of reliability at child hearsay hearing were insufficient. The court needs to make separate finding as to each statement to be introduced. The court failed to consider internal inconsistencies of the victim's taped statement in evaluating the reliability.

Cartagena v. State, 2018 WL 354553, (Fla.App. 4 Dist., 2018)

Because the court applied a domestic violence multiplier without the jury having found that a related child was present during the battery, reversal is required.

Pinnock v. State, 2018 WL 387245, (Fla.App. 2 Dist., 2018)

The prohibition of possessing an internet accessible cellphone is reasonably related to the trial court's instruction barring him from accessing the internet without a treatment safety plan.

The court did not specifically order the defendant not to own a smartphone. The probation officer ordered him not to own one until he got a treatment safety plan. Defense argued that the probation officer cannot make her own conditions.

Richards v. State, 2018 WL 560701 (Fla.App. 2 Dist., 2018)

The State charged defendant with failing to register as a sexual predator in that he "did fail to provide required location information, or did otherwise fail, by act or omission, to comply with the requirements of Florida Statute 775.21; contrary to Chapter 775.21(10)(a)."

In reversing the conviction, the court stated the information in this case did not allege the essential elements of the charged offense and it did not cite a specific subsection of the statute that included the missing elements or otherwise place the defendant on notice of the nature of his alleged criminal conduct.

Citing of the general statute is not sufficient where it does not put the defendant on notice of the elements that constitute the charged conduct.

The statute cited in the information was the sentencing subsection. The state went forward on subsection 6(g), which was not specifically cited.

Bermudez v. State, 2018 WL 560369, (Fla.App. 2 Dist., 2018)

> A conviction for both traveling to meet a minor and unlawful use of a two-way communications device violates the prohibition against double jeopardy.

SEX CRIMES/CHILD ABUSE CASE LAW UPDATES FOR FEBRUARY 2018

By Dennis Nicewander
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Harrington v. State, 2018 WL 1001349, (Fla.App. 4 Dist., 2018)

> Trial court properly revoked defendant's probation for failing to successfully complete a sex offender program when doctor's discharge summary stated Appellant was terminated from the program for two principal reasons: *willful* treatment resistance and *ongoing disruption* of the treatment process for other members.

Barlow v. State, 2018 WL 944487, (Fla.App. 1 Dist., 2018):

> Defendant received 15 years prison based on a conviction for possession 10 images of child pornography. Defendant alleged that the court improperly relied on testimony at the hearing that the suspect told the undercover detective that would like to have sex with a 14-year-old boy. The appellate court first noted that the reference was not unsubstantiated because the detective testified to it. Secondly, the court ruled that it was relevant to rebut the defendant' motion for downward departure where a report indicated he was a low risk to reoffend.
>
> In response to defendant's argument that the judge improperly relied on the general harm caused by child pornography, the appellate court noted,
>
>> *But in Barlow's sentencing, although the court noted the substantial harm child pornography inflicts, it did not announce any policy applicable to all child-pornography cases, and it did not articulate any other impermissible basis for its sentence. Instead, the trial court considered the individual facts of Barlow's case.*

Wromas v. State, 2018 WL 844595 (Fla.App. 3 Dist., 2018):

> Although defendant qualified for removal from the sex offender registry pursuant to F.S. 943.04354, judge had discretion to deny the motion based on defendant's history of violent crimes and other factors.

Thompson v. State, 2018 WL 794682 (Fla.App. 1 Dist., 2018):

> There is no requirement for a judge to conduct a balancing test pursuant to section 403 when introducing child hearsay statements.

Prosecutors opening statement calling the suspect the boogeyman was objectionable, but not fundamental error.

The offense of unnatural and lascivious act is not a necessary lesser-included offense of lewd and lascivious molestation, but a permissive one.

State v. Knighton, 2018 WL 654179 (Fla., 2018)

Defendant who was on trial for lewd or lascivious battery was not entitled to a jury instruction on the permissive lesser included offense of unnatural and lascivious act; the information charged defendant by specifically alleging penile union or penetration with the child victim's vagina, but the instruction on unnatural or lascivious act was a permissive lesser included offense of lewd and lascivious battery in cases not involving penile-vaginal sexual intercourse; disapproving *Harris v. State*, 742 So.2d 835.

In cases not involving penile-vaginal sexual intercourse, the jury instruction on unnatural or lascivious act is a permissive lesser included offense of lewd and lascivious battery.

Furlow v. State, 2018 WL 663548 (Fla.App. 2 Dist., 2018):

Sending images via messaging applications does not violate section 800.04(5). That section requires lewd act to be live.

Wood v. State, 2018 WL 1096062, (Fla.App. 1 Dist., 2018)

Case reversed where court failed to make a finding that similar fact victims in child sexual abuse prosecution were proven by clear and convincing evidence.

SEX CRIMES/CHILD ABUSE CASE LAW UPDATES FOR MARCH 2018

By Dennis Nicewander
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Connolly v. State, 2018 WL 1219064 (Fla.App. 5 Dist., 2018):

> Convictions for sexual battery and lewd battery based on same act violate double jeopardy.

Watkins v. State, 2018 WL 1309053 (Fla.App. 2 Dist., 2018)

> Convictions for traveling to meet a minor and unlawful use of a two-way communication device violate double jeopardy.

In re Standard Jury Instructions in Criminal Cases-Report 2017-03, 2018 WL 1193193 (Fla., 2018)

> This is new jury instruction for possession of material depicting sexual performance by a child with intent to promote.

SEX CRIMES/CHILD ABUSE CASE LAW UPDATES FOR APRIL 2018

By Dennis Nicewander
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Gomez v. State, 2018 WL 1956309 (Fla.App. 4 Dist., 2018):

During trial for defendant sexually battering his wife, defense sought to introduce evidence that wife accused an employer of raping her several years earlier and also accused defendant of trying to rape her year earlier. The trial court ruled that both incidents violated the Rape Shield law and were irrelevant. Appellate court ruled Rape Shield law did not apply in either circumstance because that statute is limited to prior "consensual" activity and also does not apply to prior sex with defendant. The court upheld the ruling however, because they agreed that the acts were irrelevant. When objecting under Rape Shield, make sure you argue relevance in addition to the Act.

Frandi v. State, 2018 WL 1886514, at *1 (Fla.App. 1 Dist., 2018)

First, the record shows that Appellant specifically agreed to the sexual predator designation as part of the negotiated plea agreement. Because this designation is not a sentence or a punishment, Appellant was not precluded from agreeing to the designation even if he did not qualify under the statute. See Kingry v. State, 28 So.3d 173, 174 (Fla. 1st DCA 2010). And, because Appellant has received the benefits of the plea agreement,[2] he cannot now seek to be relieved of one of the burdens imposed on him by the agreement.

An adjudication of delinquency can be used to satisfy the prior conviction element of the sexual predator statute.

Bettey v. State, 2018 WL 1833401, (Fla.App. 1 Dist., 2018):

This is an ineffective assistance of counsel case alleging defense counsel failed to object to issues related to the two-year time frame in the information and upon comments made by the prosecutor in closing arguments.

The court provides a good discuss about why the State only needed to be as specific as they could on the charging dates. The court also noted that the date is not an element of the offense, so proving the sexual acts took place between the charged dates in not necessarily required.

The defense also objected to the following statements in closing argument:

In ground three, Appellant argued that counsel was ineffective for failing to object to the following statements made by the prosecutor during closing

argument, which he contends (1) bolstered the credibility of the witnesses and (2) demeaned his defense:
(a) "It's not reasonable to believe that they weren't doing anything other than telling you the truth."
(b) the CPT interviewer "has no interest in the outcome of this case";
(c) "the truth is what [the victims] told you happened";
(d) "there's no reasonable reason for these girls to lie";
(e) it was painful for both victims to tell the truth;
(f) the victims' mother was "telling you the truth";
(g) "the truth is what [the victims] told you";
(h) the victims' disclosures could not be "anything other than the truth"; and
(i) the Child Protective Team interviewer "didn't have an interest in this case."

The Appellate court noted that the comments were not inappropriate because,

> *Here, nothing in the challenged arguments indicates that the prosecutor was relying on information outside of the record or that he had reasons to believe the victims or the victims' mother that were not presented to the jury. The context of the statements indicate that the prosecutor was arguing why the jury should find the victims credible.*

See the opinion for additional related issues.

Lara-Castillo v. State, 2018 WL 1833357, (Fla.App. 1 Dist., 2018)

A young girl claimed defendant touched her vagina. Defendant claimed he touched it accidently. Court ruled that intent is almost always proven circumstantially and State did not have to provide direct evidence of intent. Factors such as the victim leaving the suspect's home crying and the defendant changing his story are sufficient to allow the jury to infer the lewd intent.

Robinson v. State, 2018 WL 1647692, (Fla.App. 1 Dist., 2018)

In ruling that the facts were sufficient for the jury to convict on the charge of sexual battery-great force, the court noted,

> *The young woman testified that Robinson held her down by her neck, bit her, made her bleed, and caused her great pain. The young woman's medical records, entered into evidence, detailed a half-centimeter vaginal tear, significant bruising and discoloration on her neck, and bleeding following the attack. Other witnesses testified to seeing significant amounts of blood on the young woman's bed sheets, and Robinson himself testified that he changed shirts afterward because the shirt he wore during the encounter was covered in blood. This evidence—and all the*

inferences drawn from it—were sufficient to allow a reasonable jury to conclude that Robinson used force sufficient to cause "great bodily harm or pain."

The nurse who performed the sexual assault exam was allowed to testify the injuries were "what you might see after forced sexual intercourse or sexual battery."

Roberts v. State, 2018 WL 1613874, (Fla.App. 2 Dist., 2018):

Defendant was improperly designated a sexual predator when his offense was committed prior to October 1, 1993.

Jefferson v. State, 2018 WL 1612237, (Fla.App. 3 Dist., 2018)

In ruling that evidence was sufficient to support an attempted sexual battery, the court wrote,

Both the victim's testimony and the Appellant's testimony provide proof beyond a reasonable doubt that the Appellant had the specific intent to sexually assault the victim, and made overt acts to accomplish that assault. The Appellant admitted that he followed the victim and demanded that she get into his car, that he asked her to take her blouse off, that he offered her money for sex, and that he forcibly attempted to keep her in the car for that purpose.

Lenz v. State, 2018 WL 1956322, at *3 (Fla.App. 4 Dist., 2018)

In his closing argument, prosecutor commented on a jail call between the defendant and his wife:

And sometimes silence can be deafening. And in this case in this jail call, I think his silence not to comfort her and say, hey, this is a misunderstanding, I didn't do it on purpose, I didn't have a lewd intent, something to that effect, he's silent. I can't help but wonder what has changed. Think about this. This is early on in the case, this is the first jail call. What has changed over the three years, what has changed? I'll tell you what's changed. He's had three years to think about this. He's had three years to think of his story and to explain everything away…

Really? And he was innocent. Why couldn't he talk about the case? Why couldn't he get on the phone and say this is a misunderstanding, why couldn't he say I was tricked by the police, why couldn't he say PTSD kicked in, why couldn't he say all that? That wouldn't put him in jeopardy, not one bit. Not at all. He knows he's guilty, that's why he doesn't want to talk about this case.

In addressing this closing argument, the appellate court stated,

We find that the prosecutor's argument was both an impermissible comment on silence and a burden-shifting comment, with either one being egregious and obviously improper.[1]

Kania v. State, 2018 WL 1734217, (Fla.App. 2 Dist., 2018)

Double Jeopardy precludes charging traveling to meet a minor and unlawful use of a two-way communication device when charged on the same day.