

SEX CRIMES/CHILD ABUSE CASE LAW UPDATES FOR DECEMBER 2008 – JANUARY 2009

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INCEST:

Beam v. State, (5th DCA January 23, 2009)

“We conclude that Beam cannot be convicted of incest with the victim by virtue of his being her “uncle-in-law” because relations by affinity are not included within the purview of incest as proscribed in section 826.04. The fact that Beam adopted the victim does not alter the biological fact that she was not related to him by consanguinity.”

CHARGING MULTIPLE COUNTS/DOUBLE JEOPARDY

Schuster v. State, 34 Fla. L. Weekly DXX (Fla. 4th DCA 2009):

Defendant who molested 12 year old boy who was spending the night at his house could properly be convicted of four counts of lewd battery and one count of lewd molestation based upon testimony about oral sex both ways, anal sex both ways and fondling of the child’s penis.

“We find no double jeopardy violation because the sexual acts were serial, distinct in character, and appellant had sufficient time between each act to reflect and form a new criminal intent.”

State v. Meshell, 34 Fla. L. Weekly SXX (Fla. 2009):

Distinct acts of sexual battery do not require a temporal break between them to constitute separate crimes under double jeopardy analysis.

Sexual acts of a separate character and type requiring different elements of proof, such as those proscribed in the sexual battery statute, are distinct criminal acts that the legislature has decided warrant multiple punishments.

The same double jeopardy analysis that applies to acts proscribed under sexual battery statute also applies to acts proscribed under lewd and lascivious battery statute because the definitions of the proscribed acts for each offense are identical.

Acts of oral, anal, and vaginal penetration, as proscribed by statute defining lewd and lascivious battery, are of a separate character and type requiring different elements of proof and are, therefore, distinct criminal acts, such that separate punishments for these distinct criminal acts do not violate double jeopardy.

WILLIAMS RULE/SIMILAR FACT EVIDENCE

Donton v. State, 34 Fla. L. Weekly D114 (Fla. 1st DCA 2009):

Admission of prior child molestation of three year old female did not warrant mistrial in prosecution for crime involving penile union with, or penetration of, anus of male teenager; defendant engaged in non-consensual sex with one very young victim and another victim whose mental status rendered him child-like and unable to take care of and protect himself, in both prior incident and charged incident, defendant did not expect to be caught having sex with victims, in prior act and charged act, defendant acted with authoritative familiarity over both victims, whom he already knew and exploited when given opportunity to be alone with them, and ample precautions were taken to avoid emphasizing collateral crime evidence.

Where the collateral evidence involves a sexual battery committed upon a child, and the perpetrator is a family member or close family friend or someone else in a “familial relationship” or setting with the victim, a relaxed standard of admissibility of the collateral-crime evidence applies.

EXPERT TESTIMONY

Torres v. State, 34 Fla. L. Weekly D105 (Fla. 4th DCA 2009):

During a sexual battery trial, the State called a retired FBI agent, Ken Lanning, as an expert witness on child crimes and the sexual victimization of children. The expert provided extensive testimony on the common characteristics of behavior exhibited by child molestation victims and explained a concept he called “compliant child victim.” He defined a compliant child victim as one “who cooperate[s] in or ... consent[s] to their sexual victimization,” and explained that they are frequently adolescent boys. He described why compliant child victims may not disclose the behavior at first and may later disclose the facts surrounding the incident in a piecemeal fashion. Mr. Lanning knew very little about the pending case or the victim of the case., He testified purely on his own past experience and did not apply his opinion to the victim in the pending case. He testified that his opinion was based exclusively on his own experience and not on any scientific studies or syndromes, etc...

The court ruled that Lanning’s testimony was pure opinion and not subject to a *Frye* hearing. The court also ruled that his testimony did not improperly bolster the testimony of the victim.

AMENDED INFORMATION

State v. Haubrick, 34 Fla. L. Weekly D40 (Fla. 1st DCA 2009):

Trial court should not have dismissed amended information charging defendants with sexual battery by multiple perpetrators, even though information cited the wrong statutory subsection and omitted statutory language stating that the defendants did not “use physical force and violence likely to cause serious personal injury”; omitted language was not an essential element of the offense, and there was no evidence that defendants were confused and prejudiced by the amended information other than their bare assertions to that effect.

FOURTH AMENDMENT:

State v. Butler, 34 Fla. L. Weekly D40 (Fla. 1st DCA 2008):

Defendant, who allegedly suffered from Munchausen syndrome by proxy which was disorder whereby defendant factitiously induced illness in child to draw attention to herself, did not have reasonable expectation of privacy when she was in her child's hospital room, and thus, the state action, namely court's broad delegation to hospital staff of the power to conduct video surveillance, together with court's authorization for the State to take immediate custody of child if surveillance showed he was in danger, did not amount to a search for Fourth Amendment purposes; even though defendant did not know about surveillance, she would have expected that efforts to interrupt child's breathing would have triggered medical response, and she could not have reasonably expected privacy in her actions affecting the health and well-being of a heavily monitored patient.

For Fourth Amendment purposes, patients admitted to private hospital rooms may reasonably expect that law enforcement will not search their belongings; the more private the treatment space, the more reasonable the patient's expectation of privacy with respect to official activity.

CHILD HEARSAY

Johnson v. State, 34 Fla. L. Weekly DXX (Fla. 1st DCA 2009):

During sexual battery on a child trial, the state presented admissible child hearsay testimony concerning the abuse. At trial, the victim recanted and said he had lied about the abuse. When asked if he was telling the truth at trial, the child said he did not know.

“If the only evidence of guilt is a child victim's out-of-court statement admitted under section 90.803(23), and if the child has recanted the accusation in court, the trial court must grant a motion for judgment of acquittal.”

“The most that could be said of M.J.'s trial testimony is that it leaves open the possibility that his earlier accusation was true. That is not proof of guilt. The child was reluctant and equivocal, but at no point did he adopt or support the accusation he had made in his out-of-court statement. The state has the burden of proving beyond a reasonable doubt that the defendant is guilty of the crime charged. That burden cannot be established by testimony that the victim does not know whether he is telling the truth by retracting an earlier accusation. It can only be established by affirmative evidence that the crime was committed.”

HEARSAY

Fleitas v. State, 34 Fla. L. Weekly D60 (Fla. 3rd DCA 2008):

Officer's testimony regarding child molestation victim's prior consistent statements to State Attorney's Office was admissible nonhearsay; declarant testified at trial and was subject to cross-examination concerning statement, and record established that victim's prior statements were introduced to rehabilitate victim from defendant's implied argument of improper influence, motive or recent fabrication.

SEXUAL PERFORMANCE BY A CHILD

State v. Brabson, 34 Fla. L. Weekly D7 (Fla. 2d DCA 2008):

The lewdness requirement, under statute setting forth offense of sexual performance by a child, may be satisfied by the intent of the person promoting the performance which included sexual conduct by the child.

State established prima facie case of lewdness so as to require submission to jury of charges of promotion of sexual performance by a child; girls were asked to try on swimsuits under pretense of determining sizes for purposes of placing orders for team swimsuits, defendant, who coached girls' swim team, placed camera in his office, defendant then lured girls to his office, where they otherwise would not have been undressing and changing into suits, but for defendant's cajoling, victims were enticed to change in office with intent that their nude bodies be visible to camera and recorded, and nudity and female genitalia were the focus of defendant's filming.

SEX OFFENDER PROBATION

Grosso v. State, 34 Fla. L. Weekly D24 (Fla. 4th DCA 2008):

Trial court's amendment of defendant's sexual offender probation to add the condition of electronic monitoring did not violate double jeopardy; electronic monitoring was mandatory based on defendant's prior convictions and new offense.

Where a trial court fails to impose a mandatory penalty at the original sentence, double jeopardy principles are not offended where the trial court subsequently corrects the sentence by imposing the omitted mandatory sanction.

Trial court's order sentencing defendant to sexual offender probation, which omitted the mandatory condition of electronic monitoring, was not an order affecting Department of Corrections' performance of its duties regarding sex offenders, and thus trial court lacked jurisdiction to modify the sentence more than 60 days later to add the condition, despite Department's contention that the lack of electronic monitoring affected its ability to perform its duty to supervise sex offenders and protect the public; statutes granting agencies a year to challenge orders affecting performance of their duties were intended to enforce registration requirements, rather than monitoring requirements

Newton v. State, 996 So.2d 960 (Fla. 2d DCA 2008):

Evidence at violation of probation hearing was insufficient to demonstrate that defendant willfully violated condition of his sex offender probation by changing his approved residence without consent, where county withdrew its approval of defendant's formerly-approved residence and refused to approve the alternate location he proposed, and it was not established that defendant had the ability to return to probation officer as he was ordered to do after he reported his inability to find approved housing.

OTHER STUFF

Kovaleski v. State, 34 Fla. L. Weekly D79 (Fla. 4th DCA 2009):

Proffer was required to cross-examine sexual abuse victim about prior false accusation of sexual misconduct against another person, where record was silent as to whether victim had ever made such an accusation or withdrawn it.

Failure of defendant to object to closing of courtroom when sexual abuse victim testified constituted waiver of his right to public trial.

Hobbs v. State, 33 Fla. L. Weekly S1005 (Fla. 2008):

A trial court may consider a victim's recantation when determining whether the state is unable to prove the existence of the elements of the crime for purposes of

admitting a statement under the statute governing the admissibility of confessions in sexual-abuse cases; disapproving *Kelly v. State*, 946 So.2d 591. F.S. 92.565.

In re STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, 33 Fla. L. Weekly S982 (Fla. 2008):

New Jury Instructions are given for the various F.S. 800.04 offenses.

Rincon v. State, 33 Fla. L. Weekly D2766 (Fla. 4th DCA 2008):

Fact that information charging defendant with sexual offenses committed on a victim under 12 years old included, as the end date for the offenses, victim's 12th birthday did not preclude sentencing for offenses committed on a victim under 12 years old, where defendant pled guilty, thereby admitting that he sexually abused the victim while she was under 12 years old.