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Brumit v. State, 33 Fla. L. Weekly D168 (Fla. 4th DCA 2008)

Jury determination that defendant was guilty of aggravated child abuse, i.e., that she maliciously punished child, could not be deemed to include a jury finding that she was guilty of every element of the permissive lesser included offense of child abuse, and thus appellate court, when reversing defendant's conviction for aggravated child abuse, could not direct entry of judgment for lesser included offense of child abuse.

Bennett v. State, 33 Fla. L. Weekly D98 (Fla. 1st DCA 2007):

The competence of a child witness is based on intelligence, not age, and whether the child possesses a sense of the obligation to tell the truth.

When ruling on a child's competency to testify, the trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a moral sense of the obligation to tell the truth.

Factors to consider in reviewing a trial court's decision on a child's competency to testify include the entire context of her testimony and whether her testimony is corroborated by other evidence.

Trial court did not abuse its discretion when it found 12-year old victim competent to testify in trial for attempted sexual battery, sexual battery, and lewd and lascivious molestation, although expert testified that victim had expressive and receptive language impairment; victim accurately recounted facts about her life, there was corroborating evidence from defendant, who admitted to touching victim's vagina, from family friend, and from defendant's cousin, and victim possessed a moral sense of the obligation to tell the truth.

Convictions for attempted sexual battery, sexual battery, and lewd and lascivious molestation arose out of multiple offenses and, thus multiple convictions did not violate his double jeopardy rights, although only one victim was involved; record demonstrated several incidents of digital penetration, touching of victim's vagina, and kissing and fondling her breasts throughout a one-year period, victim testified that defendant rubbed her vagina "a lot" of times and touched and kissed her breasts, and defendant admitted

touching her vagina four times and digitally penetrating her once or twice.

Nature of conviction for attempted sexual battery required a jury finding of sexual contact, as necessary for assessment of victim-injury points when sentencing defendant; defendant was charged with sexual battery based on sexual penetration or union with his penis, jury heard evidence that defendant put his penis in contact with victim's vagina, defendant admitted digitally penetrating victim once or twice and touching her vagina, such that jury had to find that defendant somehow put his penis in contact with victim's vagina, in order to convict him of attempted sexual battery.

Trial court did not increase defendant's sentence for attempted sexual battery beyond statutory maximum when it assessed 40 victim-injury points for sexual contact, as would violate *Blakely* and *Apprendi*, where statutory maximum was 30 years imprisonment and trial court sentenced defendant to 225 months imprisonment.

Lugo v. State, 31 Fla. L. Weekly D141 (Fla. 5th DCA 2007):

Child molestation victim's out-of-court statements indicating that she understood what it meant to be truthful and could accurately relate matters, such as color of an object, that she had personally observed was not hearsay as the statements were not being offered to prove the truth of the matters asserted in the child's responses to the questions posed by child protection team interviewer.

Diez v. State, 33 Fla. L. Weekly D172 (4th DCA 2008):

The use of force, by breaking in, threatening with a gun, and forced movement and restraint, could not be viewed as naturally accompanying the interference with custody, and thus, all three kidnapping prongs under the *Faison* test, for determining whether the movement or confinement of a victim during the commission of another felony is sufficient to support an additional conviction for kidnapping, were proved; defendant committed the offenses in effort to forcefully remove five year old child from her mother's care, defendant arrived at mother's apartment, showed her fake badge, search warrant, and gun, and as mother opened door, defendant pushed her against wall and took mother from room to room through apartment in search of child's passport and other documents.