IN THE SUPREME COURT OF FLORIDA

GARRETT STATLER,

Petitioner,

vs. CASE NO. SC21-119

STATE OF FLORIDA,

First DCA No. 1D19-264

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PAGES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

To convict a defendant of sexual battery under section 794.011(5)(b), Florida Statutes (2015), which involves sexual activity among adults with no force or violence, must the state prove that the accused knew that the act occurred without the consent of the complainant? In the absence of a legislative directive to the contrary, the constitutionally grounded presumption in favor of a requirement of *mens rea* to convict for serious crimes compels an affirmative answer to this question.

This case is before the Court on review of the holding of the First District Court of Appeal that guilty knowledge or *mens rea* is not an element of the crime. This Court should quash that decision and remand with directions to acquit Statler for insufficient proof of *mens rea*, or at a minimum to grant him a new trial before a jury correctly instructed on this element.

In this brief, the volume identified as Original Record is cited as "R" and the Trial Transcript as "T." The volume titled Certified Copy of Appeal papers is cites as "AP."

STATEMENT OF THE CASE

Garrett Statler was charged with and convicted of one count of sexual battery on an adult without force likely to cause injury, a second-degree felony. (I-53) Both Statler and the complaining witness were university students over age 18. Following a jury trial, Statler was convicted as charged. (R-176) The trial court sentenced him to 18 months incarceration [the state affirmatively waived any objection to the downward departure], followed by ten years sex offender probation. (R-190) Florida law requires him to register as a sex offender indefinitely.

On direct appeal to the First District Court of Appeal, Statler raised five issues: (1) denial of his motion for judgment of acquittal asserting insufficient evidence that the complainant did not consent and, in addition, that Statler lacked knowledge of nonconsent; (2) error in admission of testimony that two items belonging to the accuser were not discovered in a search of Statler's apartment; (3) admission of testimony that after the incident, Statler was grinning as if he knew he had done something wrong; (4) denial of a motion to suppress evidence of a photo identification of Statler, and (5) facial unconstitutionality of the provision under which Stater was

convicted, section 794.011(5)(b), Florida Statutes. (AP-70-118, 180-93) On this issue, Statler asserted that the provision denied him his Fourteenth Amendment right to due process by omitting a requirement that the accused have knowledge of the complainant's nonconsent. (AP-111-17, 191-92)

A three-judge panel of The First DCA affirmed Statler's conviction. The court addressed only the constitutional challenge, which it rejected in reliance on its decision in *Watson v. State*, 504 So. 2d 1267 (Fla. 1st DCA 1986). *Statler v. State*, 310 So. 3d 133 (Fla. 1st DCA 2020). The court distinguished this Court's precedent holding that conviction of a serious offense requires proof of *mens rea* as applicable only to statutes punishing otherwise innocent conduct. According to the court, "[t]he crime of sexual battery under section 794.011(5)(b)" does not involve innocent conduct. *Id.* at 134.

The First DCA denied Statler's motion for rehearing or certification of a question of great public importance without comment. (AP-199-219)

This Court accepted jurisdiction on grounds that the First DCA expressly declared valid a statute.

STATEMENT OF THE FACTS

The undisputed facts

A.B. was 22 years old at the time of the incident, which occurred on Friday night/Saturday A.M., April 15/16, 2016, and about to graduate from the University of Florida. She had three alcoholic drinks at the Rowdy Reptile, preceded by half of a drink before she left home. (T-203) After 40-50 minutes at the bar, she met Jonathan Tait, and after talking and flirting they decided to hook up, meaning, go to his apartment for the purpose of having sex. A.B. referred to Tait as "Joseph" when talking to law enforcement officers after the incident. (T-210) A.B. was tipsy, in her own words, such that she would not have driven a car (T-317) when walking to Tait's apartment, which was a few minutes from the Rowdy Reptile. She described herself as definitely flirtatious while walking with Tait. (T-219) She intended to return to the bar after the hook-up with Tait, and in fact left her credit card on file there. A.B. and Tait went into his apartment, but soon discovered he had no condoms, and she insisted they go get some. (T-229)

They walked to a convenience store and purchased condoms, although ultimately they did not use them. On the way to the store,

A.B. and Tait encountered and spoke with three young men in the apartment parking lot: Tait's roommate, the defendant; the defendant's brother, Cody Statler; and his friend Phillip Bedran. After purchasing the condoms and returning to the apartment, A.B. and Tait had sexual intercourse several times. At one point, Tait left the room and said he would be back. A.B. was lying on the bed on her stomach. She felt him get off the bed and about 30 seconds later felt hands on her hips. A.B. testified she assumed it was Tait and they had intercourse. (T-230)

The person behind A.B., who was naked and lying on her stomach, did not say anything. They had intercourse, the person ejaculated on her back and subsequently wiped her back with a towel. (T-240) Tait told the defendant to tell A.B. to leave. When A.B. turned and saw it was not Tait, she became upset. She partially dressed and then attacked the defendant, claiming he had raped her. He responded that, no, they were just partying. (T-245) She followed him to the other bedroom where Tait and Bedran were located, and accused Tait of setting it up and Bedran of also participating. (T-760, 359) She tried to call 911, and Tait took her

phone and told her she was crazy and had to get out. (T-251) A.B. called 911 again from an apartment downstairs.

A.B. admitted that while having intercourse with the defendant, she told him "harder" seven times, the first time after about a minute. (T-291-2) She said that may have been because his penis was smaller than Tait's. (T-295) She also told the defendant that it felt good, and she made other pleasurable sounds and had an orgasm with him. A.B. admitted that she was not blacked out, nothing was covering her head, the lights were on, the defendant did nothing to conceal his identify or obstruct her view of him or keep her from turning around, and did not tell her not to look at him. (T-305) He did not run away afterwards, and there was enough light in the room to see. (T-304) She further stated that while the sex with Tait had been rough, the sex with the defendant was not as rough, without biting or hair pulling, and that he was gentle when he grabbed her. (T-306) The defendant was taller and thinner than Tait. (T-715) While A.B. testified at trial that the sex with the defendant lasted two to three minutes, previously she had said it lasted less than ten minutes and also three to five minutes. While she testified she did not hear anyone walk into the room,

previously she had said she did hear someone walk into the room. (T-294, 297)

A.B. acknowledged smoking marijuana three to four times a week, but only before bed. (T-318) About a month before the incident, she had been diagnosed with general anxiety disorder and had tried several different medications, one of which had the side effect of causing someone to want to kill themselves. (T-365, 367) Since the incident, A.B. had moved to Tampa, completed a master's degree, and applied to medical school. (T-368)

It is further undisputed that after having sex several times with A.B., Tait went into the other bedroom, where the defendant and Bedran were located, and was bragging about the sex he had with A.B. (T-702) He told the defendant, "You can try if you want." (T-705, 752) The defendant then went into Tait's bedroom and had sexual intercourse with A.B. from behind.

When A.B. accused the defendant of raping her, he said, "no, we were just partying." After Tait told the defendant to tell A.B. to leave, the defendant came back to Tait and said something was wrong. Tait said to go calm her down. Tait was the one who took A.B.'s phone and forced her to leave the apartment. Tait told her

she was crazy and had to leave. Tait was granted immunity from prosecution in return for his trial testimony. The defendant appeared shocked and scared by the accusation.

Additional testimony at trial

Tait testified that the defendant was not with him at the Rowdy Reptile. (T-683) He testified that A.B. behaved in a flirty, sexual manner, and the two left intending to hook up. He said she was intoxicated, but coherent and able to walk, and seemed OK. (T-687) They agreed to have sex and then return to the bar. (II689) They did not see anyone on the way to the apartment, but decided to go purchase condoms. On the way to the convenience store, they saw the defendant, the defendant's brother, and Bedran, and stopped to speak. Tait said he did not recall A.B. communicating with them or touching them. (T-696) When they arrived back at the apartment, no one else was there. They had sex but did not use the condoms. They took a break and had sex a second time. He could not recall using his phone during that time and thought the calls that appeared later on his phone were "butt dials." There was one call from the defendant at 12, but Tait did not answer. (T-701)

After having sex with A.B. from behind, Tait got up, said he would be right back, and told her to stay right there. (T-702) She was on the bed on her stomach. His recollection was that she was naked. (T-703) He went to the rest room then to the other bedroom. He realized the others were there by then, having heard music from the room. He was bragging to the defendant and Bedran about how great the sex was, and told the defendant, "you can try if you want." (T-752) The defendant did not say anything, but walked into Tait's bedroom. Tait smoked a cigarette and briefly looked in the door of his bedroom to see the two having sex. A.B. had not said anything to him indicating interest in the defendant, nor had the defendant said anything to him indicating interest in having sex with A.B. (T-706)

Tait testified that A.B. had not said anything to indicate interest in the defendant, and she did not ask him to send anyone into the room. (T-706) Tait could not say why he had told the defendant he could try if he wanted. He said the defendant was in his room for probably no more than about five minutes. He said when the defendant came to the door of the room, he told him to go tell A.B. to leave. (T-709) Later the defendant came out with a

scared look and said something was not right. A.B. came flying out of his room and attacked the defendant. (II710) Tait grabbed her around the waist. A.B. was angry and went into the other room picking up her things. She had knocked over the TV set in there. When he asked what was going on, she said the defendant had raped her and accused him of setting it up. (T-711) He told her to leave and she refused, so he grabbed her phone and tossed it near the front door. She went for it, and he followed her out the front door. He may have shoved her. (T-714)

Tait did not see any pink underwear or a lipstick container in the apartment. (T-716) He recalled that one of the times they had sex, her underwear was off, and one of the times he pushed it aside. (T-717, 719, 721, 731) He said the defendant and Bedran were not with him at the Rowdy Reptile. He said the lights were on in his bedroom, it was not dimly lit, and he did not recall A.B. asking for anything to eat or leaving the room after they had sex the first time. (T-741) He said he ejaculated twice inside her and it was obvious that he was done at that point. (II749, 763) He said the sex was rough with biting and scratching and slapping. He did not initiate the second time they had intercourse, A.B. did. He did not tell A.B.

to hold on or not to move when he left the room. He admitted he invited the situation by bragging and telling the defendant that it was great and that he could try it. (T-752) He told them she was crazy and a "tiger." (T-753)

The apartment is very small, but you cannot always hear people talking normally in the other room. (T-754) He said music was playing in both rooms during the incident. (T-756) Tait believed A.B. would be willing to have sex with the defendant. (T-758) When he saw them for a moment through the doorway having sex, he did not think anything was wrong. (T-758) He was not trying to get the defendant into trouble. Tait said he heard no nervous laughter from the defendant. (T-760) Tait never told A.B. his name was Joseph. (T-762) He did not text the defendant while in bed with A.B.

A.B. testified that she heard nervous laughter from the defendant when she turned around and saw him. (T-240) When she testified he was grinning as if he had done something wrong, the defense objected to speculation. The objection was overruled. (T-243) When she accused the defendant of rape, he said, "no, we were just partying." A.B. testified that the defendant and one of the others had been at the Rowdy Reptile with Tait. (T-213) She did not

hear or see anyone else inside the apartment while she and Tait were having sex. (T-224) When they stopped to speak to the others while walking to the convenience store, she said they did not speak to her. She said she smiled at them but denied touching them or asking them to party with them. (T-230) She said that between the two times she had sex with Tait, she asked him for some bread to eat and ate it on the balcony. (T-235) After they had sex the second time and he left the room, she assumed the person who put his hands on her hips was Tait and they had intercourse. She said she never turned around. She said the person did not say anything, there were no noises, and there was no significant difference in the sex. (T-238) She said she had no reason to think it was not Tait. The defense objected when the state asked her about the long-term psychological effects the incident had on her. (T-284) She testified she did not consent to sex with the defendant.

On cross-examination, A.B. testified that when she told the man "harder" seven times, she assumed it was Tait. She testified the sex lasted two to three minutes, while in deposition she had said under ten minutes. (T-294) When she had sex with Tait, there was biting, hair pulling, slapping and she had no complaints about

that. She said the defendant had a gentle grab and had not been as rough, with no biting or hair pulling. A.B. denied being a regular at the Rowdy Reptile. (T-311) She was too tipsy to drive a car, but not impaired. She was flirtatious with Tait. She regularly smokes marijuana three or four times a week, but only before bed. (T-318) She did not know anyone else was in the apartment. (T-322) She had oral sex with Tait, but not with the defendant. (T-329) She told the police officers and the emergency room providers that the man she hooked up with was "Joseph." (T-332) She testified that they gave her the name Jonathan. She also told the ER doctor she had recently been diagnosed with an anxiety disorder, but while first acknowledging that she possibly was taking anxiety medication at the time of the incident, she later denied taking any medications during that time, because she believed she had tried several medications and had stopped them at that time. (T-334) She denied telling the doctor Tait had ejaculated twice, and testified that he had not, and in that way the sex with him was not completed. (II235, 338). (II0342) She said she saw Tait on his phone, and he said he was talking to his roommate. (T-346) She testified she told the victim advocate she saw the name G. Statler on Tait's phone.

[Tait said his roommate is listed as Garrett on his phone.] (T-347, 762) A.B. did not recall the show-up that occurred the night of the incident through the peephole of the downstairs apartment. (T-349) [Officers conducted a show up, but A.B. told them it was not the person.] She did not recall how her underwear came off during sex with Tait. (T-370, 372) Tait, not the defendant, grabbed her phone and threw her out of the apartment. (T-377) She denied asking the defendant or the others to come up and party while they were in the parking lot talking. (T-378) The defendant did nothing to keep her from turning around or knowing he was in the room. (T-379)

The bartender that night at the Rowdy Reptile testified that A.B. was a regular, and that he knew what she would order every time. (T-404, 406) She always paid with her credit card, which she left that night. Later police came to get her card and the receipt. (T-408) He knew her well enough to know it as unusual for her to leave her credit card and not close out her bill. (T-416)

Ms. McCarthy, the ER nurse, testified that she was present while the sexual assault kit was prepared by the attending doctor, and that the doctor had taken the detailed history. A.B. had identified the person she met as Joseph and said there had been no

condom and that Tait did ejaculate. (T-467) A.B. had admitted alcohol use and some samples were collected, but they did not do a toxicology report. (II476)

The DNA evidence showed only two samples of those taken had interpretable mixtures of foreign DNA to which the defendant was a possible contributor. (T-500) No DNA standard from Tait was ever provided. (T-430)

Officer Lormil testified that they conducted a show up through the apartment peephole that night, but A.B. said it was not that person. (T-546) The unidentified person apparently had been in the area that night and met the description. Lormil also testified that she did not have suspect names while interviewing A.B. at the hospital and could not have provided them to A.B. (T-563) Lormil did not ask if the person was disguised and A.B. said when she turned around, it was the first time she saw the defendant. (T-569, 573) Officer Orengo-Scott testified that the initial call to law enforcement came at 12:15 AM. (T-577) She said A.B. had not said anything about the defendant laughing or about him being at the bar earlier. (T-613) A.B. said she left her underwear and a lipstick at the apartment. (T-617)

A.B. told Lormil she was unsure whether Tait had ejaculated. (T-603) A.B. testified she did not recall exactly how her underwear came off, but it was before the consensual sex with Tait. She did not know what happened to it after it came off. (T-667)

Over defense objection, Officer Mullins was permitted to testify that they had gone into the apartment just after the incident but had not found the underwear or lipstick. (T-670) Mullins testified that A.B. had said those items were in the apartment, but they were not. (T-672) [The court had granted in part the defendant motion to suppress the fruits of the warrantless search of the apartment.] Mullins further testified that they did not attempt to determine who was on the lease of the apartment until two years after the incident. (T-673)

The defense presented several witnesses. Mr. Patel owned the convenience store. He testified he remembered that night because police came in later. He said A.B. had been a little intoxicated, but not too much. (T-784)

Cody Statler, the defendant's brother, testified that he was in the parking lot with the defendant and Bedran when Tait and A.B. came by on the way to the store to buy condoms. He testified he

had not been at the Rowdy Reptile earlier that night. (T-790) They talked for five to fifteen minutes, and Tait and A.B. invited the others to hang out, and said something to the effect of, "want to come up and party?" (T-791) He said that A.B. was actively involved in talking with them all. A.B. asked him if he was going to come up, and she was very friendly. She got close to him and was flirting and even hugged him. (T-800) He was uncomfortable and said he was going to see his girlfriend. She was touchy-feely and drunk, and was checking them all out. (T-792) She was also flirting with the defendant and asked which one was the roommate. They were going to get condoms and there was a friendly, sexual vibe. (T-795) She was asking if they were going to come up and party. He left after that. He said she did not single out the defendant when asking her questions. (T-801) He heard her ask the defendant if he was coming up and wanted to party and hang out. (T-807)

Phillip Bedran testified that Cody Statler had agreed to drive him to the airport to pick up his father that night, but his father missed the flight, so they returned and were in the apartment parking lot talking when Tait and A.B. came by. She was flirty, asking about his necklace, grabbing his waist and touching him,

and talking to all of them. (T-810) He had to back away a little. She was touchy-feely, buzzed, talkative, tipsy and flirting with the defendant and touching him, too. (T-813) She said they were going to get condoms. Bedran and the defendant then left and went to the store to get snacks, and then back to the apartment. They did not drink alcohol that night. They could hear the two having sex as soon as they came in, and so turned on some music to drown out the noise. (T-815)

Bedran testified that after about thirty minutes, Tait came in and told the defendant to go into his room. Tait did not say anything about trying to trick A.B. The defendant was in Tait's bedroom for about fifteen minutes. Bedran and Tait smoked cigarettes on the balcony. (T-817) When he came out, Tait told the defendant to tell her to leave. (T-818). The defendant went back into the room, and then he heard screaming. (T-819) The defendant was shocked, as was Tait. Tait told the defendant to go calm her down. The defendant went back in the room and back out, and A.B. came out punching and kicking the defendant. The defendant did not fight back but was trying to cover his face. Tait grabbed her arm and pulled her off. She used the word rape. (T-822) He thought from

Tait's demeanor when he came in that A.B. wanted the defendant to go into the bedroom. (T-833) He seemed to be delivering her consent. (T-834) They were in the room for about fifteen minutes. He did not see anyone use a phone. Tait had told the defendant she wanted him to go in there. (T-840) They were all talking in the parking lot earlier for about twenty minutes. (T-826) He did not see them when they returned from the store. (T-828)

The ER doctor, Dr. Zeinali, testified that certain SSRIs, when mixed with alcohol can have interactive effects, and can impair judgment, depending on the person. (T-630) There was evidence that Citalopram, an SSRI, was prescribed for A.B. at some point. She took a history from A.B., who gave the name Joseph and said she had consensual sex with him twice and that he had ejaculated twice. (T-638) She reported an altercation, but no loss of consciousness or memory. (T-654) She said her underwear had been left at the location. (T-661)

SUMMARY OF THE ARGUMENT

In the absence of a legislative directive to the contrary, the constitutionally grounded presumption in favor of a requirement of *mens rea* to convict a person of a serious crime impels a construction of section 794.011(5)(b), Florida Statutes, to include, as an essential element, knowledge by the accused of nonconsent by the alleged victim.

Multiple reasons support this view. A 1992 amendment abrogating a decision by this Court demonstrates legislative intent to retain knowledge of nonconsent as an element of the basic charge of sexual battery in section 794.011(5)(b). Knowledge of nonconsent is also baked into precedent on inchoate sexual battery offenses, admission of collateral-crime evidence, and the elements of the necessarily lesser included offense of simple battery. Further, a construction of subsection (5)(b) that requires knowledge of nonconsent comports with decisions of other states that have considered the issue. If construed to omit an element of nonconsent, the provision violates due process of law on its face in violation of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 9 of the Florida Constitution.

The circuit court's erroneous construction of section 794.011(5)(b) entitles Statler to acquittal or at least a new trial before a correctly instructed jury. Under the correct interpretation of the provision, the evidence was legally insufficient to prove Statler's knowledge of nonconsent. If, however, the evidence met the threshold to create a jury question, failure to instruct the jurors on knowledge of nonconsent, a disputed issue, constituted fundamental error.

ARGUMENT

To avoid finding the provision unconstitutional for lack of *mens rea*, section 794.011(5)(b), Florida Statues, should be construed to require knowledge by the accused of the alleged victim's nonconsent.

Standard of review: An appellate court addresses the constitutionality of a statute *de novo*. *State v. Adkins*, 96 So. 3d 412, 416 (Fla. 2012). Courts must, if possible, construe statutes to avoid finding them unconstitutional. *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004). Statutory construction is also conducted *de novo*. *State v. Peraza*, 259 So. 3d 728 (Fla. 2018).

Merits: In the absence of a legislative directive to the contrary, the constitutionally grounded presumption in favor of a requirement of *mens rea* to convict a person of a serious crime impels a construction of section 794.011(5)(b), Florida Statutes, to include, as an essential element, knowledge by the accused of nonconsent by the alleged victim. In the absence of such a constitution, the provision denies all persons accused of the crime due process of law in violation of the Due Process Clauses of the Florida and United States Constitutions.

A. Guilty knowledge must be presumed for conviction of a felony offense unless explicitly excluded by statute.

In *Giorgetti*, this Court recognized that "[a]t common law, all crimes consisted of both an act or omission coupled with a requisite guilty knowledge, or *mens rea*. . . . Hence, as a general rule, guilty knowledge or *mens rea* was a necessary element in the proof of every crime." 868 So. 2d at 515 (citations omitted). "Because scienter is often necessary to comport with due process requirements," the general rule has been carried forward in Florida as a virtual presumption that in enacting criminal statutes, the Legislature "intended to include such a requirement." *Id.* at 518 (citing *United States v. Balint*, 258 U.S. 250 (1922)). The presumption of guilty knowledge, *i.e.*, "intentional misconduct," applies "absent an express provision to the contrary." Id. at 515-16.

Giorgetti concerned the *mens rea* for the third-degree felony of failing to comply with Florida's sexual offender registration statutes. Although the statutes did not explicitly require that the offender know he or she had a duty to register, this Court read the knowledge requirement into the laws, which classified a violation as a third-degree felony punishable by five years' imprisonment. This

Court relied on *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), in which it read the element of knowledge of the illicit nature of the substance into Florida's drug possession laws. 868 So. 2d at 515-16.[1] Following *Giorgetti*, Florida courts have read *mens rea* into numerous criminal statutes that lacked an express requirement of guilty knowledge.[2]

B. The Legislature has retained intent to overcome nonconsent as an element of the basic charge of sexual battery in section 794.011(5)(b), Florida Statutes.

Section 794.011(5)(b), Florida Statutes, should also be construed as including an element of guilty knowledge, tantamount to intent to overcome nonconsent. Subsection (5)(b) provides:

> A person 18 years of age or older who commits sexual battery upon a person 18 years of age or older, without that person's consent, and in

[1] Legislation superseding *Chicone* made lack of knowledge of the illicit nature of the substance an affirmative defense. Ch. 2002-258, § 1, Laws of Fla. (creating § 893.101, Fla. Stat.).

[2] *See Enoch v. State*, 95 So. 3d 344 (Fla. 1st DCA 2012) (gang recruitment); *State v. Carrier*, 240 So. 3d 852 (Fla. 2d DCA 2018) (altering certificate of veterinary inspection); *Figueroa-Santiago v. State*, 116 So. 3d 585 (Fla. 2d DCA 2013) (use of electronic communications to benefit gang); *Ramirez v. State*, 113 So. 3d 28 (Fla. 2d DCA 2012) (employment by felon at bail bond agency); *Wegner v. State*, 928 So. 2d 436 (Fla. 2d DCA 2006) (receiving information to facilitate sex with minor); *Mathis v. State*, 208 So. 3d 158 (Fla. 5th DCA 2016) (racketeering).

> the process does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree.

In contrast to other provisions in section 794.011, the offense defined by this subsection involves no violence, force, threat of force, or victim lacking the capacity to consent. Because sexual activity between consenting adults constitutes innocent conduct, the *mens rea* for this second-degree felony necessarily turns on the element of nonconsent.

In *Watson v. State*, 504 So. 2d 1267 (Fla. 1st DCA 1986), the trial court denied two requested instructions on the defendant's intent in a sexual battery trial. The first instruction would have required "that either [the victim] effectively communicated her refusal to [the defendant], or that [the defendant] reasonably should have known that [the victim] was refusing." The second would have specified: "The crime of sexual battery must be committed intentionally. The State must prove beyond a reasonable doubt that the assailant knew he was acting without the consent of the alleged victim." *Id.* at 1269. The First DCA affirmed, summarily concluding that "whether a defendant knew or should have known that the victim was refusing sexual intercourse is not an element of the

crime of sexual assault as defined in section 794.011(3), Florida Statutes (1983)." That provision read:

> A person who commits sexual battery upon a person over the age of 11 years, without that person's consent, and in the process thereof threatens to use a deadly weapon or uses actual physical force likely to cause serious injury shall be guilty of a life felony[.]

The threat of use a deadly weapon or use of force in section 794.011(3), Florida Statutes (1983), supplied the *mens rea* not contained in section 794.011(5), Florida Statutes (2015), In fact, until 1992, each of the provisions in section 794.011 involving victims older than 11 contained an element of guilty knowledge: threat to use a weapon or use of actual physical force in subsection (3), a physically helpless victim in subsection (4)(a), coerced submission by threat of force in subsection (4)(b), coerced submission by threat of retaliation in subsection (4)(c), use of a substance to incapacitate the victim in subsection (4)(d), use of familial or custodial authority to coerce submission in a victim under 18 in subsection (4)(e), knowledge that the victim is mentally defective in subsection (4)(f), and use of "physical force and violence not likely to cause serious personal injury" in subsection (5).

This Court's decision in *Gould v. State*, 577 So. 2d 1302 (Fla. 1991), which concerned lesser included offenses, prompted a 1992 legislative revision to section 794.011(5). This Court held in *Gould* that sexual battery as defined in subsection (5) was not a lesser included offense of sexual battery on a victim physically helpless to resist in subsection (4)(a). In so holding, the Court reasoned that "the use of some physical force beyond that which is required to accomplish the "penetration" or "union" [in the definition of sexual battery] is an essential element of section 794.011(5)." *Id.* at 1305.

In response, the Legislature enacted the provision now codified a section 794.011(5)(b), as well as section 794.005, Florida Statutes, which provides:

> **Legislative findings and intent as to basic charge of sexual battery**.—The Legislature finds that the least serious sexual battery offense, which is provided in s. 794.011(5), was intended, and remains intended, to serve as the basic charge of sexual battery and to be necessarily included in the offenses charged under subsections (3) and (4), within the meaning of s. 924.34; and that it was never intended that the sexual battery offense described in s. 794.011(5) require any force or violence beyond the force and violence that is inherent in the accomplishment of "penetration" or "union."

Ch. 92-35, Laws of Fla. The preamble paragraphs in this enactment reflect legislative intent to abrogate *Gould*'s holding on lesser included offenses and its view on element of force or violence in the "basic charge" of sexual battery under subsection (5):

> WHEREAS, the Legislature intended and still intends that the least serious sexual battery offense, which is provided in section 794.011(5), Florida Statutes, is the basic charge of sexual battery and is necessarily included in the offenses provided in subsections (3) and (4), within the meaning of section 924.34, Florida Statutes, and
>
> WHEREAS, the Legislature never intended that the sexual battery offense described in section 794.011(5), Florida Statutes, require any force or violence **beyond the force and violence that is inherent in the accomplishment of "penetration" or "union"**, and
>
> WHEREAS, the Florida Supreme Court recently found that the sexual battery offense provided in section 794.011(5), Florida Statutes, is not a necessarily included lesser offense to the sexual battery offense described in section 794.011(3) and (4), Florida Statutes, in the case of Gould v. State, 577 So.2d 1302 (Fla.1991), ….

(Emphasis supplied.)

In construing the penetration or union in section 794.011 as inherently accomplished through force or violence, the Legislature

implicitly conveyed its intent to require proof of knowledge of nonconsent. Consensual penetration or union does not occur through force or violence. A person cannot "accomplish" penetration or union forcefully or with violence unless he intends to overcome nonconsent. This conclusion is reinforced by the definition of consent in section 794.011(1)(a), which excludes "coerced submission."

The First DCA erroneously relied on *Watson*, which concerned a version of sexual battery that involved the threat or use of force, both evincing guilty knowledge. In addition, the First DCA failed to consider precedent and resulting statutory amendment after *Watson* which demonstrates the Legislature's intent to retain the element of guilty knowledge for the basic charge of sexual battery even without the threat or use of force not inherent in penetration or union.

C. Construing section 794.011(5)(b) to require knowledge of nonconsent preserves precedent on inchoate offenses, admission of collateral-crime evidence, and instruction on lesser included offenses.

1. Attempt and conspiracy to commit sexual battery involve knowledge of nonconsent.

Section 777.04, Florida Statutes, defines criminal attempt, solicitation, and conspiracy to commit substantive offenses such as sexual battery. All three offenses require intent that the substantive offense be committed. In *Rogers v. State*, 660 So. 2d 237 (Fla. 1995), this Court held that the state failed to meet its burden to establish attempted sexual battery, which required proof of "a specific intent to commit a particular crime and an over act toward the commission of that crime." *Id.* In *Bullington v. State*, 616 So. 2d 1036 (Fla. 3d DCA 1993), the Third DCA reversed a conviction of conspiracy to commit sexual battery, reasoning:

> A conspiracy charge focuses primarily on the intent of the defendant. It must be shown not only that the defendant intended to combine with another, but that they combined to achieve a particular act which is criminal. No evidence was presented showing that the defendant intended to perform a sexual battery on S.E.M. without her consent. Although the law of conspiracy contemplates that there may be a conspiracy to commit a sexual battery on an unconsenting person, notwithstanding the fact that the crime was impossible to commit because the person consented, here the evidence did not suggest the presence of the requisite mental state to achieve an illegal objective.

Id. at 1039.

An absurdity would result from construing section 794.011(5)(b) to require no guilty knowledge by the accused, when such knowledge is required to prove the inchoate offenses of attempt or conspiracy to commit sexual battery. "[A] statutory provision should not be construed in such a way that it renders the statute meaningless or leads to absurd results." *McCloud v. State*, 260 So. 3d 911, 919 (Fla. 2018) (quoting *Warner v. City of Boca Raton*, 887 So.2d 1023, 1033 n.9 (Fla. 2004)).

2. Precedent on admission of collateral-crime evidence in a sexual battery trial rests on knowledge of nonconsent.

A construction of section 794.011(5)(b) which foregoes guilty knowledge would also unsettle precedent on collateral-crime evidence in sexual battery prosecutions. In *Williams v. State*, 621 So. 2d 413 (Fla. 1993), this Court approved the introduction of collateral-crime evidence in a sexual battery prosecution in which consent was the theory of defense. This Court found the evidence relevant to rebut the defense contention that the complainant had consensual sex with him in exchange for drugs, "by showing a common plan or scheme to seek out and isolate victims likely not to complain or to complain unsuccessfully because of the

circumstances surrounding the assaults and the victims' involvement with drugs." *Id.* at 417. In this context, the evidence of a "plan or scheme" concerned the defendant's intent to engage in nonconsensual sex. If intent to engage in nonconsensual sex is irrelevant to a prosecution for sexual battery under section 794.011(5)(b), the rationale of *Williams* bears reconsideration.

3. Simple battery is a necessarily lesser included offense of sexual battery because both offenses require knowledge of nonconsent.

"Simple" battery under section 784.03(1)(a)1, Florida Statutes, involves an actual, intentional touching against the will of another. *De Aragon v. State*, 273 So. 3d 26, 29 (Fla. 4th DCA 2019). Simple battery is a necessarily lesser included offense of sexual battery in sections 794.011(5)(a)-(c), "meaning that a person necessarily commits a battery if he commits a sexual battery." *Osborn v. State*, 177 So. 3d 1034, 1036 (Fla. 1st DCA 2015). *T.K. v. State*, 245 So. 3d 960 (Fla. 1st DCA 2018), concerned the sufficiency of the evidence to provide battery on a school employee. The court ruled that evidence showing that a student who struck a teacher who was trying to break up a fight was sufficient to establish that the student "intended to touch or strike the teacher against his will." *Id.*

at 961. Simple battery under section 784.03(1)(a)1 could not be a necessarily lesser included offense of sexual battery under section 794.011(5)(b) unless the latter offense included an element of intent to engage in sex "against the will of another," which requires awareness of nonconsent.

D. A construction of section 794.011(5)(b) that requires knowledge of nonconsent comports with decisions of other states that have addressed the issue.

In *State v. Smith*, 554 A.2d 713 (Conn. 1989), the Supreme Court of Connecticut considered the significance of the defendant's knowledge of nonconsent in a sexual assault prosecution. The court stated:

> While the word "consent" is commonly regarded as referring to the state of mind of the complainant in a sexual assault case, **it cannot be viewed as a wholly subjective concept.** Although the actual state of mind of the actor in a criminal case may in many instances be the issue upon which culpability depends, a defendant is not chargeable with knowledge of the internal workings of the minds of others except to the extent that he should reasonably have gained such knowledge from his observations of their conduct. The law of contract has come to recognize that a true "meeting of the minds" is no longer essential to the formation of a contract and that rights and obligations may arise from acts of the parties, usually their words, upon which a reasonable

> person would rely. E. Farnsworth, Contracts § 3.6. Similarly, whether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed. If the conduct of the complainant under all the circumstances should reasonably be viewed as indicating consent to the act of intercourse, a defendant should not be found guilty because of some undisclosed mental reservation on the part of the complainant. Reasonable conduct ought not to be deemed criminal.

Id. (emphasis supplied). The court pointed out that under Connecticut law, as in the case of the Florida statute, sexual assault (sexual battery in Florida) is a general intent crime, not a specific intent crime. However, neither is it a strict liability crime when it involves adults. *Efstathiadis v. Holder*, 119 A.3d 522 , 535 (Conn. 2015). Under the Connecticut statute, provision is made to consider a reasonable, good-faith mistake of fact as to consent, using a sanctioned jury instruction to the effect that "the state must prove beyond a reasonable doubt that the conduct of the complainant would not have justified a reasonable belief that she had consented." The court further observed:

> It is likely that juries in considering the defense of consent in sexual assault cases, though visualizing the issue in terms of actual consent by the complainant, have reached

> their verdicts on the basis of inferences that a reasonable person would draw from the conduct of the complainant and the defendant under the surrounding circumstances. It is doubtful that jurors would ever convict a defendant who had in their view acted in reasonable reliance upon words or conduct of the complainant indicating consent, even though there had been some concealed reluctance on her part. **If a defendant were concerned about such a possibility, however, he would be entitled, once the issue is raised, to request a jury instruction that the state must prove beyond a reasonable doubt that the conduct of the complainant would not have justified a reasonable belief that she had consented.**

Smith, 554 A.2d at 717 (emphasis supplied). Similarly, in *State v. Koperski*, 578 N.W. 2d 837 (Neb. 1998), the Supreme Court of Nebraska concluded that "for an offense as serious as sexual assault, it should be presumed that the Legislature intended to follow the usual mens rea requirement unless excluded expressly or by necessary implication." The court placed the burden on the prosecution to "prove beyond a reasonable doubt that the accused subjected another person to sexual penetration and overcame the victim by force, threat of force, coercion, or deception." *Id.* at 847. And in *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975), the Supreme

Court of California observed that the provisions governing kidnapping and rape by means of force or threat

> neither expressly nor by necessary implication negate the continuing requirement that there be a union of act and wrongful intent. The severe penalties imposed for those offenses and the serious loss of reputation following conviction make it extremely unlikely that the Legislature intended to exclude as to those offenses the element of wrongful intent. If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite … to a conviction of either kidnaping or rape by means of force or threat.

Id. at 155 (statutory citations omitted).

Section 794.011(5)(b) should be accorded a similar construction, one which precludes conviction without proof of wrongful intent in the form of knowledge of nonconsent to the acts charged.

E. A construction of section 794.011(5)(b) which does not incorporate the accused's knowledge of nonconsent renders the provision facially unconstitutional.

But for the construction discussed above, section 794.011(5)(b) denies all criminal defendants charged with the offense due process of law, rendering the provision unconstitutional

on its face. Without this saving construction, the provision punishes the entirely innocent activity of engaging in what the accused believes is consensual sex.

Florida courts have invalidated other criminal statutes that were not susceptible of saving constructions. In *Sult v. State*, 906 So. 2d 1013 (Fla. 2005), this Court invalidated, on vagueness, overbreadth, and substantive due process grounds, a statute creating a first-degree misdemeanor for wearing or displaying any indicia of authority which could deceive a reasonable person into believing that such item is authorized. The Court concluded that "[w]ith no specific intent-to-deceive element, the section extends is prohibition to innocent wearing and displaying of specified words." *Id.* at 1021. The Court relied on *Virginia v. Black*, 538 U.S. 343, 363 (2003), where the U.S. Supreme Court held a cross-burning statute unconstitutional on its face for failure to require that the act be done with the intent to intimidate. The *Sult* opinion also invoked *Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980), in which this Court struck down a statute criminalizing the wearing of a mask or hood because of the danger the law could be applied to entirely innocent activities.

In *Sult*, this Court concluded the statute was "incapable of a narrower construction "incapable of a narrower construction because there is no logical way to read a specific intent element into the statute as it is currently written." 906 So. 2d at 1022. If this Court finds section 794.011(5)(b) similarly impervious to a construction which recognizes knowledge of nonconsent as an element of the crime, the provision must be struck down as a violation of substantive due process of law.

The remedy for the constitutional violation, if found, is reversal of the sexual battery conviction and discharge. *Cf. Robinson*, 393 So. 2d at 1077 (remanding case to county court with directions that information be dismissed).

F. The circuit court's erroneous construction of section 794.11(5)(b) entitles Stater to acquittal or at least a new trial before a correctly instructed jury.

1. Under the correct interpretation of the provision, Statler was entitled to a judgment of acquittal.

A holding that knowledge of nonconsent is an essential element of section 794.011(5)(b) would invalidate the circuit court's reasoning in denying the defense motion for judgment of acquittal. Defense counsel asserted in the alternative (1) that the complaining

witness consented to sex with Stater, and (2) the evidence showed Statler reasonably believed the witness consented. (T.770) Discussion on the motion included the following exchange between the judge and defense counsel:

> THE COURT: The issue is not whether he believes he has consent; correct? The issue is whether she gave consent.
>
> MR. SHELTON: Well, I don't think you can be guilty of battery if you don't have any kind of criminal intent at all.
>
> THE COURT: Well, that's not the law in this case; is it? The issue is – the elements they have to prove … beyond a reasonable doubt [is] that she did not give consent. Whether he believes he has consent is not a defense. It goes to – it may go to the reasonable doubt in terms of the – all of those actions may give rise if the jury believes they have a doubt as to whether she gave consent, but the issue is not what he believed.

(T-770-71). The court took the motion for judgment under advisement, then denied the motion with no further argument or discussion after the defense rested. (T-774, 841)

The trial court's erroneous view on the import of knowledge of nonconsent led it to erroneously deny the defense motion for judgment of acquittal. Statler raised this issue, asserting both

grounds argued below, in briefing before the First DCA, which affirmed without discussion on the issue. (AP-93-97, 185-87)

Statler reasserts that argument herein:

The undisputed facts of the case showed that the alleged victim, A.B., in no way signaled non-consent to Statler and that Tait, who was Statler's roommate, told Statler "you can try if you want to." It is also undisputed that immediately after A.B.'s accusation, the defendant's demeanor was shock.

Further, A.B. admitted that while having intercourse with the defendant, she told him "harder" seven times, the first time after about a minute. (T-291-92) She also told the defendant that it felt good, and she made other pleasurable sounds and had an orgasm while having sex with him. A.B. admitted that she was not blacked out, nothing was covering her head, the lights were on, the defendant did nothing to conceal his identify or obstruct her view of him or keep her from turning around, and he did not tell her not to look at him. (T-305) He did not run away afterwards, and there was enough light in the room to see. (T-304) She further stated that while the sex with Tait had been rough, the sex with the defendant was not as rough, without biting or hair pulling, and that he was

gentle when he grabbed her. (T-306) Statler was taller and thinner than Tait. (T-715) A.B. acknowledged that when she accused the defendant of raping her, he immediately said, "no, we were just partying."

Even in the light most favorable to the state, the testimony at trial did not constitute competent, substantial evidence that Statler knew that A.B. did not consent to sexual activity with him. This Court should hold that the circuit court erred in denying the motion for judgment of acquittal raising these grounds and order Statler's discharge based on legally insufficient evidence of guilt. In the alternative, this Court may direct the First DCA to reconsider the issue under the correct legal standard.

2. The failure to instruct the jury on knowledge of nonconsent constitutes fundamental error entitling Statler to a new trial.

Fundamental error occurs when the trial court fails to instruct on a disputed element of a crime. *Garcia v. State*, 901 So. 2d 788, 794 (Fla. 1995); *State v. Delva*, 575 So. 2d 643, 645 (Fla. 1991); *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982). Similarly, failure to instruct on a theory of defense is fundamental error when it deprives the defendant of a fair trial. *Martinez v. State*, 981 So. 2d

449, 455 (Fla. 2008); *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988). The lack of a jury instruction on an affirmative defense amount to fundamental error "when a defendant is deprived of his or her sole or primary defense strategy, and that defense is supported by evidence adduced at trial not otherwise characterized as weak." *Woods v. State*, 95 So.3d 925, 927 (Fla. 5th DCA 2012).

In this case, the trial court's statements during argument on the motion for judgment foreclosed an instruction on Statler's knowledge as either an element of the crime or an affirmative defense. A request for an instruction on knowledge of nonconsent would have been futile in light of the court's views. But even without a specific request, the failure to instruct on knowledge of nonconsent constituted fundamental error if such knowledge was either an element of the offense, as Statler believes, or an affirmative defense.[3] The circuit court's ruling left him only the argument that A.B.'s claim of nonconsent was not credible. Had an instruction on Statler's lack of knowledge of nonconsent been given,

[3] Statler asserted in the First DCA that the failure to instruct on guilty knowledge constituted fundamental error. (A.P.-117, 191-92)

counsel would almost certainly have relied on his lack of *mens rea* as an affirmative defense.

CONCLUSION

If section 794.011(5)(b) is construed to omit knowledge by the accused of nonconsent as an element of sexual battery, the provision deprives defendants of their constitutional rights to due process of law. But legislative history, the presumption in favor of *mens rea*, the preference for a construction that avoids unconstitutionality, and other factors warrant a recognition that knowledge of nonconsent is an essential element. Under that construction, Statler is entitled to acquittal based on insufficient evidence of *mens rea*, or at least a new trial before a jury instructed to consider knowledge of nonconsent.

For these reasons, Statler requests that this Court quash the First DCA decision and remand with instructions to acquit or retry him.

CERTIFICATES AND SIGNATURE OF COUNSEL

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on Chief Deputy Solicitor General Jeffrey Paul DeSousa, at jeffrey.desousa@myfloridalegal.com, on November 12, 2021.

Respectfully submitted,

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