

The Third District Court of Appeal

State of Florida

Opinion filed October 21, 2026.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D24-1040 & 3D24-1368
Lower Tribunal No. F20-10308

Evin A. Figueroa Hernandez,
Appellant,

vs.

State of Florida,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Marisa Tinkler
Mendez and William Altfeld, Judges.

Michael Van Cleve, Law, and Michael Van Cleve, for appellant.

James Uthmeier, Attorney General, and Sandra Lipman, Senior
Assistant Attorney General and Yolande M. Samerson, Assistant Attorney
General, for appellee.

Before SCALES, C.J., and FERNANDEZ and LOGUE, JJ.

SCALES, C.J.

This case comes to us on appellant Evin A. Figueroa Hernandez's July 25, 2026 motion for rehearing. We deny the motion, withdraw our prior opinion, and substitute the following opinion in its place.

Appellant appeals both his convictions on six counts of criminal sexual activity with a minor (case number 3D24-1040) and the trial court's denial of his Florida Rule of Criminal Procedure 3.850 motion based on the ground of double jeopardy (case number 3D24-1368). We consolidated the two appeals. We affirm Appellant's convictions and affirm the trial court's denial of Appellant's postconviction motion.

I. Relevant Background

A. Charges, Convictions and Sentence

The State charged Appellant with one count of violating section 794.011(8)(b) of the Florida Statutes, sexual activity with a child by a person in familial or custodial authority, and five counts of violating sections 800.04(5)(c) and 800.04(6)(b) of the Florida Statutes, respectively, prohibiting lewd and lascivious molestation of a child and lewd and lascivious conduct. On May 14, 2024, after a six-day trial, the jury convicted Appellant on all counts. On count 1, Appellant was sentenced to twenty-five years in prison followed by twenty years of probation; on counts 2-6, he was sentenced to fifteen years in prison followed by twenty years of probation –

all sentences to run concurrently. The trial court also entered an order finding Appellant a sexual predator.

B. The Criminal Episode and Aftermath, Medical Exam and Report

At the time of the alleged crimes, Victim was twelve-years old. She is the daughter of a divorced woman who was dating Appellant. On the evening of July 16, 2020, Appellant was in Victim's bedroom where Victim was teaching him English. Victim's mother was in her own bedroom watching television. After locking the door, Appellant lay on the bed beside Victim, pulled down her underwear, rubbed his penis against her vagina and buttocks, and kissed her breasts and mouth. At a certain point, he stopped, dressed, and left the bedroom. Victim immediately told her mother what happened. Appellant denied everything and departed the apartment.

After her mother called 911, the police arrived and interviewed Victim. Twelve hours later, Cara Saxton, a nurse practitioner with the University of Miami Child Protection Team ("CPT"), examined Victim and, on the same day, CPT coordinator Armenta Acevedo interviewed Victim. Victim's statements to her mother, the investigating police officer, Saxton, Acevedo, as well as Victim's trial testimony, were consistent.

In addition to conducting a medical exam of Victim, Saxton, the nurse practitioner, took swabs to distinguish Victim's DNA from that of another

person. Saxton prepared a written report, which both included a description of the sexual assault as presented by Victim to investigators and the details of Saxton's medical examination of Victim. Saxton reported collecting forensic specimens by the use of swabs of the areas Victim identified where Appellant allegedly touched her. Saxton's report arrived at no forensic conclusions.

Prior to trial, Saxton ended her CPT employment and moved away from Miami. At trial, Dr. Walter Lambert, the chief medical officer of CPT and Saxton's supervisor, testified in her absence. He explained the work of CPT, the protocols of forensic interviews and medical examinations of child sexual abuse victims. Dr. Lambert then summarized Saxton's report for the jury. Dr. Lambert had not met with or examined Victim.

Dr. Lambert testified that Saxton had asked Victim to point to the places where Victim had received sexual contact. Saxton then took two forensic swabs from each of these areas, sixteen in all. Dr. Lambert testified that, per protocol, the swabs were labeled, sealed and stored until retrieved by law enforcement. He further testified that Victim's medical exam was normal and that the sexual contact Victim experienced did not and would not necessarily cause physical injury.

C. The DNA Testing

Cosette Alvarez of the Miami-Dade Police Department's crime lab tested the DNA swabs. She described the standard five-part process of her DNA analysis: extraction, quantification, preliminary chain reaction, analysis, and interpretation. From the serology test – called the “saliva presumptive test” – she detected sufficient biological material from which a sample was extracted for DNA testing. She determined a mixture of DNA consisting of two contributors, one male and one female. At both the Daubert¹ hearing and at trial, she testified to the crime lab's accredited testing procedures. Applying the procedures of the crime lab's Technical Manual, she used the DNA subtraction method: the sample's major donor (Victim) is subtracted to reveal the foreign donor to determine a ratio of the two donors (a third donor was not found). The resulting foreign profile matched Appellant's DNA in all sample locations. She testified that her work underwent a technical peer review that found no error.

¹ Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); see § 90.702, Fla. Stat. (2023). “[T]he test under Daubert is not the correctness of the expert's conclusions but the soundness of his methodology.” State Farm Mut. Auto. Ins. Co. v. All X-Ray Diagnostic Servs., Corp., 338 So. 3d 376, 383 (Fla. 3d DCA 2022) (quoting Kemp v. State, 280 So. 3d 81, 89 (Fla. 4th DCA 2019)). On April 4, 2023, the trial court conducted a Daubert hearing to address two defense motions in limine: (i) to suppress the State's forensic DNA report; and (ii) to prevent the State from referring to its serology test as a “saliva presumptive test.” The trial court's May 26, 2023 Daubert order denied both motions.

Defense DNA expert Tiffany Roy disputed the reliability of the State's testing procedures. Roy testified that Miami-Dade's crime lab should have updated to a new genotyping software (for example, STRmix), which is better suited for mixed profiles and profiles with low-grade DNA, both of which occurred here. Roy testified that the crime lab's manual method relies too much on the analyst's view of the DNA, yielding uncertainty in the tested locations. With low-grade DNA, the manual method may be inadequate to determine "stochastic" effects (random distortions) in the DNA sample. Roy testified that Alvarez, contrary to her own lab's standards, interpreted DNA profiles below a 60% peak-height ratio, this ratio constituting a threshold for scientific certainty. Below-level peaks have an increased potential for stochastic effects, any of which could lead to the unreliability of the result.²

² Peak-height ratio is a measurement comparing the heights of two alleles at a specific locus. The relative peak height of alleles is an indicator of the presence of a DNA sample mixture of two or more contributors. An allele is a variation of a gene that one inherits from each biological parent. For example, as Roy explained in her testimony, there is a gene for eye color, and the allele determines the color itself. In DNA profiling, alleles are displayed as peaks on a chart. When the sample comes from only one person, two peaks of similar height will appear at a locus. "The process becomes more complicated where the DNA in the sample is a mixture from two or more individuals. In that case, more than two peaks may appear at any given locus and an individual profile may be determined only if the analyst is able to distinguish between donors, including by isolating a so-called 'major donor.'" United States v. Barton, 909 F.3d 1323, 1329 (11th Cir. 2018). Alvarez, the State's analyst, testified that she was aware that some samples were below the 60% peak-height threshold. A peak-height below

D. Procedural Rulings

In case number 3D24-1040, Appellant challenges eleven procedural rulings of the trial court (the “Procedural Rulings”).

1. Appellant moved for a continuance of the trial after the State added count 6 four days before the start of the trial. The State determined that Appellant had initiated sexual contact, i.e., kissing Victim on the mouth, during the two-week period prior to July 16, 2024 date of the alleged molestation of Victim in her bedroom. Appellant maintained he had been prejudiced by the late amendment. The State maintained that he was on notice all along from separate statements Victim had made in interviews of her. The trial court denied the continuance motion.

2. The police set up a controlled call between Victim’s mother and Appellant that, eventually, led to his arrest. Appellant moved for a continuance because the State delayed in giving him a translated transcript of the call. The State maintained that it gave Appellant a transcript of the call

60% indicates either the presence of more than one DNA contributor or that the DNA is degraded in some way. Alvarez testified she proceeded cautiously and consistent with her laboratory’s standard operating procedures in evaluating the samples. She determined that the samples below the 60% peak-height threshold were caused by there being a predominant component of DNA (Victim) in a mixture of two contributors.

more than three years prior to trial. The trial court denied the continuance motion.

3. Appellant sought text messages between Victim and her mother in the aftermath of the crime to ascertain whether the mother pressured Victim into making her accusation. In her deposition, the mother had denied any such text messages existed. The trial court ordered the State to examine Victim and the mother under oath, and the State reported back confirmation that the text messages did not exist. The trial court denied the defense motion; nonetheless, Appellant's counsel was able to cross-examine Victim and her mother on this issue during trial.

4. Appellant argues that the trial court improperly limited the testimony of defense witness Dean Tong. The trial court did not allow him to provide the jury with alternate hypotheses (e.g., witness coercion, memory contamination, other psychological phenomena), limiting his testimony to his area of expertise in child interviewing techniques and excluding testimony about whether Victim was telling the truth.

5. Appellant also argues, with respect to Tong's testimony, that the trial court erred by finding the CPT handbook hearsay. Nevertheless, Tong did testify as to whether Acevedo deviated from the CPT handbook in her

interview. The trial court later allowed defense counsel to raise the CPT handbook in another line of questions.

6. Appellant argues that the trial court allowed an improper impeachment of defense DNA expert Roy by allowing the State to raise her workplace disciplinary history to discredit her testimony about the State's DNA evidence. The State counters that her disciplinary history related to her crime lab work and that the State cross-examined her to expose her testimony to the weight it deserved.

7. Appellant challenges a trial court cross-examination ruling finding hearsay in a defense question of Victim about what she told her mother about the incident. The State points out that this was another effort to elicit testimony that the mother pressured Victim to accuse Appellant.

8. Appellant challenges the trial court's not allowing questions of Victim about what she told her father and brother. The State argues that these questions lacked relevance and might have been for the sake of insinuating that Victim's father or brother molested her.

9. Appellant challenges the trial court's not allowing the defense to ask Appellant whether the mother coached Victim. The State argues this was speculative; nonetheless, Appellant's counsel mentioned it in closing argument.

10. Appellant argues that the trial court erred by not allowing questions of Acevedo whether she sought from Victim alternate reasons why Victim accused Appellant. The State counters that, first, Acevedo answered the question by saying “no” and, second, this was a line of questioning intended to elicit speculative answers.

11. Appellant argues that the trial court erred by neither allowing the defense to ask whether Victim was under the influence of drugs at the time of the incident nor allowing the defense to inquire into Victim’s psychological state after the alleged crime. The State counters that the trial court properly deemed these questions as not relevant.

E. The Rule 3.850 motion

On June 18, 2024, Appellant filed a rule 3.850 postconviction motion, asking the trial court to vacate certain counts of the judgment of conviction on double jeopardy grounds. The trial court orally denied the rule 3.850 motion on July 30, 2024. Appellant filed his notice of appeal on August 1, 2024, and on August 15, 2024, this Court relinquished jurisdiction to the trial court to enter a written order on Appellant’s rule 3.850 motion. On October 21, 2024, the trial court entered the challenged order summarily denying Appellant’s rule 3.850 motion.

II. Analysis

In addition to his challenges to the Procedural Rulings described above, Appellant argues that the trial court: (i) abused its discretion by admitting the State's DNA evidence; (ii) abridged Appellant's Sixth Amendment rights guaranteed by the Confrontation Clause by allowing Dr. Lambert to testify to the contents of nurse practitioner Saxton's report in her absence; and (iii) erred by denying Appellant's rule 3.850 motion to vacate certain counts of the judgment of conviction based on double jeopardy.

Upon our review of the record of this case, including the Daubert hearing and trial transcripts, we conclude without further elaboration that the trial court did not abuse its discretion in making the challenged Procedural Rulings. McDuffie v. State, 970 So. 2d 312, 324 (Fla. 2007) (holding that a trial court's limitation on the examination of a witness is reviewed for an abuse of discretion); Fennie v. State, 648 So. 2d 95, 97 (Fla. 1994) (holding that a trial court does not abuse its discretion by denying a motion for continuance unless the ruling will result in prejudice to the defendant); see Pulles v. Onorato, 399 So. 3d 1200, 1202-03 (Fla. 3d DCA 2024) (Gooden, J., specially concurring). We write to address the DNA testing issues, the Confrontation Clause issue, and the trial court's ruling on Appellant's rule 3.850 motion.

A. DNA Evidence (3D24-1040) ³

The crux of Appellant's argument is that Alvarez's DNA analysis methodology was unreliable. Appellant challenges this methodology in the context of a larger argument that the Miami-Dade Police Department crime lab's testing methods are outdated. Appellant's arguments, however, go to the weight rather than to the admissibility of Alvarez's testimony. See Forbes v. State, 410 So. 3d 574, 581 (Fla. 4th DCA 2025) ("Any concerns about the probative value of the DNA evidence goes to the weight of the evidence and not its admissibility."); Vitiello v. State, 281 So. 3d 554, 563-64 (Fla. 5th DCA 2019).

Alvarez gave ample testimony about her DNA testing procedures. Her identification of Appellant's DNA from sample mixture was not repudiated by the defense's case. Alvarez testified that her use of this manual method was consistent with her crime lab's standard procedures. She testified that these procedures are not outdated, still in use in laboratories around the country, and generally accepted by the scientific community, and therefore, the Miami-Dade Police Department's crime lab remained accredited. She also testified that her work and conclusions were peer-reviewed before their

³ We review a trial court's ruling on the admissibility of DNA evidence for an abuse of discretion. Zieler v. State, 434 So. 3d 666, 678 (Fla. 2026).

finality. While perhaps the latest genotyping software might be a better tool for interpreting mixed samples of more than one DNA contributor, and this issue was ripe for cross-examination by Appellant, the trial court was well within its discretion to determine at the Daubert hearing that Alvarez's methodology remained reliable and that Alvarez's expert testimony was admissible at trial.

The State met the Daubert criteria for reliability. See United States v. Gissantaner, 990 F.3d 457, 463 (6th Cir. 2021) ("Four inquiries guide the reliability analysis: Is the technique testable? Has it been subject to peer review? What is the error rate and are there standards for lowering it? Is the technique generally accepted in the relevant scientific community?"); Kemp v. State, 280 So. 3d 81, 89 (Fla. 4th DCA 2019); § 90.702, Fla. Stat. (2024). We conclude that the trial court did not abuse its discretion in admitting the State's DNA evidence.⁴

B. Confrontation Clause (3D24-1040)

Appellant did not raise the Confrontation Clause by objection at trial and is raising it here in the first instance through an assertion of fundamental

⁴ We also conclude that the trial court did not abuse its discretion in allowing the State to refer to its serology test as a "presumptive saliva test" to describe Alvarez's search for the alpha amylase enzyme within the DNA samples. Once explained that the test is merely a preliminary step to the DNA testing, the name of the test was unlikely to mislead the jury or prejudice Appellant.

error. Appellant maintains that the testimony of substitute witness Dr. Walter Lambert to the contents of a medical examination report prepared by absent witness Cara Saxton violated his right to confront Saxton at trial. Appellant argues that the United States Supreme Court opinion in the Sixth Amendment Confrontation Clause case of Smith v. Arizona, 602 U.S. 779 (2024) – a case released after Appellant’s trial but before his sentencing – compels reversal of his conviction.

1. Precursors to Smith v. Arizona

In the seminal case of Crawford v. Washington, 541 U.S. 36, 53-54 (2004), the Supreme Court held that the Confrontation Clause bars the admission of a testimonial statement of a witness who did not appear at trial “unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” A statement is testimonial when its primary purpose is to establish evidence relevant to a later criminal prosecution. Davis v. Washington, 547 U.S. 813, 822 (2006); State v. Lopez, 974 So. 2d 340, 346 (Fla. 2008). Five years after Crawford, the Supreme Court applied a Crawford analysis to forensic reports of laboratory analysts, finding them to be testimonial statements subject to the Confrontation Clause. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009). Then, the Supreme Court extended Crawford and Melendez-Diaz to the

situation in which a substitute witness testifies at trial to a forensic report prepared by an absent witness, concluding that this testimony is also subject to the Confrontation Clause. Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011).

2. Smith v. Arizona

This line of cases left open the question that Smith v. Arizona answered: Whether a substitute witness may introduce the forensic report prepared by an absent forensic analyst as support for the substitute witness's own independent opinion? Smith, 602 U.S. at 783.

In Smith, the defendant was charged with possession of illegal drugs and with committing other drug offenses. The State sent seized drug items to a crime lab. An analyst, Elizabeth Rast, ran forensic tests on the items and concluded in her report that the items contained quantities of illegal drugs. Id. at 789-90. Like Saxton's ceasing her work for CPT in our case, Rast ceased working at the crime lab. The State substituted another analyst, Gregory Longoni, to testify at trial about Rast's drug testing and report. Id. at 790. Longoni's testimony conveyed both Rast's methods and conclusions and his own "independent opinion" confirming them. The defendant was convicted. Id. at 791.

The Supreme Court in Smith held that Longoni offered Rast's out-of-court statements into evidence for their truth and not, as the State argued, merely to show the basis of the substitute witness's opinion. The Supreme Court concluded that Longoni's independent opinion was predicated on the truth of Rast's statements and conclusions. Thus, a Confrontation Clause violation was implicated because the defendant was unable to challenge the veracity of Rast's forensic conclusions. Id. at 803.⁵

3. Smith v. Arizona's Inapplicability to this Case

Appellant describes Smith as an "intervening change in the law" that supports a fundamental error review by this Court. Smith, however, is not applicable to the facts of the instant case. In Smith, the substitute witness based his own opinion – i.e., that the defendant had committed an illegal act – on the forensic findings and conclusions of the absent analyst. The instant case departs factually from Smith in two, important ways.

First, Dr. Lambert, unlike Longoni in Smith, offered no opinions. Dr. Lambert testified only to (i) the procedures Saxton employed in her examination of Victim, and (ii) CPT protocol for such examinations. Smith acknowledges that a witness such as Dr. Lambert may provide general

⁵ The Supreme Court did not decide whether Longoni's testimony constituted "testimonial statements," returning that issue to the Arizona Court of Appeals to decide in the first instance. Smith, 602 U.S. at 801.

testimony to the “standards, practices, and procedures” used to develop the evidence against a defendant without violating the Confrontation Clause. Id. at 799. Second, Saxton, unlike Rast in Smith, did not make findings or conclusions, leaving to others to determine through forensic testing whether an illegal act occurred here.⁶ Accordingly, Smith is dispositively distinguishable and does not govern our case.

4. Fundamental Error Analysis

Even though Smith is inapplicable to this case, we still must address Appellant’s fundamental error assertion consistent with Crawford. It has often been stated that for error to be fundamental, it “must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” Marin v. State, 429 So. 3d 618, 622 (Fla. 3d DCA 2026) (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)). “The error must be entwined so closely with the verdict that one is forced to conclude that the verdict could not have been obtained without the assistance of the error.” Phillips v. State, 316 So. 3d

⁶ Saxton offered one opinion at the end of her report when she wrote: “In my medical opinion, this case represents sexual abuse.” Dr. Lambert did not convey this statement to the jury. In fact, our record indicates that Saxton’s report was never introduced into evidence and that the State used Saxton’s report merely to aid Dr. Lambert’s recollection. Thus, the jury was not privy to this opinion by Saxton.

779, 782 (Fla. 1st DCA 2021). The error must be prejudicial to the defendant's ability to receive a fair trial. Louidor v. State, 162 So. 3d 305, 310 (Fla. 3d DCA 2015). Put succinctly, fundamental error must be harmful. Jackson v. State, 983 So. 2d 562, 576 (Fla. 2008).

Although fundamental error cannot be subject to a harmless error review, Reed v. State, 837 So. 2d 366, 369-70 (Fla. 2002), a determination of whether the complained-of error rises to the level of fundamental error necessarily parallels harmless error considerations. Appellant argues that the trial court's allowing Dr. Lambert to testify as to the examination procedures contained in Saxton's report constituted fundamental error. Specifically, Appellant argues that, because Saxton decided the selection of DNA specimen collection sites based on Victim's description of where Victim was touched by Appellant, Appellant was entitled, under the Confrontation Clause, to cross-examine Saxton.

But Appellant's fundamental error assertion goes amiss when we put the Saxton report in context with the other evidence adduced by the State. During Saxton's medical examination of Victim, Saxton swabbed the areas Victim identified on her body where Appellant allegedly touched her with his hands, mouth and penis. Saxton collected sixteen such specimens from eight locations and, as Dr. Lambert explained, per CPT protocol, Saxton

packaged, labeled and stored the specimens until law enforcement picked them up and delivered them to the lab for DNA testing.

Before Saxton conducted the medical examination of Victim, Saxton's CPT colleague, Armenta Acevedo, interviewed Victim. With respect to Victim's allegations of Appellant touching her, Acevedo's written report mirrors Saxton's report. The efforts of Acevedo and Saxton in this instance dovetail. Unlike Saxton, Acevedo testified at trial. Video of her interview of Victim – in which Victim described where and how Appellant had touched her – was played for the jury. Defense counsel cross-examined Acevedo.

DNA analyst Cosette Alvarez received the swabs. Alvarez gave extensive testimony tying each swab to the location on Victim's body where Victim alleged Appellant had touched her. In this way, Alvarez's testimony also mirrored Saxton's report. Defense counsel cross-examined Alvarez.

And Dr. Lambert testified to the chain-of-custody portion of Saxton's involvement, describing her adherence to protocol. Defense counsel cross-examined Dr. Lambert, as well.

Therefore, even if a Confrontation Clause error⁷ occurred during the trial it was not fundamental. Dr. Lambert's testimony regarding Saxton's

⁷ We need not, and therefore do not, adjudicate, in the first instance, either of the two prongs necessary to determine whether the introduction of Saxton's report through Dr. Lambert's testimony constituted a Confrontation

report did not reach down into the validity of the trial so deeply that the guilty verdict would have been unobtainable without the alleged error. It played too small a role in the State's case. The main factual assertions of the Saxton report (according to Appellant) were factual assertions made by other trial witnesses. See Phillips, 316 So. 3d at 785 (holding, in part, that an unpreserved Confrontation Clause challenge was not fundamental error when certain of defendant's convictions were supported by independent evidence). We conclude that Appellant's conviction would have been obtained without the assistance of the alleged error; therefore, even if error occurred in allowing Dr. Lambert to testify regarding the contents of Saxton's report, such error was not fundamental.

*C. Rule 3.850 Motion (3D24-1368)*⁸

Finally, Appellant argues that the trial court erred in denying his postconviction motion alleging his convictions constituted a double jeopardy violation. Specifically, Appellant argues: (i) the State sought to convict Appellant on the same offense multiple times because counts 2, 3 and 4 all

Clause violation: (i) whether Dr. Lambert's testimony was hearsay admitted to prove the truth of the matter asserted; or (ii) whether Dr. Lambert's testimony in that regard was testimonial in nature. See Smith, 602 U.S. at 784-85.

⁸ We review *de novo* the summary denial of a rule 3.850 postconviction relief motion. Simeon v. State, 273 So. 3d 157, 158 n.3 (Fla. 3d DCA 2019).

represent the same statutory offense of lewd and lascivious molestation; and (ii) count 5 is a lesser included offense (rather than a distinct act) of counts 2, 3 and 4.

We agree with the State's argument that double jeopardy does not apply to the State's charges because each offense charged was a distinct criminal sexual act. Graham v. State, 207 So. 3d 135, 137 (Fla. 2016). The State charged Appellant with committing three separate offenses of lewd and lascivious molestation under section 800.04(5)(C)2. – one count each for touching Victim's breasts, buttocks and vagina. "[A] new act began each time one touch ended and another was initiated, no matter how closely each one followed the other." Graham, 207 So. 3d at 141; see Trappman v. State, 384 So. 3d 742, 754 (Fla. 2024) ("Acts are distinct when they result from 'successive impulses' even when the character of the acts is the same.").⁹ Accordingly, we affirm the trial court's denial of Appellant's rule 3.850 motion because Appellant was not subjected to double jeopardy in the State's charges.

III. Conclusion

⁹ Below, Appellant raised an additional double jeopardy issue pertaining to count 5, the charge of lewd and lascivious conduct under section 800.04(6)(b), maintaining it was a lesser included offense of the charges underlying counts 2-4. Again, the State argued, count 5 constituted a distinct offense. In his appellate briefing, Appellant did not pursue this argument.

We affirm the jury verdict convicting Appellant of criminal sexual activity on a minor in violation of the applicable Florida statutes. We also affirm the trial court's denial of Appellant's postconviction motion based on the ground of double jeopardy.

Affirmed.