

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502017AP000032AXXXMB
L.T. NO.: 502016MM001881AXXXMB

ADAM JAMES MALCOLM,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed: OCT 29 2018

Appeal from the County Court in and for Palm Beach County,
Judge Sheree Cunningham.

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PER CURIAM.

Appellant Adam James Malcolm appeals his convictions on three counts of battery. Appellant claims, *inter alia*, the trial court reversibly erred when it denied his motion for judgment of acquittal on two of the three counts as violative of double jeopardy. We agree, and remand this case with instructions to vacate two of Appellant's three convictions and sentences. We find no merit to his additional arguments on appeal and deny them without comment.

On October 31, 2015, Appellant attended the Moonfest Halloween festival in downtown

West Palm Beach, Florida. Appellant met up with an acquaintance—who would later become the victim in this case—and the pair decided that Appellant would drive the victim to her house. The victim testified that, during the drive, Appellant attempted to make sexual advances on her, during which he grabbed her thigh and pulled her neck towards him; when she resisted, Appellant struck her face.

Appellant was charged with three counts of battery, with each count corresponding to each touching. He pleaded not guilty and the case went before a jury. Appellant moved for a judgment of acquittal on two of the three battery charges based on double jeopardy grounds. The trial court denied Appellant's motion, ruling that "there [was] a separation of time," and the jury returned a guilty verdict on each of the three counts. On appeal, Appellant argues two of his three convictions violate double jeopardy.

"A double jeopardy claim based upon undisputed facts presents a pure question of law and is reviewed de novo." *Pizzo v. State*, 945 So. 2d 1203, 1206 (Fla. 2006). The Fourth District Court of Appeal has explained how courts analyze double jeopardy claims in this context:

Under the *Blockburger* test, separate convictions for different offenses arising from a single act are only permissible where each separate offense contains an element that the other lacks. . . . "The proper analysis to determine whether offenses arise from the same criminal episode requires consideration of the following factors: 1) whether separate victims are involved; 2) whether the crimes occurred in separate locations; and 3) whether there has been a temporal break between the incidents." *Russo v. State*, 804 So. 2d 419, 420–21 (Fla. 4th DCA 2001) (quoting *Vasquez v. State*, 778 So. 2d 1068, 1070 (Fla. 5th DCA 2001)).

Judd v. State, 839 So. 2d 830, 831 (Fla. 4th DCA 2003) (quoting *Olivard v. State*, 931 So. 2d 823, 824 (Fla. 4th DCA 2002)) (citation omitted). Thus, a defendant's guarantee against double jeopardy is violated when multiple convictions arise from a single "continuous incident." *Russo*, 804 So. 2d at 421; *see also, e.g., Johnson v. State*, 744 So. 2d 1221 (Fla. 4th DCA 1999) (reversing

multiple aggravated battery convictions when they amounted to one “single act occurring in an uninterrupted sequence”).

In this case, Appellant was charged with and convicted of three counts of battery: count one referred to grabbing the victim’s neck, count two referred to grabbing the victim’s thigh, and count three referred to striking the victim’s face. These three acts all involved the same victim, all took place in the same location, and all occurred within the same temporal period of just a few moments. Accordingly, we find that they arose from the same continuous incident, *Judd*, 839 So. 2d at 831, and by sustaining the three separate convictions, the trial court violated Appellant’s right to be free from double jeopardy.

Because a double jeopardy violation of this nature constitutes fundamental error, *Tannihill v. State*, 848 So. 2d 442, 444 (Fla. 4th DCA 2003), we **REMAND** this case to the trial court with instructions to **VACATE** two of Appellant’s three convictions and sentences for battery and to **DISMISS** those two counts.

KELLEY, MARTZ and J. MARX, JJ., concur.

CONCURRING:	DISSENTING:	CONCURRING SPECIALLY:
	With/Without Opinion	With/Without Opinion
DATE: 10/26/10		
DATE: 10-26-18		
DATE: 10-25-18		