

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

APPELLATE DIVISION (CRIMINAL): AC
CASE NO: 502014AP900027XXXXMB
L.T. NO: 2013MM014404ANB

WILLIE J. ONEAL,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

Opinion filed: **NOV - 9 2015**

Appeal from the County Court in and for Palm Beach County,
Judge Paul A. Damico.

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PER CURIAM.

Defendant/Appellant, Willie J. Oneal was charged with one count of battery after an altercation with his girlfriend's brother. In his appeal, Oneal raises four issues: (1) that the trial court fundamentally erred by presenting four discrete acts by Defendant in one charge of battery and failing to provide the jury with a special interrogatory form; (2) that the trial court abused its discretion by admitting harmful hearsay testimony; (3) that the trial court erred by allowing the State to bolster its witness; and (4) that the trial court fundamentally erred by submitting an improper jury instruction. This Court affirms on issues two, three, and four. As to the first issue, this Court agrees with Defendant, reverses his conviction, and remands for a new trial.

The State mentioned in its closing that the Defendant intentionally touched the victim against his will four times; “the biting, the bear hug, the tire rim throwing, the tackle.” The State further argued it “met the element (intentional touching) in [Defendant’s] case several times.” In its rebuttal, the State again repeated for the jury the list of four intentional touchings Defendant made against the victim.

The State and Defendant agree that the trial court fundamentally erred by allowing the State to argue multiple instances of battery and charge only one count, and failing to give the jury a special interrogatory on the verdict form. The State and Defendant both recommend that the judgment be reversed and the case be remanded for a new trial.

A criminal conviction requires a unanimous verdict. *Perley v. State*, 947 So. 2d 672, 674 (Fla. 4th DCA 2007). “Where a single count embraces two or more separate offenses, albeit in violation of the same statute, the jury cannot convict unless its verdict is unanimous as to at least one specific act.” *Id.* Where it is possible to distinguish between different acts, each should be contained in a separate count of the accusatory document. *State v. Dell’Orfano*, 651 So. 2d 1213, 1216 (Fla. 4th DCA 1995). If the acts take place in different locations, or have gaps in time between them, they are discrete acts. *Doucet v. State*, 21 Fla. L. Weekly Supp. 397a (Fla. 15th Cir. Ct. 2014); *Foreman v. State*, 22 Fla. L. Weekly Supp. 794a (Fla. 15th Cir. Ct. 2015). A special interrogatory form ensures that the jury is unanimous regarding one discrete act being the battery. *Id.* Failure to provide a special interrogatory form when it is necessary to ensure a unanimous verdict is fundamental error. *Perley*, 947 So. 2d at 674.

In the instant case the State presented in its closing argument that Defendant committed multiple instances of battery. The State, however, charged Defendant with only one battery. As

a result, the failure to provide the jury with a special interrogatory form prevents the jury from indicating unanimous agreement on which act by Defendant was a battery. It is impossible to tell whether the jurors unanimously agreed on one discrete act causing the battery. Thus, the judgment is reversed and Defendant is entitled to a new trial. Accordingly, we **REVERSE** Defendant's conviction and **REMAND** for a new trial.

KASTRENAKES, KEEVER, and COX, JJ. concur.