

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CARL WAYNE PICKLE, JR.,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

No. 2D19-4237

October 15, 2021

Appeal from the Circuit Court for DeSoto County; Lon S. Arend,
Judge.

Kevin C. Shirley, Esq., Punta Gorda, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Lindsay D.
Turner, Assistant Attorney General, Tampa, for Appellee.

ATKINSON, Judge.

Carl Wayne Pickle, Jr., appeals from the judgments and
sentences entered against him following a jury trial on one count of
conspiracy to commit racketeering and four counts of illegally

killing, possessing, or capturing alligators or eggs. The State cross-appeals the downward departure sentence of eleven months and twenty-nine days followed by ten years' probation. For the reasons set forth below, we vacate the conviction for conspiracy to commit racketeering but affirm the remaining convictions and sentences. We affirm, without comment, as to the cross-appellant State's issue regarding the downward departure sentence.

Background

The State tried Pickle jointly with his alleged coconspirator, Robert Thomas Beasley, for conspiracy to engage in racketeering. The alleged predicate acts of which Pickle was accused were theft, grand theft, and dealing in stolen property. Pickle was also charged with and tried on four counts of illegally killing, possessing, or capturing alligators or eggs.

In an attempt to curb the illegal collection and sale of alligator eggs, agents of the Florida Wildlife Commission covertly operated a licensed alligator egg processing facility in Arcadia, Florida.¹ Robert

¹ The collection and sale of alligator eggs, hatchlings, and adult alligators in Florida is governed by statute as well as administrative code provisions promulgated by the Florida Fish and

Albritton, who was licensed and permitted to collect eggs from certain public and private lands, hired Pickle to assist with the collection.

Albritton was working with a large alligator farm based in Louisiana, which, from what can be understood from the record, was not implicated in any of the alleged wrongdoing. Because the importation of alligator eggs harvested outside the state is illegal under Louisiana law, *see* 76 La. Admin. Code Pt V, § 701(A)(3)(j), Albritton needed a licensed facility in Florida to hatch the alligator eggs before he could transport and sell them to the farm in Louisiana. He approached an individual operating Sunshine Alligator Farms, located in Arcadia, Florida, who was actually an undercover FWC officer, and offered to teach the officer the alligator business in exchange for the use of the facility.

Albritton recruited Pickle, who had worked with him at another farm, to assist with the alligator egg collection during the 2016 collection season.² Although Pickle had obtained a resident

Wildlife Conservation Commission (FWC). *See generally Nichols v. State*, 312 So. 3d 530, 531 (Fla. 2d DCA 2021).

alligator trapping license for live alligators during the 2015 season, he did not obtain the *required* farmer's agent license for the 2016 season. *See* § 379.3751(4), Fla. Stat. (2016) ("A person may not take any alligator egg occurring in the wild or possess any such egg unless the person has obtained, or is a licensed agent of another person who has obtained, an alligator egg collection permit."); *see also* § 379.3751(2)(e) ("The annual fee for issuance of an alligator farming agent's license, which permits a person to act as an agent of any person who has been issued an alligator farming license . . . and to take . . . alligator eggs occurring in the wild, to possess and process alligators taken under authority of such agency relationship . . . shall be \$50.").

At trial, the State admitted evidence that Pickle knowingly collected eggs from a private property located in DeSoto County called "Mare Branch" without a license or permit. Pickle had obtained a permit to collect eggs there in 2015, but his application for 2016 was rejected because he only obtained consent from a

² The licenses are valid for twelve months, *see* § 379.3751(1)(a), Fla. Stat. (2016), but several witnesses testified that egg collection occurs primarily in July and August.

lessee and not the owner of Mare Branch. Pickle texted the lessee an image of an email exchange indicating that the permit had been denied; Pickle told the lessee he would take care of it. A few days later, Albritton dropped off eggs labelled "Mare" containing the initials "CWP." Pickle paid the lessee for the eggs.

The State presented evidence that Pickle knew they were collecting eggs in excess of the permit limits on another occasion. On July 23, 2016, Pickle, Beasley, and Albritton, among others (including the undercover officer), were at another private property called "2x4 Ranch." The manager of 2x4 Ranch met the group at the property. She testified that she told them they needed to notify the State that they were searching for eggs on the property. She had received all of the necessary paperwork beforehand, which indicated that they could collect 560 eggs. Albritton told her that they collected 559 out of the 560 that they were allowed to have under the permit. She was paid for 559 eggs. The undercover officer overheard a conversation in which Beasley told Pickle that they were over the permit amount; he saw that Beasley had written 655 in his notebook. Pickle commented that they had better call someone named Mike and that they should not tell the manager.

When they had finished calculating the additional eggs from Beasley, they had 710. The manager testified that her employer was not paid for the additional 151 eggs.

After the State concluded its case, Beasley and Pickle moved for judgment of acquittal, for which Pickle adopted Beasley's argument. Beasley's attorney argued that the illegal taking of alligator eggs from State lands was a victimless crime because the State did not own the collected eggs, and the taking of the eggs from private land was similarly victimless because the owners were compensated for the eggs. Pickle's counsel added that there was no direct proof that Pickle illegally harvested the eggs. The court reserved ruling as to count one, the racketeering charge, but it denied the motion with respect to the four additional counts, concluding that there was circumstantial evidence of those crimes.

The jury found Pickle guilty of conspiracy to commit racketeering. It found him guilty of two of the four counts of illegally killing, possessing, or capturing alligators or eggs.

Pickle filed a motion for a new trial. He asserted several grounds, one of which we find meritorious. Pickle argued that, for the purposes of establishing the commission of the underlying

predicate offense of theft—which requires the taking of the "property of another"—the State of Florida cannot be considered a "an actual 'victim' in the case."

At a hearing during which the court heard argument on the motion for judgment of acquittal (on which it had reserved ruling) and the written motion for new trial, counsel for Pickle argued that the illegal taking of alligator eggs could not constitute theft as a predicate act for racketeering, because "the only entity that owns wildlife is a higher power . . . not the State of Florida." While remaining duly agnostic on counsel's theological premise, this court finds the gist of the argument persuasive and dispositive: No one owned the eggs that Mr. Pickle and his compatriots were purported to have stolen. Perhaps more importantly, the State's attempt to shoehorn the violation of a regulatory statute into the enumerated RICO offense of "theft" illuminates a damning deficiency in its case: the legislature did not include violation of alligator egg harvesting regulations among its list of predicate acts that can form the basis of a racketeering conviction.

I.

The crime of conspiracy to violate RICO requires proof "that either (1) the defendant knew of the overall objectives of the criminal enterprise and agreed to further its purpose or (2) the defendant personally committed *at least two predicate acts.*" *Morgan v. State*, 117 So. 3d 79, 82 (Fla. 2d DCA 2013). Predicate acts are enumerated in section 895.02(8)(a), Florida Statutes (2016). Under that statute "[r]acketeering activity means . . . to conspire to commit . . . [a]ny crime that is chargeable by petition, indictment, or information under the following provisions of the Florida Statutes" § 895.02(8)(a). Listed are fifty-one different categories of crimes that can form the basis of a racketeering charge, including "[c]hapter 812, relating to theft, robbery, and related crimes." § 895.02(8)(a)33.

Theft occurs when a person

knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit from the property. (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

§ 812.014(1). Pickle argues that the alligator eggs were not "property of another." The State argues that it was only required to prove that the alligator eggs were "owned by someone other than [Pickle]." *Cf. Nelson v. State*, 453 So. 2d 473, 475 (Fla. 2d DCA 1984) ("In order to support a conviction for larceny, it is necessary to prove that the property allegedly stolen was owned by someone other than the accused." (citing *Wilcox v. State*, 183 So. 2d 555, 557 (Fla. 3d DCA 1966))).

With respect to wild game, a landowner only owns the right to pursue the game on his or her own lands. *See Alford v. Finch*, 155 So. 2d 790, 793 (Fla. 1963). It is not until the landowner actually has the game "in his actual possession, custody or control" which is "usually . . . accomplished by taming, domesticating or confining them" that he or she acquires an ownership interest. *State v. Lee*, 41 So. 2d 662, 663 (Fla. 1949). While the alligator eggs were in the nests, "the State had both the authority and the right to regulate and protect wildlife resources." *See State v. Butler*, 587 So. 2d 1391, 1392 (Fla. 3d DCA 1991) (recognizing a "long-standing common-law principle that title to wildlife is vested in the State, as trustee for all citizens, and that the State has both the authority and

the right to regulate and protect wildlife resources" and concluding that the respondent had no right to return of his "pet[]" alligators that had been seized due to his unlawful possession of them without the requisite license and permit (emphasis added)). But the State's authority to regulate the eggs is not the same as a property right in the eggs.

Taking the eggs from their nests without permission from the State, within the parameters outlined in a valid permit, was a criminal act. *See* § 379.3751. However, it did not constitute theft sufficient to support the conspiracy to commit racketeering because no individual person owned the alligator eggs while they were in the nests—neither the private landowners nor the State.

The authority to regulate something does not necessarily confer ownership of that thing on the State. The State regulates many things it does not own. For example, keeping an undersized fish, while illegal, is not theft. *See, e.g.*, Fla. Admin. Code R. 68A-23.002(6) (prohibiting the taking of fish that are under specified lengths), 68A-23.005 (same). While the State may regulate the harvesting of fish in its waters, it does not own the fish.

The definition of racketeering activity includes the commission of "[a]ny crime that is *chargeable* by petition, indictment, or information under . . . Chapter 812, relating to theft, robbery, and related crimes." § 895.02(8) (emphasis added); *see* § 812.014(1). Violation of the alligator egg harvesting regulations could not be *charged* under the theft statute any more than, say, shooting a buck out of season can be grounds for a theft charge—as opposed to a violation of the regulations that govern under what conditions it is permissible to do so, *see, e.g.*, section 379.404(1), Florida Statutes (2016) ("Whoever takes or kills any deer . . . during the closed season prescribed by law or by the rules and regulations of the Fish and Wildlife Conservation Commission . . . commits a Level Three violation under s. 379.401 and shall forfeit any license or permit issued to her or him under the provisions of this chapter."). The eggs cannot constitute the *property of another* under the theft statute, unlawfully taking them was not theft, and the violations could not serve as predicate acts comprising a pattern of racketeering activity.

The legislature chose to designate a finite group of predicate acts, and a violation of section 379.409, Florida Statutes (2016),

which criminalizes illegally harvesting alligator eggs, is not among those itemized offenses. See § 895.02(8). The legislature created a list of crimes and used the phrase "under the following provisions of the Florida Statutes"—indicating that the offenses enumerated therein are exhaustive. See § 895.02(8)(a); *State v. Maisonet-Maldonado*, 308 So. 3d 63, 69 (Fla. 2020) ("[Section 775.021(4)(b), Florida Statutes (2016)] states that these exceptions 'are' the exceptions to the same-elements test and does not use terms of expansion like 'include' or 'are not limited to,' so we can conclude from the text that this list is exhaustive."); *Siegle v. Lee County*, 198 So. 3d 773, 775 (Fla. 2d DCA 2016) ("Pursuant to [the canon of statutory construction *expressio unius est exclusio alterius*], when a statute or code provision lists the areas to which it applies, it will be construed as excluding from its reach any areas not expressly listed." (citing *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976))). The legislature having declined to include chapter 379 in the definition of racketeering activity, evidence of violations of that chapter's regulations could not support the State's RICO charge.

In 2021, the legislature added to the definition of racketeering activity violations of "Chapter 379, relating to the illegal sale,

purchase, collection, harvest, capture, or possession of wild animal life, freshwater aquatic life, or marine life, and related crimes" and "of Title 68, Florida Administrative Code, relating to the illegal sale, purchase, collection, harvest, capture, or possession of wild animal life, freshwater aquatic life, or marine life, and related crimes." See ch. 21-55, §1, Laws of Fla. But the conduct on which the racketeering charges against Pickle was based occurred in 2016. As such, the trial court erred by failing to grant Pickle's motion for judgment of acquittal.

II.

Pickle also argues that the trial court erred in failing to provide the jury with an instruction on a violation of section 379.3751, Florida Statutes (2016), which, pursuant to sections 379.401(2)(a)29 and (b)1, is a second-degree misdemeanor and a lesser included offense of the charged crime of illegally killing, possessing, or capturing alligators or their eggs. The denial of a request to give a jury instruction is reviewed for abuse of discretion. *Aumuller v. State*, 944 So. 2d 1137, 1142 (Fla. 2d DCA 2006).

Pickle was charged with four counts under section 379.409(1), which prohibits a person from "intentionally kill[ing], injur[ing],

possess[ing], or captur[ing], or attempt[ing] to kill, injure, possess, or capture, an alligator or other crocodilian, or the eggs of an alligator or other crocodilian, unless authorized by rules of the commission." "A person who violates [that] section commits a Level Four violation under s. 379.401." § 379.409(4). A "Level Four violation" is a third-degree felony. See § 379.401(4)(b).

Section 379.3751(4) prevents a person from collecting alligator eggs without a license and a permit. See § 379.3751(4) ("A person may not take any alligator egg occurring in the wild or possess any such egg unless the person has obtained, or is a licensed agent of another person who has obtained, an alligator egg collection permit."). Subsection (5) states that "[a] person who violates this section commits a Level Two violation under s. 379.401." A Level Two violation involving "[s]ection 379.3751, relating to licenses for the taking and possession of alligators," § 379.401(2)(a)29, is a second-degree misdemeanor if he or she "has not been convicted of a Level Two or higher violation within the past 3 years." § 379.401(2)(b)1.

The issue is whether a Level Two violation is a lesser included offense of a Level Four violation on which the trial court was

required to instruct the jury. The trial court must instruct the jury on all necessary lesser-included offenses and on permissive lesser-included offenses if certain criteria are met. *See McKiver v. State*, 55 So. 3d 646, 648 (Fla. 1st DCA 2011).

"[A] crime 'is a necessarily lesser included offense if, based on the statutes themselves, a defendant cannot possibly avoid committing the offense when the other crime in question is perpetrated.' " *Boland v. State*, 893 So. 2d 683, 686 (Fla. 2d DCA 2005) (quoting *Overway v. State*, 718 So. 2d 308, 310 (Fla. 5th DCA 1998)). The statutes do not make a Level Two violation a necessarily lesser included offense of a Level Four violation.

The State argues that a person can violate section 379.409 without regard to permits or licenses by intentionally killing, injuring, or capturing alligators or their eggs. However, the statute limits the punishment to activity that is not "authorized by rules of the commission." *See* § 379.409(1) ("A person may not intentionally kill, injure, possess, or capture, or attempt to kill, injure, possess, or capture, an alligator or other crocodilian, or the eggs of an alligator or other crocodilian, unless authorized by rules of the commission."). Permits and licenses are among the rules of the

commission. *See, e.g.*, Fla. Admin. Code Ann. R. 68A-25.031(2) (setting forth regulations governing alligator egg collections). However, there are additional rules, which could constitute a violation of section 379.409 but not section 379.3751. For example, Pickle's intentional possession of alligator eggs in excess of the permit amount for 2x4 Ranch in contravention of rule 68A-25.031(2)(b)6 violated section 379.409(1). But that conduct does not necessarily result in a violation of section 379.3751, which only restricts the taking or possessing of wild eggs *without* a permit, as opposed to *in excess of* the permit. Because one can avoid violating section 379.3751 while collecting alligator eggs in excess of the amount designated in the alligator collection permit, it is not a necessarily lesser included offense of section 379.409. *See Boland*, 893 So. 2d at 686.

An instruction is only required for a permissive lesser included crime where "the information alleged all of the statutory elements . . . and there was some evidence adduced at trial to establish those elements." *McKiver*, 55 So. 3d at 649; *see also Boland*, 893 So. 2d at 686 ("[W]hen a defendant requests an instruction on a permissive lesser included offense the trial court is required to grant the

request only if: (a) the accusatory pleading specifically alleged all the statutory elements of the lesser offense; and (b) a finding of guilt on the offense would be supported by the evidence submitted at trial."). Here, as the State correctly argues, the amended information does not allege that Pickle's taking of alligator eggs was without the agent license or egg collection permit. As such, an instruction on a Level Two violation was not required, and Pickle's judgment and sentence as to the two counts of illegally taking alligator eggs must be affirmed.

Affirmed in part and reversed in part.

CASANUEVA and VILLANTI, JJ., Concur.

Opinion subject to revision prior to official publication.