NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

EVA FINTA CSULLOGHNE,
Appellnt,

v.

Appeal No. CRC 11-00070 APANO
UCN: 522011AP000070XXXXCR

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed January 30, 2013.

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge Susan P. Bedinghaus

Stephen L. Romine, Esquire
Attorney for Appellant

Gary M. White, Esquire
Office of the State Attorney
Attorney for Appellee

**ORDER AND OPINION**

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Eva Finta Csulloghne's, appeal from a conviction, after a jury trial, of Unlicensed Specialty Contracting (Structural Masonry), a first degree misdemeanor, in violation of § 489.127(1)(f) Fla. Stat. (1989). Among Appellant's

arguments on appeal is the contention that her conviction should be reversed because the statute of limitations had expired. We agree and reverse.

*Background*

Appellant was charged by Misdemeanor Information on August 25, 2010 with Unlicensed Specialty Contracting (Structural Masonry), a first degree misdemeanor, in count one and Unlicensed Specialty Contracting (Plaster, Stucco, and Lath), a first degree misdemeanor, in count two. Appellant was convicted only of the charge contained in count one. The Information alleged both offenses had been committed beginning October 17, 2007 and continuing through October 17, 2008.

Prior to trial, Appellant filed a *Motion to Dismiss (Statute of Limitations)*. The trial court heard argument on the motion at a hearing; there was no witness testimony or documentary evidence presented. Ms. Csulloghne argued that any acts that occurred prior to the two-year Statute of Limitations period, that is prior to August 25, 2008, could not be prosecuted; the statute of limitations had expired. The State argued that "the act of acting in the capacity of a contractor or engaging in the business was not fully completed until the project was either completed or it broken down and was terminated." "[I]n effect, this defendant is accused of acting in furtherance of this criminal act for that period of time, until the relationship between the parties ended." The trial court denied the motion to dismiss.

The case proceeded to jury trial. The only trial testimony regarding any work performed after July 2008 by Appellant was that they "put the sample column up" at the end of September or in October 2008. There was no trial testimony or evidence that the sample column was "Structural Masonry" related to the charge of Unlicensed Specialty Contracting (Structural Masonry) for which Appellant was convicted. To the contrary, the state's expert witness

testified "[s]tructural masonry would be the -- the laying of a block, brick, those types of materials and attaching anything with mortar that would fall under that classification." "The concrete balustrades and base and caps would come under the structural masonry license." The state's other witness, the homeowner, testified "balustrades [are] ...railings in the front of the house and upstairs on a porch in the top of the house." Balustrades are the masonry railings around exterior patios and stairs.

In opening statement at trial the Assistant State Attorney stated, "[a]gain, ladies and gentleman, it's not about the work. It's about whether she was licensed to even enter into that contract in the first place to do the work." In closing argument the Assistant State Attorney, in part, argued:

> [T]hat's what the defendant is charged with, is agreeing pursuant to that contract for over $100,000 to provide cement-based products ...
>
> The contractor who's going to agree to do this work for money, whether they do the work or not, the mere agreement to do it for money for work requiring a license is a violation of the law.
>
> The only facts that are relevant in this case at hand is on October 18th, 2007 the contract entered into between the Wendleks and Ms. Csulloghne who is doing business as.Euro-Trade, LLC, was that a contract that was for work that required a license? Was there compensation paid with regards to that, or contemplated? And did Ms. Csulloghne have a license for paster, stucco, lath and/or structural masonry as it was required, and/or did she fall under any of the exceptions? That's it. The trigger date is October of 2007.

At the conclusion of the trial, Ms. Csulloghne was found guilty of Unlicensed Specialty Contracting (Structural Masonry) alleged in count one and not guilty of Unlicensed Specialty Contracting (Plaster, Stucco, and Lath) alleged in count two.

*Standard of Review*

Determining whether the statute of limitations is violated based on undisputed facts is a legal determination, and thus the standard of review is de novo. *See Bryson v. State,* 42 So.3d

852, 854 (Fla. 1st DCA 2010). A legal issue surrounding a statute of limitations question is an issue of law subject to de novo review. *Hamilton v. Tanner,* 962 So.2d 997, 1000 (Fla. 2d DCA 2007).

*Statutes of Limitations &*
*Continuing Offenses*

The Florida Legislature, in 1974, addressed *continuing offenses* in the statute of limitations for criminal prosecutions; that statutory provision is presently identified as Florida Statute § 775.15 (3) which provides; "an offense is committed either when every element has occurred or, *if a legislative purpose to prohibit a continuing course of conduct plainly appears,* at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed." § 775.15 (3) Fla. Stat. (emphasis added).

> 'Statutes of limitations normally begin to run when the crime is complete.' [...] And Congress has declared a policy that the statute of limitations should not be extended '(e) xcept as otherwise expressly provided by law.' [...] These principles indicate that the *doctrine of continuing offenses* should be applied in only limited circumstances since [...]'(t)he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term.' [ ...] These considerations do not mean that a particular offense should never be construed as a continuing one. *They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.*

*Toussie v. U.S.,* 397 U.S. 112, 115, 90 S.Ct. 858, 860 (1970), (internal citations omitted) (emphasis added); *See State v. Webb*, 311 So.2d 190, 191-192 (Fla. 2nd DCA 1975).

> The notion of "continuing offense" has traditionally identified a type of offense fundamentally different from most known to the common law. [...] [A] criminal offense is typically completed as soon as each element of the crime has occurred. For example, a larceny is completed as soon as there has been an actual taking of the property of another without consent, with the intent permanently to deprive the owner of its use. The offense does not "continue" over time. The crime is complete when the act is complete. A "continuing offense," in contrast, is an unlawful course of conduct that does perdure. As the Supreme Court has described the notion, "the unlawful course of conduct is 'set on foot by a single

> impulse and operated by an intermittent force,' until the ultimate illegal objective is finally attained." [...] The classic example of a continuing offense is conspiracy.[FN13]
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> FN13. *See generally Toussie v. United States,* 397 U.S. 112, 134-36, 90 S.Ct. 858, 870-71, 25 L.Ed.2d 156 (1970) (White, J., dissenting) (general discussion of continuing offenses, citing "embezzlement, conspiracy, bigamy, nuisance, failure to provide support, repeated failure to file reports, failure to register under the Alien Registration Act, [and] failure to notify the local board of a change in address" as examples of continuing offenses) (footnotes omitted).

*U.S. v. McGoff*, 831 F.2d 1071, 1078-1079, (D.C. Cir. 1987) (internal citations omitted). The hallmark of the continuing offense is that it [continues] beyond the initial illegal act, and that "each day brings a renewed threat of the evil Congress sought to prevent" even after the elements necessary to establish the crime have occurred. *U.S. v. Yashar*, 166 F.3d 873, 875 -876 (7th Cir. 1999).

In Florida, the legislative intent to prohibit a continuing offense must *plainly appear* in the statute. Therefore, legislative silence in a statute is 'strongly in favor of not construing [the statute] as incorporating a continuing-offense theory. *Webb,* 311 So.2d at 192 (citing *Toussie v. United States*, 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970)). Florida courts have addressed, on a case by case basis, specific criminal statutes and the issue of whether those statutes prohibit a continuing course of conduct.[1]

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[1] *See Young v. Moore*, 820 So.2d 901, 903 (Fla. 2002) (holding that the crime of scheme to defraud/organized fraud in violation of section 817.034(4)(a)1 is actually a true continuing offense under *Toussie v. United States,* 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970); *Clements v. State,* 979 So2d 256, 260 – 261 (Fla. 2nd DCA 2007) (holding nothing in the statutes proscribing the offense of sexual activity by a person in familial or custodial authority indicates that the legislature intended to prohibit a continuing course of conduct. A person may be convicted of sexual battery by a person in a familial or custodial authority based on one incident of penetration or union.); *Rodriguez-Cayro v. State,* 828 So.2d 1060, 1061 (Fla. 2d DCA 2002) (holding that the stalking statute evinces a legislative purpose to prohibit a continuing course of conduct); *Leverenz v. State,* 586 So.2d 1155, 1155 (Fla. 2nd DCA 1991) (holding the offense proscribed by Florida Statute 658.77 (1987), specifically, a savings and loan association employee, soliciting or receiving money and other things of value for procuring a loan from the employer was a continuing offense in that case where the employee was receiving cash payments in installments); *State v. Webb* , 311 So.2d 190, 191 (Fla. 2nd DCA 1975) (holding that the crime of receiving and concealing stolen property is not a continuing offense); *State v. Diaz*, 814 So.2d 466, 467 (Fla. 3rd DCA 2002) (a plain reading of Section 812.014 provides that a person is guilty of grand theft if he knowingly obtains or uses the property of another with intent to temporarily or permanently deprive the other person of that right. The statute is silent on the

*Waiver of the Statute Of Limitations*

A waiver of the statute of limitations must be express and certain, not implied or equivocal.

> The right not to be convicted of an offense for which prosecution is barred by limiting statute is substantive and fundamental. Waiver of that right must meet the same strict standards which courts have applied in determining whether there has been an effective waiver as to other fundamental rights. [...] Waiver of any fundamental right must be express and certain, not implied or equivocal. With respect to waiver of the statute of limitations there should be a waiver in writing made part of the record or at least an express oral waiver of the statute preventing prosecution and conviction made in open court on the record by the defendant personally or by his counsel in his presence. *See, e.g., United States v. Wild, supra*, (written waiver after full consultation with attorney effective); *United States v. Sindona*, 473 F.Supp. 764 (S.D.N.Y.1979) (same).

*Tucker v. State*, 417 So.2d 1006, 1013 (Fla. 3rd DCA 1982) (footnote omitted). A criminal defendant need not raise the bar of the statute of limitations and his [or her] failure to do so does not preclude appellate consideration of the issue. *Maguire v. State,* 453 So.2d 438, 440 (Fla. 2nd DCA 1984). The statute of limitations is a jurisdictional issue and [an appellate court] is not foreclosed from considering that issue notwithstanding that the issue was not raised at the trial or appellate level. *Bridenthal v. State*, 453 So.2d 437, 438 (Fla. 2nd DCA 1984).

*The Present Case*

Ms. Csulloghne was charged with violating Florida Statute § 489.127(1)(f). It was alleged she engaged in the business or acted in the capacity of a Structural Masonry Speciality Contractor without having a required speciality license. The statute of limitations for that

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issue of continuing offenses, with no suggestion that the legislature intended to make grand theft a continuing offense); *Rosen v. State,* 757 So.2d 1236, 1238-39 (Fla. 4th DCA 2000) (holding that the explicit language of the statute indicates that under certain circumstances, the prohibited fraud is subject to the continuing offense doctrine); *O'Malley v. Mounts,* 590 So.2d 437, 438 (Fla. 4th DCA 1991) (holding that the language of the grand theft statute does not suggest that the legislature intended grand theft to be a continuing offense); *Lieble v. State,* 933 So.2d 119, 122 (Fla. 5th DCA 2006) (holding the crime of failure to register as a sex offender is continuing in nature).

offense is two years. § 775.15(2)(c) Fla. Stat. Those two years started to run the day after the offense was *committed.* The offense was *committed* either when every element of the crime had occurred or if a *continuing offense* when the course of conduct or the defendant's complicity therein is terminated. § 775.15 (3) Fla. Stat. (emphasis added).

In the present case it is undisputed that the Appellant entered into a contract on October 18, 2007. At that point every element of the charge of Unlicensed Specialty Contracting (Structural Masonry) had occurred. If that offense was not a *continuing offense,* the limitations period would have expired two years later, specifically October 18, 2009. If the charged offense was a *continuing offense* it was committed in July 2008 when Appellant performed her last work as a Structural Masonry Speciality Contractor. In that situation the limitations period would have expired in July 2010. The Misdemeanor Information was filed on August 25, 2010. In either event the statute of limitations had expired.[2] The issue of the statute of limitations was never waived by the Appellant.

On appeal the State argues "[t]he appellant ceased *acting in the capacity of a contractor* with regard to this contract either at the end of September 2008 or sometime in October 2008 and that is when the two year statute of limitations began to run." The problem with this argument is that the work performed by Appellant in either September 2008 or October 2008 was not related to charge of Unlicensed Specialty Contracting (Structural Masonry); the charge for which

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[2] This court does not reach the issue of whether the charged offense of Unlicensed Specialty Contracting (Structural Masonry) is a continuing offense. However this court does note that there is nothing in Florida Statute § 489.127(1)(f) that clearly suggests a legislative purpose to prohibit a continuing course of conduct; no such legislative purpose *plainly appears.* As the State Attorney argued to the jury at trial, a person may be convicted of this licensing offense for a single act of engaging in the business of a contractor. Moreover in its application to penal and criminal statutes, the due process requirement of definiteness is of special importance. Thus, to the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused. *Perkins v. State,* 576 So.2d 1310, 1312 (Fla. 1991); *See* § 775.021 Fla. Stat. Any ambiguity or situations in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense. *Kasischke v. State,* 991 So.2d 803, 814 (Fla. 2008); *State v. Byars,* 823 So.2d 740, 742 (Fla.2002).

Appellant was convicted. The evidence at trial failed to establish that Appellant did anything after July 2008 that required a license for Specialty Contracting (Structural Masonry). The fact that the Misdemeanor Information filed in this case contained a second charge that was based on conduct arguably occurring within the limitations period does not permit the prosecution of a related but different crime for which the statute of limitations had already expired. *See Nooe v. State,* 892 So.2d 1135, 1141 (Fla. 5th DCA 2005) (citing *State v. Diaz*, 814 So.2d 466 (Fla. 3rd DCA 2002).[3]

*Conclusion*

The issue of the statute of limitations is dispositive. The prosecution of the misdemeanor offense for which Appellant was convicted was not commenced within the time permitted by the applicable statute of limitations; it must be dismissed. This court does not address the remaining issues raised by Appellant. Accordingly, the conviction of the Appellant should be reversed.

IT IS THEREFORE ORDERED that the conviction of the Appellant is reversed. This matter is remanded to the trial court with directions to enter a judgment of acquittal and to vacate and set aside the conviction and sentence.

Reversed and remanded.

ORDERED at Clearwater, Florida this 30th day of January, 2013.

Original order entered on January 30, 2013, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

[3] In *Diaz* the defendant was charged with one count of first degree grand theft in connection with twenty-three invoices for payment issued to the county. The defendant successfully moved to dismiss the charges on twenty-two of the invoices which were beyond the five-year statute of limitations applicable to grand theft. *Diaz*, 814 So.2d at 466-467.

cc: Honorable Susan P. Bedinghaus
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