IN THE SUPREME COURT OF FLORIDA

MICHAEL WILBER SNEERINGER,

Petitioner,

vs. CASE NO. 65,188

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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CASES

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PRELIMINARY STATEMENT

Michael Wilbur Sneeringer, the defendant at trial and appellant below will be referred to herein as Petitioner. The State of Florida, the prosecution at trial and appellee below will be referred to herein as Respondent.

The record on appeal consists of four consecutively numbered record and transcript volumes and one supplemental record volume. Citations to the record and transcript volumes will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the supplemental record volume will be indicated parenthetically as "SR", with the appropriate page number(s).

STATEMENT OF THE CASE

Although Respondent accepts the Statement of the Case as contained on pages one and two of Petitioner's brief on the merits as being accurate, it should be added that the trial court gave the following jury instructions regarding the asserted defense of entrapment and burden of proof:

> Before you can find the defendants guilty of an attempt to commit the crime of trafficking in marijuana, as I have previously defined trafficking, the state must prove the following two elements beyond a reasonable doubt:
>
> One, that the defendants did some act toward committing the crime of attempting to possess or possessing the marijuana that went beyond just thinking or talking about it.
>
> And, second, that they would have committed the crime except that someone prevented them from committing the crime of possession of cannabis in excess of 100 pounds, or that they failed. . .
>
> In this case, the defendants, each has entered a plea of not guilty. This means you must presume or believe the defendants are innocent. This presumption stays with them as to each material allegation in the information, through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.
>
> To overcome the defendants' presumption of innocence, the state has the burden of proving the following two elements:
>
> One, that the crime with which the defendant is charged was in fact committed.
>
> And, second, that the defendant, either or both of them, is the person who committed the crime.
>
> The defendants are not required to prove anything.

Whenever the words "reasonable doubt" are used, you must consider the following:

A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt as these must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all of the evidence there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendants may arise from the evidence, conflict in the evidence or the lack of evidence.

It is up to you to decide what evidence is reliable. You must use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict.

You may find some of the evidence not reliable or less reliable than the other evidence. You should consider how the witnesses acted as well as what they said. And some of the things you should consider are:

One, did the witness seem to have an opportunity to see and know the things about which the witness testified?

Second, did the witness seem to have an accurate memory?

Third, was the witness honest and straightforward in answering the attorneys' questions?

Fourth, did the witness have some interest in how the case should be decided?

And, fifth, does a witness's testimony agree with the other testimony and the other evidence

in the case?

Sixth, was it proved that the general reputation of the witness for telling the truth and being honest was bad?

You may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Now, the defense of entrapment has been raised. This means that Mr. Timmons and Mr. Sneeringer claim that they had no prior intention to commit the offense and that they committed it only because they were persuaded or caused to commit the offense by law enforcement officers.

These defendants, Mr. Timmons and Mr. Sneeringer, weren't [sic] entrapped if:

One, they had no prior intention to commit the crime of attempted trafficking in marijuana, but they were persuaded, induced or lured into committing the offense, and the person who persuaded, induced or lured them into committing that offense was a law enforcement officer, or someone acting for the officer.

However, it is not entrapment merely because a law enforcement in a good-faith attempt to detect crime provided the defendants with the opportunity, means and facilities to commit the offense, which the defendants intended to commit, and would have committed otherwise. Or, use tricks, decoys or subterfuge to expose the defendants' criminal acts, or were present and pretending to aid or assist in the commission of the offense.

If you find from the evidence that the defendants were entrapped, or if the evidence raises a reasonable doubt about the defendants' guilt, you should find them not guilty. . .

This case must be decided only upon the evidence that you have heard from the answers of the witnesses and have seen in the form of the exhibits that have been introduced into evidence and these instructions. . .

Although these defendants have been tried together, you will consider the evidence as it

affects them separately, and you must render separate verdicts.

Your verdict for or against one defendant does not necessarily dictate your verdict for against the other defendant.

(R 533, 535-542).

STATEMENT OF FACTS

Respondent accepts as accurate Petitioner's representation, located at page eight of his brief on the merits, concerning the fact that the record shows the trial court misread a portion of Florida Standard Jury Instruction 3.04(c). Respondent rejects the remainder of Petitioner's Statement of Facts and offers the following factual statement for purposes of resolving the issues raised herein:

At trial, Robin McDaniel, an agent for the Florida Department of Law Enforcement, testified that on August 3, 1982 he was contacted by the Gilchrist County Sheriff's Office regarding an undercover operation wherein his role was to pose as an informant's brother in order to effectuate a sale of 200 pounds of marijuana. The informant was Barbara Follis and a meeting was arranged at her real estate office at 1:45 p.m. Present at that meeting was McDaniel, Follis, Petitioner, and his co-defendant Ronald Timmons. (R 208, 209). The conversations were tape recorded and Barbara Follis, the person who wore the "body bug" or recording device, consented to wearing the device and having her conversations so recorded. (R 214). State's exhibit number one (SR 1) was received into evidence and the tape played for the jury.

The tape recording of the August 3, 1982 meeting reveals that Petitioner and Timmons were prepared to consummate the deal and had the money to do so, although they refused to produce it without seeing a sample of the marijuana they were buying.

Follis informed them that what they were buying was the same as that which she had previously shown them a sample of. Petitioner and Timmons were interested in the quality of the marijuana; inquired as to whether it was imported or domestic. They were told it was Columbian marijuana, loose, and in garbage bags. They rejected the idea of using a camper since it aroused suspicion and stated they would rent a car for the transfer. They asked McDaniel if both of them could ride with him and the purchase money to the transfer site and expressed a desire for the transfer to occur across the Suwannee River. Petitioner and Timmons, when informed that McDaniel expected a new shipment of Columbian gold marijuana, stated that they would like to dispose of the 200 pounds they were purchasing for $10,000 and turn around in a day or two and buy some of the new shipment. The transfer operation was scheduled to begin at 7:00 p.m. that evening. (SR 1). From the trial record, it is clear that both Petitioner and Timmons engaged in the above conversation. (R 218).

McDaniel resumed testifying and stated that he procured five "bales" of marijuana from the Suwannee County Sheriff's Office for the transfer; the bales totalled 204 pounds. (R 219, 220). McDaniel, in a police van, drove to the delivery site near the Santa Fe River in Suwannee County. He then drove back to Follis' office per agreement to meet with Follis, Petitioner, and Timmons. (R 221, 222).

Once everyone was inside the office, Petitioner went with Follis into a back bedroom. Timmons told McDaniel that if the instant deal went well, there would be another one in a couple of weeks. (R 223, 224). Follis came out of the bedroom

and handed McDaniel an envelope, stating it was all there. McDaniel saw numerous bills inside the envelope. McDaniel, Petitioner, and Timmons got in a rented vehicle and Timmons drove to the transfer site. (R 224). On the way they discussed future deals and Petitioner and Timmons mentioned doing them in Dixie County. Once at the site, Petitioner and Timmons inspected the marijuana, said it was real good, and began loading it into their car. They were arrested shortly thereafter. (R 225, 226).

On cross-examination, McDaniel testified that it was hard to tell who was the leader between Petitioner and Timmons; both were actively talking about the deal. (R 230). McDaniel also stated that marijuana which had been buried and dry would be worth $50 to $100 per pound. (R 238).

Barbara Follis, the informant, testified that her husband had been arrested on drug charges about a year prior to the transaction herein and that he had died July 11, 1982. (R 242, 243). Follis was contacted by Petitioner and Timmons shortly after her husband's death and they inquired about the marijuana transaction that had been arranged between them and her husband. The three met on the side of a road and discussed the transaction generally, but no negotiating took place regarding quantity or price. (R 243, 244). Timmons had previously left a note asking Follis to contact him. (R 252, 253). Follis subsequently contacted Bud Dubose at the sheriff's department and then met Petitioner and Timmons both at Ron's Auto Body Shop and later at her real estate office. (R 245). Follis was wearing an electronic recording device during the body shop

conversation and recalled that Petitioner and Timmons wanted to fly to Sumter County, where the buried marijuana allegedly was, and get it. Follis delayed the transaction since Dubose was out of town. (R 246). Follis' testimony regarding the subsequent meetings at her real estate office were corroborative to McDaniel's testimony. (R 247, 248).

On cross-examination, Follis denied any involvement in the transaction prior to Petitioner and Timmons contacting her. (R 251, 252). She denied ever telling Petitioner and Timmons that she was deeply in debt. (R 253). Follis had never been convicted of a crime and denied ever living with a Mr. and Mrs. Gossett. (R 256, 259, 260). Follis stated that Petitioner's name was in her deceased husband's almanac wherein he had detailed his marijuana activities. (R 264, 267). Follis only received expense money from law enforcement agencies and was not motivated to cooperate with them out of fear she might be arrested because of her deceased husband's activities. (R 268-271). Follis never tried to sell marijuana to a Herbert Langford. (R 274).

David Turner, chief deputy with the Gilchrist County Sheriff's Office, testified that he placed a recording device both on Follis' person and in the trunk of her car on July 27, 1982. Following said placement, Follis went to Timmons' body shop for a pre-arranged meeting. Turner later retrieved the tape from Follis. (R 286-289). Follis consented to the recording and testified that the tape (state's exhibit eleven) fairly and accurately reflected the conversations at the body shop. (R 289, 292). The tape was played for the jury. (SR 2) (R 292).

The tape recording reflects that both Petitioner and Timmons were concerned about a possible foul-up in the marijuana transaction due to a search of Follis' house. They expressed worry about Follis being followed when she went to get the marijuana from Sumter County. Follis continually stated that the transaction time and method could be determined by Petitioner and Timmons. A price of $10,000 was agreed upon, but no payment would occur until 200 pounds of marijuana was successfully delivered. There was concern that someone might stumble upon the area where the marijuana was supposedly located. In the end, it was agreed that Follis was to leave to get the marijuana at 3:00 p.m. the next day unless told otherwise. (SR 2). The transaction did not occur as planned, Follis apologized for the delay at the August 3, 1982 meeting. (SR 1). As was the case with the August 3rd meeting, both Petitioner and Timmons actively engaged in the July 27th conversation. (R 293-295).

During cross-examination, Turner testified that while Petitioner may not have been under formal investigation for drug activities in May or June of 1982, his name had surfaced during previous narcotics investigations. (R 300-303).

Kenneth W. Moore, an agent with the Florida Department of Law Enforcement, testified simply to establish the chain of custody of state's exhibit one (SR 1), to corroborate McDaniel's testimony regarding the transfer and arrests, and to establish chain of custody as to the marijuana samples comprising state's exhibits three through nine. (R 314-319).

Sheriff Robert Leonard, Suwannee County, testified that he loaned 204 pounds of marijuana to McDaniel for the undercover operation and identified one bale in court as part of the loaned contraband. (R 324, 325). Leonard acknowledged that he wanted the arrests to be made in Suwannee County "partly" due to the conviction rate there (R 329), but also because he wanted to maintain control over the contraband in his custody. (R 331).

Harriet Pfaffman, a chemist with the Florida Department of Law Enforcement, testified that state's exhibit three through nine were marijuana. (R 336). The state rested its case. (R 339).

The defense presented evidence as contained in Petitioner's brief on the merits, but Petitioner also acknowledged a profit motive for his actions. (R 414, 415). Although carefully avoided during direct examination, Petitioner acknowledged he had twice in the past flown in hundreds of pounds of marijuana from Columbia, South America on cross-examination. (R 422, 424). Petitioner admitted he never contacted law enforcement officials after Follis' husband initially contacted him about the marijuana. (R 424). Petitioner's second thoughts about the deal were motivated by a fear of getting caught, not by any desire to avoid breaking the law. (R 425). Petitioner allegedly determined that $10,000 for 200 pounds of marijuana was a good deal by reading newspapers. (R 430, 431).

It was established that Petitioner was a pilot and businessman and had been such since 1970. (R 401).

Finally, Respondent adopts the District Court's finding that:

> The record shows no contemporaneous objection to the misstated instruction at the time it was given or at the close of the jury charge. In fact, it appears that defense counsel failed to even discover the discrepancy until they were preparing their reply briefs for submission to this court. (Emphasis in original).

Timmons v. State, ___ So.2d ___ (Fla. 1st DCA 1984), corrected opinion at page two.

ARGUMENT

ISSUE I

THE JURY WAS PROPERLY AND ADEQUATELY INSTRUCTED REGARDING THE STATE'S BURDEN OF PROOF CONCERNING THE DEFENSE OF ENTRAPMENT.

Petitioner contends that the State has the burden of disproving entrapment beyond a reasonable doubt once that defense is sufficiently raised at trial and, as a consequence, the jury should receive a special charge to that effect. Respondent notes that the District Court premised the certified question sub judice on the same burden. See Wheeler v. State, 425 So.2d 109 (Fla. 1st DCA 1982), pending on certified question, Case No. 63,346; Rotenberry v. State, 429 So.2d 378 (Fla. 1st DCA 1983), pending on certified question, Case No. 63,719. Respondent, to the contrary, contends that the State does not have the burden of disproving affirmative defenses beyond a reasonable doubt.

The United States Supreme Court in Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), established the proposition that while the State must prove beyond a reasonable doubt all of the elements of the offense of which a defendant is charged, there is no constitutional requirement that the State must disprove a defendant's affirmative defenses beyond a reasonable doubt. The Court, at 53 L.Ed.2d 292 held:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.

> Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. (Emphasis added).

Similarly, this Court recognized this proposition in State v. Kahler, 232 So.2d 166, 168 (Fla. 1970), where Justice Boyd wrote:

> The law requires that the State prove each element of a criminal offense charged. The State is not required, however, to anticipate defensive matters or exceptions and negative them. The obvious result of such a requirement would render prosecution under our criminal laws unfeasible, if not impossible. (Emphasis added).

In conformity with the foregoing principles, it has been well established in the State of Florida that a defendant who raises the affirmative defense of insanity has the burden to prove it. McVeigh v. State, 73 So.2d 694 (Fla. 1954); Evans v. State, 140 So.2d 348 (Fla. 2d DCA 1962). If this Court holds that the State must disprove the entrapment defense beyond a reasonable doubt, then this Court must necessarily be prepared to hold, given the bar's proclivity for argument by analogy, that the State must likewise disprove the insanity defense or any other affirmative defense for that matter. Intellectual honesty compels no other result. Respondent respectfully submits that this Court could

not seriously harbor an intention to impose such an onerous burden on the State and therefore most strenuously urges this Court to reject the contention that the State must disprove the entrapment defense beyond a reasonable doubt.

In the case at bar, the jury was given the entrapment instruction, Florida Standard Jury Instructions In Criminal Cases, No. 3.04(c)(1981) (hereinafter referred to as "Instruction 3.04(c)") (R 537, 538), along with the standard instructions concerning the State's burden of proof beyond a reasonable doubt and the fact that the defendant was not required to prove anything (R 533, 535, 536). Respondent therefore submits that the jury was properly instructed regarding the State's burden of proof and the consideration to be afforded Petitioner's entrapment defense.

However, Petitioner, relying on the "federal view" of entrapment adopted in Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978) claims that the jury must be explicitly instructed as to the State's burden of disproving entrapment and that Instruction 3.04(c) is insufficient in this regard and may lead the jury to believe that the burden of proof lies with the defendant since it is he who raises the defense. This claim was specifically rejected by the First District Court of Appeal in the instant case and in Rotenberry v. State, supra, and by the Fourth District Court of Appeal in McCray v. State, 433 So.2d 5 (Fla. 4th DCA 1983),[1] pending

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[1] Petitioner contends that the instant case is distinguishable from Rotenberry and McCray since the trial judge sub judice inadvertently misread a portion of the entrapment instruction. The District Court rejected this contention finding that the matter had not been properly preserved for review inasmuch as no objection was raised in the trial court and it wasn't raised in the appellate court until submission of Petitioner's reply brief. This question is more fully treated in Issue II infra.

on certified question, Case No. 64,058. Both Rotenberry and McCray involve the same certified question being addressed here.

Interestingly enough, the Eleventh Circuit Court of Appeals rejected a similar claim for a special instruction on the Government's burden of disproving entrapment in United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982), cert. denied sub nom, Natale v. United States, ___ U.S. ___ 76 L.Ed.2d 344 (1983), where the Court held that the instructions given were sufficient where the trial court gave a general instruction on burden of proof, told the jury to consider the charge as a whole, and instructed the jury that the law does not require a defendant to prove his innocence or produce any evidence at all. Id. at 1337. Thus, in United States v. Vadino, supra, a federal appellate court construing similar instructions as those given herein, as well as in Rotenberry, supra, and McCray, supra, held that they sufficiently apprised the jury of the federal standard regarding entrapment and burden of proof. Respondent therefore submits that, assuming this Court adopts the "federal view" espoused in Moody, supra, the decisions of the District Courts in the instant case, in Rotenberry v. State, supra, and in McCray v. State, supra, are in conformity with federal authority construing the sufficiency of jury instructions under the "federal view" of the entrapment defense.

Accordingly, the jury was properly and adequately instructed regarding the State's burden of proof concerning the defense of entrapment and the certified question concerning the sufficiency of the instruction should be answered in the affirmative, but

Respondent strenuously urges this Court to reject the proposition that the State has the burden of disproving the defense of entrapment beyond a reasonable doubt.

ISSUE II

PETITIONER HAS FAILED TO DEMONSTRATE THE REQUISITE CONFLICT UPON WHICH HE SEEKS TO INVOKE THIS COURT'S JURISDICTION PURSUANT TO FLA.R.APP.P. 9.030(a)(2)(A)(iv), AND, ALTERNATIVELY, THE DISTRICT COURT PROPERLY HELD THAT THE MISREADING OF FLORIDA STANDARD JURY INSTRUCTION 3.04(c) WAS NOT FUNDAMENTAL ERROR REQUIRING REVERSAL IN THE ABSENCE OF A TIMELY OBJECTION THERETO.

Petitioner seeks to invoke this Court's discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv), predicated upon his claim that the District Court's decision sub judice expressly and directly conflicts with this Court's decisions in Motley v. State, 20 So.2d 798 (Fla. 1945); Henderson v. State, 20 So.2d 649 (Fla. 1945); and Ray v. State, 403 So.2d 956 (Fla. 1981).

In the case at bar, the trial judge, when charging the jury on the defense of entrapment pursuant to Instruction 3.04(c), inadvertently substituted the word "weren't" for the word "were" (R 537). Petitioner contended, in his reply brief, that the error was fundamental and required reversal. Timmons v. State, ___ So.2d ___ (Fla. 1st DCA 1984), corrected opinion at page two. The District Court rejected Petitioner's contention holding, at page two:

> Appellants contend Rotenberry is inapplicable to the case at bar because the trial court, in giving the standard jury instruction on entrapment, inadvertently substituted the word "weren't" for "were". Such error, they contend, is fundamental and requires reversal. We disagree.

> The record shows no contemporaneous objection to the misstated instruction at the time it was given or at the close of the jury charge. In fact, it appears that defense counsel failed to even discover the discrepancy until they were preparing their reply briefs for submission to this court. "At trial, objecting to erroneous instructions is the responsibility of a defendant's attorney, and the attorney's failure to object to such instructions can properly constitute a waiver of any defects." Ray v. State, 403 So.2d 956, 961 (Fla. 1981). An exception exists where it is shown that the error complained of is fundamental, i.e., "error which goes to the foundation of the case or goes to the merits of the cause of action." Id. at 960. This is not such error. (Emphasis original).

Thus, the question of law disposed of in the instant case was whether the inadvertent misreading of a portion of Instruction 3.04(c), is error of such fundamental magnitude as to warrant reversal where no objection thereto was made in the trial court.

In Ray v. State, supra, this Court articulated an exception to the contemporaneous objection rule under circumstances where a defendant had failed to timely object to an erroneous lesser included offense instruction and was subsequently convicted by the jury of the improperly charged lesser offense which was not lesser in degree and penalty than the main offense. The case did not involve the inadvertent misreading of a portion of an otherwise proper charge pursuant to Instruction 3.04(c). Moreover, Respondent suggests that the District Court cited Ray for a proposition of law and not the specific holding on the facts of the case.

In Motley v. State, supra, the trial court, when charging the jury on self defense, failed to instruct on the portion of the statute relating to imminent danger of great personal injury.

This Court refused to dispose of the case under the harmless error statute and reversed the cause. Nothing in the opinion dealt with a finding of fundamental error in the absence of timely objection to an inadvertent misreading of a portion of an otherwise proper charge pursuant to Instruction 3.04(c).

In Henderson v. State, supra, this Court found that the complained of jury instruction was erroneous because it invaded the province of the jury to the extent of taking from it the determination of every element of the offense charged except that of the intent of the accused. The cause was reversed notwithstanding the defendant's failure to timely object to the instruction. Once again, the error complained of was not the inadvertent misreading of a portion of an otherwise proper charge pursuant to Instruction 3.04(c).

Fla.R.App.P. 9.030(a)(2)(A)(iv) provides:

> The discretionary jurisdiction of the Supreme Court may be sought to review: decisions of the district courts of appeal that. . . expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law. . . (Emphasis added).

Respondent submits that Petitioner has failed to meet the foregoing criteria inasmuch as the cases he relies upon to establish conflict have not addressed the same question of law as that disposed of in the instant case. Consequently, this Court should properly decline review.

In the event this Court decides to reach the merits of this issue, Respondent would alternatively argue that the District Court's decision was imminently correct and conformed to Castor v. State, 365 So.2d 701, 703 (Fla. 1978), where this Court held:

As a general matter, a reviewing court will not consider points raised for the first time on appeal. Dorminey v. State, 314 So.2d 134 (Fla. 1975). Where the alleged error is giving or failing to give a particular jury instruction, we have invariably required the assertion of a timely objection. Febre v. State, 158 Fla. 853, 30 So.2d 367 (1947); see Williams v. State, 285 So.2d 13 (Fla. 1973). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. See Rivers v. State, 307 So.2d 826 (Fla. 1st DCA), cert. denied, 316 So.2d 285 (Fla. 1975); York v. State, 232 So.2d 767 (Fla. 4th DCA 1969).

* * *

The record in the case before us highlights the problems posed by counsel's inexactitude. Trial counsel for Castor stated to the judge that the jury should be recharged on all legal definitions the jury may want and any lesser included charges, but he neither signaled the judge before nor after re-instruction that, for completeness, Hedges required that the instructions on justifiable and excusable homicide should also be restated. Nor did trial counsel object, before or after re-instruction, to the trial court's failure to follow our rule regarding the procedure for submitting to counsel all responses to a jury's questions. His failure to do either not only prevented the judge from correcting an inadvertent error, but it produced the delay and systemic cost which result from invoking both levels of the state's appellate structure for the application of a legal principle which was known and unambiguous at the time of trial. Except in the rare cases of fundamental error, moreover, appellate counsel must be bound by the acts of trial counsel. (Footnotes omitted) (Emphasis added).

Petitioner nonetheless endeavors to place himself beyond the reach of Castor by characterizing the trial court's inadvertent misreading of the instruction as fundamental error and by arguing that his request for a special instruction pursuant to Moody v. State, supra, somehow constituted a proper objection to the trial court's misreading of the instruction.

In State v. Smith, 240 So.2d 807, 810 (Fla. 1970), this Court held that in certiorari proceedings the error of the trial court with respect to jury instructions, in the absence of objections, could only be considered if the error is so fundamental that it reaches into the very legality of the trial itself, and then cited Gibson v. State, 194 So.2d 19, 20 (Fla. 2d DCA 1967) for the proposition that:

> The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not properly preserved. Instances where the rule has been permitted by the appellate Courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, (2) where the issue reaches down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged, and (3) where a serious question exists as to jurisdiction of the trial Court.

Petitioner, apparently realizing that the instant case falls into neither category one or category three above, seeks to denote this case as one falling under category two on the strength of his claim that the error complained was fundamental, as defined, in Ray v. State, supra, as error which goes to the foundation of the case or goes to the merits of the cause of action. Id. at 960.

Assuming that the error complained of sub judice was not a scrivener's error, Respondent suggests that if it approached the fundamental magnitude alleged by Petitioner, it certainly would have caught the attention of trial counsel, or at the very least the issue would have been raised by appellate counsel in the initial brief. However, the simple fact of the matter is that this allegedly "fundamental error" was not seized upon by Petitioner until Respondent, when quoting the trial court's instructions in its answer brief, in good faith indicated that a word may have been transposed (see Answer Brief of Appellee, page four). Then, and only then, did Petitioner raise the issue in his reply brief. Apparently the District Court was, and Respondent still is, at a total loss to ascertain why an error of alleged fundamental proportions was reserved for treatment in of all places, a reply brief.

This Court in Ray v. State, at 403 So.2d 960, held that:

> An accused, as is required of the state, must comply with established rules of procedure designed to assure both fairness and reliability in the ascertainment of guilt and innocence. The failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial. "It is well-established law that where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal." Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 79 L.Ed.2d 1220 (1976). (Emphasis added).

If failure to object is a strong indication that a defendant did not regard the alleged fundamental error as harmful or prejudicial,

then Petitioner's failure to complain of error until submission of his reply brief unquestionably demonstrates that the alleged error was regarded as anything but fundamental, harmful or prejudicial. Therefore, Petitioner's contention that the misreading of the instruction was fundamental error is wholly devoid of merit and should be rejected.

Petitioner's argument that his request for a special instruction somehow constituted a proper objection to the trial court's misreading of the instruction is equally without merit. A similar argument was rejected by the Fourth District Court of Appeal in York v. State, 232 So.2d 767 (Fla. 4th DCA 1969), where the defendant, without specificity, objected to every general charge given by the court and to the failure of the court to give every charge requested by the defendant. The Court, at 232 So.2d 768, held:

> This objection obviously is most general and fails to specifically call attention to the matter to which defendant objected and totally failed to advise of the grounds. When considered in the light of the volume and varied content of the court's whole charge it is seen that it grossly failed to apprise the trial court of the real objection in order that it might be considered upon its merits and a proper and reasonsed ruling made. If such objection were approved as suffificient, it would enable counsel to cloak and conceal a meritorious objection from the trial court which, had it been revealed with specificity, would have allowed the trial court to eliminate the objection and possible error. Used in this fashion the adroit defendant could build error into the record and so have insurance against an unfavorable verdict. Busy trial judges have enough to do in attempting to conduct trials in accordance with law without having to play guessing games with counsel as to the true basis and nature of their objections. We hazard that had counsel given the trial court anything like the same

> opportunity that he has given this court to learn the nature of his objection, then surely the matter would have been remedied and this facet of the appeal eliminated. (Emphasis added).

Moreover, this argument was not presented to either the trial court or the District Court and is therefore not cognizable before this Court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Accordingly, the District Court's decision that the misreading of Instruction 3.04(c) was not fundamental error requiring reversal in the absence of a timely objection was correct and should be affirmed.

CONCLUSION

The certified question concerning the sufficiency of the present entrapment instruction as set forth in Standard Jury Instruction 3.04(c) should be answered in the affirmative, but, the District Court's premise that the State has the burden of disproving the defense of entrapment beyond a reasonable doubt should be rejected in this case and in all other cases pending before this Court wherein said premise has been espoused.

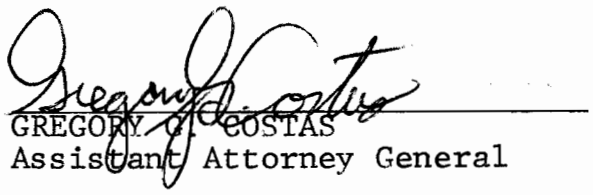
Petitioner has failed to demonstarate the conflict required to invoke this Court's jurisdiction pursuant to Fla.R. App.P. 9.030(a)(2)(A)(iv) and as a consequence, this Court should decline review of the "misread instruction" issue. Should this Court reach the merits of said issue, Respondent maintains that the District Court properly rejected Petitioner's contention that in the absence of timely objection, the misreading of the instruction

constituted fundamental error warranting reversal.

Therefore, based on the foregoing arguments and the authority cited herein, the judgment and sentence should be affirmed.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL



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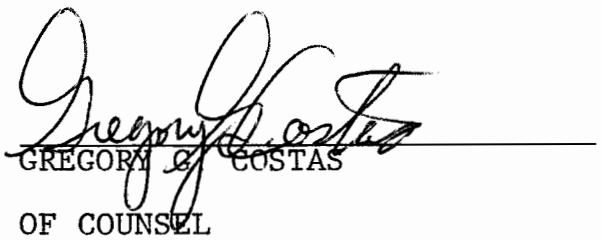
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to William N. Avera, Post Office Drawer G, Gainesville, Florida 32602, this 25th day of June, 1984.



GREGORY G. COSTAS

OF COUNSEL