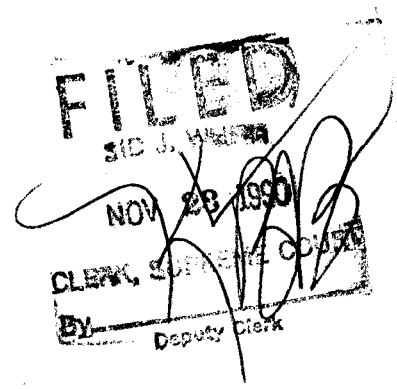
IN THE SUPREME COURT OF FLORIDA



JAMES ARMSTRONG

Petitioner,

v. CASE NO. 76,768

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The district court of appeal holding that the error was waived is correct and should be affirmed for three reasons: First, because the Florida Supreme Court has held that fundamental error resulting from an improper jury instruction is waived when defense counsel requests the improper instruction; second, waiver is compelled by the interests of justice since the improper jury instruction was requested by defense counsel; and, third, the request for the improper jury instruction was a tactical decision by defense counsel and does not involve waiver of a fundamental right which would require a personal waiver by Armstrong.

ARGUMENT

THE LIMITED INSTRUCTION ON JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION WAS NOT FUNDAMENTAL ERROR BECAUSE IT WAS REQUESTED BY ARMSTRONG'S TRIAL COUNSEL.

Petitioner, James Armstrong ("Armstrong"), appeals his conviction for second degree murder. At trial, Armstrong's counsel had requested a limited version of the instruction on justifiable and excusable homicide as part of the manslaughter instruction which was given. Armstrong now argues that his conviction should be reversed because the instruction that his trial counsel had requested was fundamental error pursuant to *Rojas v. State*, 552 So.2d 914 (Fla. 1989). The district court of appeal correctly held that although such instruction was fundamental error, the error was waived because the instruction was requested by Armstrong's trial counsel. *Armstrong v. State*, 566 So.2d 943, (Fla. 5th DCA 1990).

The district court of appeal holding that the error was waived is correct and should be affirmed for three reasons: First, because the Florida Supreme Court has held that fundamental error resulting from an improper jury instruction is waived when defense counsel requests the improper instruction; second, waiver is compelled by the interests of justice since the improper jury instruction was requested by defense counsel; and, third, the request for the improper jury instruction was a tactical decision by defense counsel and does not involve waiver of a fundamental right which would require a personal waiver by Armstrong.

A. Fundamental Error Can Be Waived

Fundamental error resulting from an improper jury instruction is waived when the defense counsel requests the improper instruction. *Ray v. State*, 403 So.2d 956, 961 (Fla. 1981). In *Ray*, the trial court improperly instructed the jury on lewd assault as a lesser included offense of sexual battery. Since lewd assault is not a lesser included offense of sexual battery, the jury was instructed on an offense not charged. The defendant did not object to the improper jury instruction and he was subsequently convicted of the offense for which he was not charged, lewd assault. The court held that failure to object to the improper instruction was not in itself waiver of the error. *Id.*, at 961. The court also held as follows:

> If Ray's counsel had requested the improper instruction, or had affirmatively relied on that charge as evidenced by argument to the jury or other affirmative action, we could uphold a finding of waiver absent an objection because constitutional error might not be fundamental error and because even constitutional rights can be waived if not timely presented.
>
> * * *
>
> We hold, therefore, that it is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action." (Emphasis added). Id.

The above holding was followed in *Hoover v. State*, 530 So.2d 308, 309 (Fla. 1988).

Since the error in the instant case resulted from the limited manslaughter instruction requested by Armstrong's trial counsel, the holding in *Ray* should also be followed in the instant case. The nature of the errors in *Ray* and in the instant case are similar because both arose from an improper jury instruction for a lesser included offense. The only distinction is that the error in *Ray* was clearly more prejudicial. The jury in *Ray* was instructed on a crime not charged; the jury in the instant case was given a limited rather than the full instruction on a lesser included offense of the crime charged. Since the court held that the error in *Ray* would have been waived if the improper jury instruction had been requested by defense counsel, the court should hold that Armstrong's trial counsel waived the error in the instant case.[1]

The argument in Armstrong's brief on the merits is based upon an erroneous interpretation of *Ray* and an absolutely absurd reference to *Achin v. State*, 436 So.2d 30 (Fla. 1982). Armstrong incorrectly argues that *Ray* does not hold that fundamental error can be waived, but only that constitutional error might not be fundamental error. (PB para. 1, page 10).[2] Such argument ignores the holding in *Ray* that follows "We hold, therefore..."[3] which is excerpted herein at page 3 and followed in *Hoover, supra*. Armstrong also points out that in *Ray*, the court cited *Achin v.*

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1 The holding in *Ray* can be stated as "waiver of fundamental error" or as "not fundamental error because the error was waived."

2 Reference to Petitioner's Brief on the Merits.

3 *Ray, supra,* at 961.

State, 387 So.2d 375 (Fla. 4th DCA 1980), which was later disapproved in *Achin v. State*, 436 So.2d 30 (Fla. 1982). In *Achin*, the defendant was convicted of a nonexistent lesser included offense as a result of defendant's trial counsel requesting a jury instruction for the nonexistent offense. *Achin*, *supra* at 960-961. Armstrong states erroneously that, in *Achin*, 436 So.2d 30 (Fla. 1982), the court reversed the conviction for the nonexistent offense "because the jury instruction on that charge constituted fundamental error." (PB para. 1, Page 11). Such statement is a serious distortion of the holding which was as follows:

> We hold that one may never be convicted of a nonexistent crime and remand for a new trial, finding that defense counsel invited the error. *Id.* at 30.
>
> * * *
>
> [W]e *reluctantly* conclude that, even under these circumstances, no one may be convicted of a nonexistent crime. *Id.* at 31.

Regarding the defendant's argument that double jeopardy prevented him from being retried, the court held as follows:

> We agree with the district court that defense counsel invited the error. Within constitutional parameters, we will not permit defendants to defeat the criminal justice system by such action. Although petitioner cannot be convicted of a nonexistent offense, he can, under these circumstances be retried. *Id.* at 32.

The above decision had nothing to do with the issue of fundamental error that is being addressed in the instant case. The Florida Supreme Court was simply holding in *Achin* that a defendant cannot be convicted of an offense that does not exist. The Florida Supreme Court did hold, however, that since the defense trial counsel invited the error, he was not entitled to the protection against double jeopardy; thus, the holding reaffirms the policy inherent in *Ray* that a defendant should not under any circumstances benefit from invited error.

B. Waiver is Compelled by Interests of Justice

Fundamental error is constitutional error that amounts to a denial of due process. *Ray*, *supra* at 960. The stringent requirements for determining whether constitutional error is fundamental are demonstrated as follows:

> Fundamental error has been defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. State*, 237 So.2d 134, 137 (Fla. 1970). The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error "very guardedly." *Id.* We agree with Judge Hubbart's observation that the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. *Porter v. State*, 356 So.2d 1268 (Fla. 3d DCA) (Hubbart, J., dissenting, *remanded*, 364 So.2d 892 (Fla. 1978), *rev'd. on remand*, 367 So.2d 705 (Fla. 3d DCA 1979). (Emphasis added.) *Id.*

The district court of appeal decision in the instant case, that the error was waived, is correct and should be affirmed because such holding is compelled by the interests of justice.

Otherwise, reversal would allow defendant's to inject error into their trial by requesting an improper jury instruction and then await the outcome of the trial with the expectation that, if they are found guilty, their conviction will be automatically reversed. This is the sort of tactic the court has condemned and sought to prevent in *Clark v. State*, 363 So.2d 311, 335 (Fla. 1978).

C. Defense counsel's Waiver of Error was Effective

The argument in Armstrong's brief on the merits is that his personal waiver was necessary to waive the error in the instant case; however, the request for the limited instruction was clearly a tactical decision by Armstrong's trial counsel. *See, e.g., Torres-Arboledo v. State* 524 So.2d 403 (Fla. 1988), *cert. denied* 109 S.Ct. 250, 102 L.Ed.2d 239 (Fla. 1987); *Roberts v. State* 510 So.2d 885 (Fla. 1987), *cert. denied* 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (Fla. 1987); and, *Jones v. State*, 484 So.2d 577 (Fla. 1986). Such actions are distinguished from the waiver of "fundamental rights" which require personal waiver by the defendant. Such distinction is explained in *State v. Griffith*, 561 So.2d 528,530 (Fla. 1990), citing from *State v. Singletary*, 549 So.2d 996,997 (Fla. 1989) as follows:

> During the course of a criminal trial, defense counsel necessarily makes many tactical decisions and procedural decisions which impact upon his client. *It is impractical and unnecessary to require an on-the-record waiver by the defendant to anything but those rights which go to the very heart of the adjudicatory process, such as the right to a lawyer, Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461...(1968), or the right to a jury trial. Fla.R.Crim.P. 3.260.

The distinction was also explained, *Id.*, citing from *Jones v. State*, 484 So.2d 577 (Fla. 1986) as follows:

> Recognizing that the role of defense counsel necessarily involves a number of tactical decisions and procedural determinations inevitably impacting on a defendant's constitutional rights, we find that no useful purpose would here be served by requiring the court to ensure that, in this instance, counsel's conduct truly represents the informed and voluntary decision of the client. *See Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126...(1976).

The record on appeal demonstrates that the request for the limited instruction was clearly a tactical decision by Armstrong's trial counsel. The defense version of events was that the killing of the victim was accidental. (R 249). Defense counsel argued that no evidence would be presented on a heat of passion or sudden combat defense. (R 5-6). He argued that reading past the word "intent" on the short form of the excusable homicide instruction, given as part of the Introduction to Homicide instruction, and reading past (1)(a) and (b) in the long version of excusable homicide, given in conjunction with the manslaughter instruction, was not relevant to the case and would only mislead and confuse the jury. (R 5-6). Defense counsel made this argument before trial, during trial and at the charge conference. (R 5-8,77-78,267-268). The trial court gave both the short form and the long form versions of excusable homicide in his jury instructions exactly as defense counsel had requested. (R 331,334,335). Pursuant to the above cases, Armstrong's personal waiver for such trial tactic was not required and the trial counsel's request of the instruction was sufficient to waive the error.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the District Court of Appeal, Fifth District.

Respectfully submitted,

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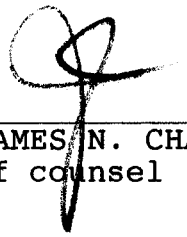
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Respondent's Brief on the Merits has been furnished by mail to Brynn Newton, Assistant Public Defender, and counsel for the petitioner, at 125 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 26th day of November, 1990.



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