IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,877

DAVID F. LUCAS,

Respondent.

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

In a four-count information, David Lucas was accused of committing robbery, kidnapping, sexual battery, and attempted second-degree murder. (R. 670-671) The victim in this case was a store clerk in a video shop. Lucas entered the store in the early evening when the clerk was alone. He grabbed the clerk by the hair, held a knife to her neck, threatened to kill her, and demanded money from the cash register. The victim complied. Lucas then dragged her to the front door to lock it. She tried to escape, but Lucas intervened. He knocked her down and beat her about the face. After locking the door and while still in the main room of the store, he yanked jewelry off the victim's body, stabbed her in the arm and abdomen, and undressed her. He then dragged her to the storeroom, where he again threatened to kill her, beat her some more, cut her throat, and sexually battered her. (R. 296-312) The victim suffered a broken nose, with the bone being exposed, a life-threatening stab wound in the neck that spurted blood, broken teeth, bruises, lacerations, and stab wounds over various parts of her body. (R. 279-290) Three passers-by, who stopped to assist, identified Lucas as the attacker. (R. 144-155, 163-181, 182-190) Lucas was apprehended while in possession of the victim's jewelry less than three hours after the crimes occurred. (R. 224, 264, 302-308)

Two alibi witnesses testified for the defense. (R. 373-78, 379-84) Lucas' sister testified that she was in the video store near closing time and did not see her brother there. (R. 385-388)

Lucas testified that he did not commit the crimes and that he had purchased the jewelry found in his possession from a third unnamed person. (T. 389-412)

In closing argument, defense counsel argued to the jury:

> The Court's going to tell you that your first duty is to determine whether or not you have been convinced beyond and to the exclusion of a reasonable doubt that a crime occurred on the 18th of February of 1991.
>
> Now, anybody who would stand here, anybody who has sat here for the last two days who has any amount of brain functioning whatsoever, knows beyond any doubt that there was, in fact, a crime on the 18th of February of 1991.
>
> I'll go a step further. I think the State has established that the crime of attempted murder has, in fact, been proven. The crime of kidnapping has, in fact, been proven. And the crime of robbery with a weapon, the weapon being a knife, has been proven.
>
> Now, the second issue ... once you have reached that conclusion, the next thing that you have to do is make a determination as to whether or not the person that has been accused is the person who committed the crime. That's where the issues really come into play.

(R. 441-442) Defense counsel repeatedly told the jury that the only disputed issue in the case was identification of the perpetrator of the crimes. (R. 131-135, 465-466, 469)

Consistent with the requests of counsel (R. 414-429, 475), the trial court instructed the jury orally and in writing on the charged offenses and twelve lesser offenses. (R. 476-498, 698-699) The lesser offenses for attempted second-degree murder were attempted manslaughter, aggravated battery, and attempted

aggravated battery. (R. 482-483, 698) The jury instruction on attempted manslaughter read as follows:

> Before you can find the defendant guilty of attempted manslaughter, the State must prove the following three elements beyond a reasonable doubt:
>
> First: An intentional attempt was made to kill Nadine Watson beyond just thinking or talking about it.
>
> 2. The attempt to kill was caused by the unlawful act of David F. Lucas.
>
> And 3. David F. Lucas would have committed the crime except that someone prevented him from committing the crime of manslaughter or he failed.

(R. 482-483)

Subsequent to the jury being instructed on the law, counsel was given an opportunity to object. No objections were made. (R. 499) The jury convicted Lucas on all four counts as charged. (R. 698-699)

Lucas received a guidelines sentence for sexual battery and habitual violent felony offender sentences for the other three offenses. He received three life sentences and a thirty-year sentence, with minimum mandatory terms spanning 40 years, all sentences to run consecutively. (R. 596-598, 736-742)

Lucas appealed his judgments and sentences to the First District Court of Appeal. All of the judgments of conviction were affirmed, except for the conviction for attempted second-degree murder. The First District reversed this conviction because of the unobjected-to jury instruction on attempted

manslaughter that did not instruct the jury that Lucas could not be found guilty of the lesser offense of attempted manslaughter if the evidence showed that the attempted homicide was justifiable or excusable. The court canvassed conflicting case law on unpreserved objections to jury instructions and certified the question of whether automatic reversal is required under these circumstances. The First District affirmed Lucas' sentence for sexual battery but reversed his sentences for robbery and kidnapping because they had been imposed consecutively instead of concurrently.

The State timely invoked the discretionary jurisdiction of this Court based on the certified question.

SUMMARY OF ARGUMENT

Lucas' conviction for attempted second-degree murder should be affirmed. Fla.R.Crm.P. 3.390(d) unequivocally states that unpreserved errors in jury instructions are not reviewable on appeal. The jury instruction in the instant case was not objected to at trial. Lucas, therefore, cannot raise the issue for the first time on appeal. Lucas' argument is so weak on the merits that it can be said beyond any doubt that the omitted portion of the instruction was both irrelevant and harmless. It could not have affected the jury verdict.

This Court should not permit review of the unpreserved issue under the fundamental error doctrine. Except for Rojas, infra, this Court has consistently refused to reverse convictions based on unpreserved errors in jury instructions. Rojas was wrongly decided, and it has far-reaching adverse consequences for the criminal justice system. Whenever a court holds that fundamental error occurs, all inmates in whose cases this type of error has occurred are entitled to a new trial, irrespective of when their cases became final. All they have to do is file a habeas petition in the appellate court alleging ineffective assistance of appellate counsel for failing to raise fundamental error.

If the fundamental error doctrine is to be applied to errors in jury instructions, a distinction must be made between preserved reversible error and unpreserved reversible error; otherwise, the contemporaneous objection rule is totally meaningless. The DiGuilio harmless error test applies to

preserved error. It should never be applied to unpreserved error. When error has been preserved, it is presumed harmful, and the State has the burden of rebutting this presumption. The burden is on the State because the defendant did all that he could do to correct the error at trial. If the State cannot prove that the error was harmless, the defendant is entitled to a new trial. On the other hand, when error is unpreserved, it is presumed harmless, and the defendant has the burden to rebut this presumption. The burden is on the defendant because he is the one who failed to avail himself of an opportunity to correct the error at trial. If the defendant cannot show that the error was harmful, his conviction will be affirmed. Unpreserved harmful error, at a minimum, must be something more egregious than preserved harmful error because of all the reasons supporting the contemporaneous objection rule.

In the instant case, Lucas cannot show that the error was harmful. The victim in this case was robbed, kidnapped, sexually battered, and almost murdered. There was no evidence whatever that Lucas' attempt to murder the victim was justified or excusable, or that the victim had unreasonably provoked him into trying to kill her. Lucas did not defend on the ground that these crimes were fabricated, only that he was not the one who committed them. The jury was repeatedly told that it must follow the law, and failure to do so would result in a miscarriage of justice. The jury convicted Lucas on all four counts as charged.

ARGUMENT

CERTIFIED QUESTION

WHEN A DEFENDANT HAS BEEN CONVICTED OF EITHER MANSLAUGHTER OR A GREATER OFFENSE NOT MORE THAN ONE STEP REMOVED, DOES FAILURE TO EXPLAIN JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION ALWAYS CONSTITUTE BOTH "FUNDAMENTAL" AND PER SE REVERSIBLE ERROR, WHICH MAY BE RAISED FOR THE FIRST TIME ON APPEAL AND MAY NOT BE SUBJECTED TO A HARMLESS ERROR ANALYSIS, REGARDLESS OF WHETHER THE EVIDENCE COULD SUPPORT A FINDING OF EITHER JUSTIFIABLE OR EXCUSABLE HOMICIDE?

A store clerk was robbed, kidnapped, sexually battered, and almost murdered. Lucas' sole defense to these crimes was misidentification; that is, he was not the person who committed these crimes. He was convicted as charged on all four counts. At the request of Lucas, the jury was instructed on the offense of attempted manslaughter, which was one step removed from the offense of conviction, attempted second-degree murder. Consistent with the evidence and the legal theory of the defense, the manslaughter instruction omitted any reference to justifiable and excusable homicide. No reference or objection was raised at trial to the omission, but Lucas raised the issue for the first time on appeal.

In light of two opinions from this court, Rojas and Miller, infra, holding that this unpreserved error was per se reversible error, the First District felt constrained to reverse Lucas' conviction, even though it was obvious in the factual and legal circumstances of the case that the omission was irrelevant and harmless. It also felt that a certified question was in order

because of two other seemingly contradictory opinions from this court, Delva and Clark, infra, holding that unpreserved error was not per se reversible but was subject to the harmless error rule. The certified question was whether an erroneous jury instruction on manslaughter was always fundamental error requiring automatic reversal of the conviction when the defendant was convicted of that crime or a crime one step removed. The answer to the certified question is a resounding "No."

There are two useful approaches to analyzing this legal question: the practical and the theoretical. In this case, both approaches produce the same answer: it cannot be said that an unobjected-to omission of the portion of the instruction on justifiable and excusable manslaughter is fundamental error going to the integrity of the trial which will always be harmful.

Turning first to the practical approach, it is obvious from a mere recitation of the facts of the case and the sole legal theory of the defendant Lucas, i.e., "it wasn't me," that there was no conceivable issue of whether the crimes were justifiable or excusable. Thus, the omission could not have had an impact on the verdict of the jury that Lucas was guilty of attempted second-degree murder. On the contrary, given Lucas' theory of defense, it was not in his interest to raise a question of justification or excuse because (1) the evidence totally defeated such a defense and (2) the raising of justification or excuse could only detract from his sole defense of misidentification because they are incompatible, and raising justification or

excuse would offer the state a straw man to attack and destroy, thus diverting the jury from the actual defense of misidentification. Thus, there is no mystery as to why the defendant requested a lesser included instruction on attempted manslaughter but did not request, or object to, the omitted portion of the instruction. Given his legal theory of defense and the evidence, the omission served his interest.

This practical analytical approach shows that the unobjected-to omission, if error at all, was not fundamental error going to the integrity of the trial and was not harmful, regardless of whether Lucas has the burden of showing harm or whether the state has the burden of showing harmlessness. Moreover, it cannot be maintained that the facts here are so unusual that a per se rule of reversible error is appropriate. The absence of justification or excuse for homicide or attempted homicide is the rule; the presence of justification or excuse is the rare exception. This Court should hold that this unpreserved issue was not fundamental error and could not be raised for the first time on appeal.

Turning now to a more theoretical analysis, the same result is reached.

LAW. The fundamental error doctrine and the contemporaneous objection rule are inextricably intertwined, neither of which can be fully understood in isolation, and both must be discussed.

Florida Rule of Criminal Procedure 3.390(d) provides:

> No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection.

In City of Orlando v. Birmingham, 539 So. 2d 1133, 1134-35 (Fla. 1989), this Court explained the rationale for the contemporaneous objection rule as it relates to jury instructions:

> [I]n criminal cases where the alleged error is giving or failing to give a particular jury instruction, this Court has refused to allow parties to object to the instruction for the first time on appeal. The requirement of a timely objection is based on practical necessity and basic fairness in the operation of the judicial system. A timely objection puts the trial judge on notice that an error may have occurred and thus provides the opportunity to correct the error at an early stage of the proceedings. It is essential that objections to jury instructions be timely made so that cases can be resolved expeditiously. In the absence of a timely objection, the trial judge does not have the opportunity to rule upon a specific point of law. Consequently, no issue is preserved for appellate review. [citations omitted]

See, also, Castor v. State, 365 So.2d 701, 703 (Fla. 1978).

The Birmingham explanation for the contemporaneous objection rule is echoed in State v. Applegate, 591 P.2d 371, 373 (Ore. App. 1979):

> There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond

> to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expenses of an appeal.

Under Rule 3.390(d), a defendant may raise on appeal preserved errors in jury instructions. When error has been preserved, it is presumed harmful, and the State has the burden of rebutting this presumption. The burden is on the State because the defendant did all that he could do to correct the error at trial. If the State cannot prove that the error was harmless, the defendant is entitled to a new trial.

The harmless error rule is set out in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986):

> [I]t places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an

> even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. [citation omitted][1]

This Court in DiGuilio adopted the harmless error test that was applied by the United States Supreme Court to constitutional error. Except under certain specified circumstances, the United States Supreme Court will not review a constitutional claim that has not been addressed in state court. Wainwright v. Sykes, 433 U.S. 72 (1977) (supreme court refused to review constitutional claim which this state had refused to review because defendant failed to preserve the issue at trial). The harmless error test, therefore, clearly was developed in cases in which the issue had already been addressed in state court. The issue facing the supreme court was whether the "preserved" constitutional error was per se reversible or subject to a harmless error test. See, e.g., Chapman v. California, 386 U.S. 18 (1967) (harmless error rule applied to comment on defendant's silence); Arizona v. Fulminante, 499 U.S. 279 (1991) (harmless error rule applied to coerced confession admitted in evidence at trial); Yates v. Evatt, 114 L.Ed.2d 432 (1991) (harmless error rule applied to burden-shifting jury instruction). As previously mentioned, DiGuilio itself was a preserved-error case.

The DiGuilio harmless error test should never be applied to unpreserved error because it places the burden on the wrong party

---

[1] The district court of Appeal made it clear that the issue was preserved for appeal. DiGuilio v. State, 451 So.2d 487, 488 (Fla. 5th DCA 1984).

and creates an incorrect presumption. Once again, preserved error is presumed harmful, and the State has the burden of rebutting this presumption. If this test is applied to unpreserved error, the contemporaneous objection rule is totally meaningless. This would mean that all errors are presumed harmful, and the State has the burden of showing their harmlessness. Why then would a defendant ever preserve an issue when the test for evaluating preserved and unpreserved error is the same? If the defendant objects at trial, the error may be avoided entirely or at least corrected, leaving the defendant without built-in reversible error in the case in the event of a conviction. Irrationally requiring the same test to be applied to both types of error surely cannot be the law.

When error is unpreserved, it is presumed harmless, and the defendant has the burden to rebut this presumption. The burden is on the defendant because he is the one who failed to avail himself of an opportunity to correct the error at trial. If the defendant cannot show that the error was harmful, his conviction will be affirmed.

Throughout the years, and particularly in recent years, this Court has struggled to define fundamental error. Fundamental error is reversible error, but not all reversible error, not even per se reversible error, is fundamental. At one time fundamental error was defined as error so egregious as to be ineradicable from the minds of the jury, but in State v. Jones, 204 So. 2d 515, 518-519 (Fla. 1967), this test was rejected. The

Jones court held that unobjected-to prosecutorial comments were not reviewable on appeal, even if their character was such that neither rebuke nor retraction could have completely destroyed their sinister influence. This holding was reflected in Clark v. State, 363 So. 2d 331 (Fla. 1978) (comment on defendant's silence constituted per se reversible error of constitutional magnitude but not fundamental error that could be raised for first time on appeal).[2] Most recently, this Court, citing earlier decisions, stated, "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." Mordenti v. State, ___ Fla. L. Weekly ___ (Fla. January 27, 1994). Unpreserved harmful error (which means error entitling the defendant to a new trial), at a minimum, must be something more egregious than preserved harmful error because of all the reasons supporting the contemporaneous objection rule. The State suggests that the only errors that are truly fundamental are those classified as structural defects, such as trial without counsel, trial by a partial judge, and trial while incompetent.

To the State's detriment, the DiGuilio harmless error test was erroneously applied in State v. Clark, 614 So. 2d 453 (Fla. 1992), cited by the First District Court of Appeal in the instant

---

[2] In State v. DiGuilio, supra, this Court receded from Clark to the extent that Clark had held that the preserved error was automatically reversible.

case. The Clark case requires elaboration, commencing with the opinion of the Fifth District Court of Appeal. Clark was convicted for armed burglary and grand theft. A discovery deposition of an unavailable prosecution witness was admitted at trial as substantive evidence. Clark objected to the admission of this evidence solely on the ground that the State failed to establish the witness' unavailability.

On appeal in the Fifth District, Clark contended that the trial court erred in admitting this evidence. It is unclear precisely what argument he advanced, except that it was something other than the ground raised at trial. The deposition was admissible under section 90.804(2)(a), Florida Statutes but not under Fla.R.Crm.P. 3.190(j). Potentially two arguments could have been raised--(1) the trial court erred in admitting evidence in violation of Fla.R.Crm.P. 3.190(j); and (2) irrespective of whether the trial court complied with state law, admission of this evidence violated Clark's constitutional rights, specifically his right to confront witnesses against him. Of course, neither of these issues was preserved for appeal. From the thrust of the court's opinion, the constitutional issue must have been the one that was raised in the appellate court. The Fifth District held that the unpreserved error was per se reversible but went on to certify the question whether a harmless error analysis could be applied to unpreserved error.

This Court accepted jurisdiction of this case and answered the certified question in the affirmative. Applying the DiGuilio

harmless error test, it reversed the defendant's conviction with the explanation, "We cannot say beyond a reasonable doubt that using Knight's deposition as substantive evidence did not affect the jury's finding Clark guilty." Id., at 614 So. 2d at 455.

Clark involved the erroneous admission of evidence. No type of evidence is so prejudicial on its face that its admission is per se reversible. Whether reversible error occurred depends on the circumstances of each individual case. The error in Clark was unpreserved. Therefore, the error was presumed harmless, and the burden was on Clark to show its harmfulness. Clark could not satisfy his burden merely by showing that had the error been preserved, it would have been reversible error. Clark's burden was much higher, once again because of all the reasons supporting the contemporaneous objection rule. Clark's burden was to show not only that reversible error occurred but that fundamental error occurred. Of course, the Clark decision was not analyzed in this manner. The case was treated as if it were a preserved error case with the burden on the State to show the error's harmlessness.

For thirty years or more, this Court has consistently refused to reverse convictions based on unpreserved errors in jury instructions. In Brown v. State, 124 So.2d 481 (Fla. 1960), the defendant was indicted for first-degree murder and convicted of second-degree murder. The issue was "whether a fundamental error occurs in a first degree murder trial when the trial judge advises the jury that under the facts third degree murder 'can in

nowise be applicable.'" Id., at 482. The question was answered in the negative. This Court further stated:

> [W]e herewith hold that in any trial for first degree murder the accused is entitled to have the jury instructed on all degrees of unlawful homicide including manslaughter and error is committed if he requests such an instruction and is refused. On the other hand, if the accused fails to request such an instruction or fails by timely objection to bring to the attention of the trial judge an error in any such instruction given he cannot urge the error for the first time on appeal.

Id., at 483.

See, also, State v. Bryan, 287 So.2d 73 (Fla. 1973) (defendant indicted for first-degree murder and convicted of second-degree murder; failure to define "evincing a depraved mind" as related to charge of second-degree murder and "culpable negligence" as related to charge of manslaughter not fundamental error); Castor v. State, 365 So.2d 701 (Fla. 1978) (defendant charged with second-degree murder and convicted of third-degree murder; failure to reinstruct on justifiable and excusable homicide not fundamental error); State v. Fuller, 455 So.2d 357 (Fla. 1984) (defendant charged with second-degree felony murder and convicted of third-degree murder; failure to instruct on any felony underlying the lesser included charge of third degree murder not fundamental error); Murray v. State, 491 So.2d 1120 (Fla. 1986) (defendant charged with attempted first-degree murder and convicted of attempted manslaughter; erroneous instruction that attempted manslaughter could be based on culpable negligence not preserved for appeal); Smith v. State, 521 So.2d 106 (Fla.

1988) (the giving of a disapproved standard jury instruction on insanity not fundamental error); Flagler v. State, 198 So.2d 313 (Fla. 1967) (defendant convicted of robbery; failure to instruct on larceny, a necessarily lesser included offense, not fundamental error) and Hand v. State, 199 So.2d 100, 103 (Fla. 1967) (interpreting Flagler); State v. Smith, 573 So.2d 306 (Fla. 1990) (failure to give long-form instruction on excusable homicide where short-form instruction was potentially confusing not fundamental error); Gibson v. State, 568 So.2d 977 (Fla. 1st DCA 1990), quashed, State v. Gibson, 585 So.2d 285 (Fla. 1991) (quashed on authority of Smith); Hodges v. State, 619 So. 2d 272 (Fla. 1993) (specific objection required to challenge Espinosa error in jury instruction); Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982) (defendant convicted of robbery as charged; failure to instruct on an essential, but undisputed, element of robbery not fundamental error); State v. Delva, 575 So. 2d 643 (Fla. 1991) (defendant convicted of trafficking in cocaine as charged; failure to instruct on an essential, but undisputed, element not fundamental error).

Rojas v. State, 552 So. 2d 914 (Fla. 1989) is an aberrational development in the case law and must be overruled. The defendant in Rojas was indicted for first-degree murder and convicted of second-degree murder. The manslaughter instruction was incomplete because no explanation was given that if the killing was justified or excusable it could not be manslaughter. From a review of this Court's opinion, it is not entirely clear

whether the issue was preserved for appeal, but the Fifth District's opinion makes it unmistakably clear that the defendant relied on the fundamental error doctrine. Rojas v. State, 535 So.2d 674, 675 (Fla. 5th DCA 1988). This Court concluded that reversible error had occurred and in support thereof cited seven of its prior decisions. None of these cases supported the proposition that unpreserved error was per se reversible. In five of the cases cited, the error had been preserved for appeal.[3] In the other two cases, the error was unpreserved, but it, nevertheless, was not fundamental error.[4] Rojas was followed

---

[3] Hedges v. State, 172 So. 2d 824, 825 (Fla. 1965) (judge "denied a request of petitioner's attorney to include his charge on justifiable and excusable homicide" when judge reinstructed jury on degrees of unlawful homicide); Lomax v. State, 345 So. 2d 719, 720 (Fla. 1977) ("defense counsel requested instructions on attempted robbery, assault with intent to commit robbery," and judge "refused to give an instruction on" these lesser offenses of robbery); Stockton v. State, 544 So. 2d 1006, 1007 (Fla. 1989) (judge "refused defense counsel's request to include the charges on justifiable and excusable homicide in the reinstruction"); Garcia v. State, 552 So. 2d 202 (Fla. 1989) ("it is reversible error for a trial court to refuse to reinstruct on justifiable and excusable homicide when it reinstructs on manslaughter"); and State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978) ("judge gave instructions on the next immediate lesser-included offense but refused to instruct the jury on an offense two steps removed" for offense of assault with intent to commit first-degree murder).

[4] Banda v. State, 536 So.2d 221 (Fla. 1988) (defendant convicted of first-degree murder; trial court's failure to give any instruction on excusable and justifiable homicide not fundamental error where evidence did not support either defense); Castor v. State, supra (defendant charged with second-degree murder and convicted of third-degree murder; failure to reinstruct on justifiable and excusable homicide not fundamental error). There was some language in Castor suggesting that had the error occurred in the original instruction, it would have been fundamental. However, this was not the issue in the case, and the argument obviously was not given serious attention.

in Miller v. State, 573 So. 2d 337 (Fla. 1991). Miller adds nothing of substance to the analysis, inasmuch as no other supreme court cases were cited in the opinion.

Rojas has far-reaching adverse consequences for the criminal justice system. A defendant has the right under the Due Process Clause of the Fourteenth Amendment to effective assistance of appellate counsel on direct appeal from his judgment and sentence. Evitts v. Lucey, 469 U.S. 387, 396-99 (1985). To prevail on this claim, the defendant must show the existence of a reasonable probability of success on the merits had the neglected issue been presented to the appellate court. Heath v. Jones, 941 F.2d 1126, 1132, 1136-37 (11th Cir. 1991).

Every defendant in whose case this type of unpreserved error has occurred can file a habeas petition in the appellate courts and obtain a new trial, if not outright discharge because of the State's inability to retry him, irrespective of when his case became final. There is no time bar on filing habeas petitions in appellate courts alleging ineffective assistance of appellate counsel for failing to raise fundamental error.

Contrast the effect of holding that fundamental error has occurred with a holding that the issue is procedurally barred because not properly preserved for appeal. When the error is unpreserved, the defendant's remedy is to file a collateral motion attacking his judgment of conviction on the ground that he was denied effective assistance of trial counsel. To obtain reversal of a conviction on this ground, the defendant must prove

that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is "a probability sufficient to undermine confidence in the outcome [of the trial]." Strickland v. Washington, 466 U.S. 668, 694 (1984). A defendant has two years from the date his conviction becomes final to collaterally attack it on this ground.

This remedy requires defense counsel to explain his conduct. There are only two reasons why defense counsel would not preserve reversible error--either he was incompetent, or he deliberately built reversible error into the case. At least one defense attorney has admitted that his failure to object was deliberate. Darden v. Wainwright, 477 U.S. 168, 182, n 14 (1986).

APPLICATION OF LAW TO FACTS. Applying Fla.R.Crm.P. 3.390(d), the unpreserved error in the jury instruction in the instant case is not reviewable on appeal. However lacking in merit, Lucas' remedy is to file a Fla.R.Crm.P. 3.850 motion alleging ineffective assistance of trial counsel.

If Lucas is allowed to raise this issue under the fundamental error doctrine, notwithstanding express language to the contrary in Rule 3.390(d), he must show not only that the error was harmful but that it was fundamentally harmful. He cannot meet his burden. Indeed, had the issue been preserved, the State easily could have shown that the error was harmless, or the court could have instructed the jury.

The victim in this case was robbed, kidnapped, sexually battered, and almost murdered. There was no evidence whatever that Lucas' attempt to murder the victim was justified or excusable, or that the victim had unreasonably provoked him into trying to kill her. Lucas did not defend on the ground that these crimes were fabricated, only that he was not the one who committed them. The jury was repeatedly told that it must follow the law, and failure to do so would result in a miscarriage of justice. (R. 493-494, 497-498) Had the jury been instructed on justifiable and excusable homicide, no doubt it would have wondered why it was being instructed on law unrelated to the facts of the case. The jury convicted Lucas as charged on all four counts, thereby rejecting the smorgasbord of lesser offenses available to it.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm Lucas' judgment and sentence for attempted second-degree murder.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to Lynn Williams, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301 this 31st day of January, 1994.

Carolyn J. Mosley

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 82,877

DAVID F. LUCAS,

Respondent.

_____/

APPENDIX

Copy of opinion of First District Court of Appeal in the instant case

(PER CURIAM.) Appellant, Ricky E. Kelly, Sr., appeals the order of the Florida Unemployment Appeals Commission reversing the Unemployment Appeals Referee's order awarding unemployment compensation benefits to appellant. On appeal, appellant raises two issues. First, appellant argues that the Commission erred in reversing the referee's factual finding that appellant was discharged for reasons other than misconduct, such finding being supported by competent, substantial evidence. We agree. The order of the Commission is reversed and the case remanded to the Commission for entry of an order consistent with this opinion. In light of this disposition, we find it unnecessary to address the second issue raised on appeal.

REVERSED and REMANDED for entry of an order consistent with this opinion. (MINER, WEBSTER and MICKLE, JJ., CONCUR.)

* * *

Criminal law—Manslaughter—Jury instructions—Failure to explain justifiable and excusable homicide as part of instruction on manslaughter is both fundamental and per se reversible error even though neither justifiable nor excusable homicide was at issue in prosecution for attempted second degree murder—Question certified whether, when defendant has been convicted of either manslaughter or greater offense not more than one step removed, failure to explain justifiable and excusable homicide as part of manslaughter instruction always constitutes both "fundamental" and per se reversible error, which may be raised for first time on appeal and may not be subjected to harmless error analysis, regardless of whether evidence could support finding of either justifiable or excusable homicide—Sentencing—Habitual violent felony offender—No error to sentence defendant as habitual violent felony offender without specifically finding that predicate conviction had not been pardoned or set aside where evidence offered by state was unrebutted—Guidelines—Departure—Sentencing defendant to life for sexual battery did not become departure sentence when it was imposed to run consecutively to habitual violent felony offender sentence—Error to impose consecutive habitual violent felony offender sentences, including mandatory minimum sentences, for convictions arising out of same criminal episode

DAVID F. LUCAS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District, Case No. 92-1826. Opinion filed November 22, 1993. An appeal from the Circuit Court for Gilchrist County. Stephan P. Mickle, Judge. Nancy A. Daniels, Public Defender; Lynn A. Williams, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Richard Parker, Assistant Attorney General, Tallahassee, for Appellee.

(WEBSTER, J.) In this direct criminal appeal, appellant raises six issues as involving error requiring reversal of either his convictions or his sentences: (1) denial of his motion for a mistrial made when inadmissible evidence of his bad character was presented to the jury; (2) failure to sustain his objection to a portion of the prosecutor's closing argument; (3) failure to include in the jury instruction on attempted manslaughter any reference to justifiable and excusable homicide; (4) sentencing him as an habitual violent felony offender without making sufficient findings; (5) imposing an improper departure sentence for sexual battery; and (6) imposing consecutive habitual violent felony offender sentences (including mandatory minimum sentences) for convictions arising out of the same criminal episode. We affirm in part, and reverse in part.

Appellant was charged by information with attempted second-degree (depraved mind) murder, sexual battery, armed robbery and kidnapping. Appellant and the state agree that all of the offenses charged arose out of the same criminal episode. Appellant entered not guilty pleas to all charges, and the case was eventually tried to a jury.

At trial, appellant's sole defense was that, although the crimes charged had occurred, they had not been committed by him. During the charge conference, appellant requested (and the trial court agreed to give) an instruction on attempted manslaughter as a category-one lesser-included offense of attempted second-degree murder. The trial court did instruct the jury that attempted (intentional act) manslaughter is a lesser-included offense of attempted second-degree (depraved mind) murder. However, nowhere in the instructions was there any reference to either justifiable or excusable homicide. Appellant did not request a charge on either justifiable or excusable homicide, and did not object to the omission.

On appeal, appellant argues for the first time that it was error requiring reversal to fail to instruct regarding justifiable and excusable homicide as a part of the charge on attempted manslaughter. According to appellant, manslaughter is a residual offense, which cannot be defined properly without an explanation that justifiable and excusable homicide are excluded from that offense. Moreover, because the offense of which appellant was convicted (attempted second-degree murder) is only one step removed from that as to which the erroneous instruction was given (attempted manslaughter), appellant argues that the error is both "fundamental" and per se reversible. To support his argument, appellant relies upon *Rojas v. State*, 552 So. 2d 914 (Fla. 1989); and *Miller v. State*, 573 So. 2d 337 (Fla. 1991).

The state responds that any error which might have occurred as a result of the failure to instruct the jury regarding justifiable and excusable homicide was not "fundamental" because neither justifiable nor excusable homicide was at issue in the case. For that matter, attempted manslaughter was not at issue in the case. As the state correctly points out, appellant conceded at trial that an attempted second-degree murder had occurred. His sole defense was that he had not been the perpetrator. In support of its position, the state relies principally upon *State v. Delva*, 575 So. 2d 643 (Fla. 1991), a case decided after *Rojas* and *Miller*.

Appellant is correct that *Rojas* and *Miller* stand for the proposition that failure to explain justifiable and excusable homicide as a part of the charge on manslaughter is "fundamental" error, which may be raised for the first time on appeal, when the defendant is convicted of either manslaughter or a greater offense not more than one step removed. *See Perez v. State*, 610 So. 2d 648 (Fla. 3d DCA 1992) (holding that failure to explain justifiable and excusable homicide as part of the lesser-included offense of attempted manslaughter when defendant was charged with attempted second-degree murder was "fundamental" error which could be raised for the first time on appeal, relying upon *Rojas* and *Miller*). However, the state is also correct that *Delva*, decided after *Rojas* and *Miller*, holds that "[f]ailing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal." 575 So. 2d at 645. Adding to the confusion caused by these seemingly conflicting holdings is *State v. Clark*, 614 So. 2d 453 (Fla. 1992). One of the apparent holdings of *Clark* is that at least some errors previously labeled by the supreme court as "fundamental" might, nevertheless, be subject to a harmless-error analysis. (The court concluded that a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution and article I, section 16, of the Florida Constitution, previously held to be a "fundamental" error, was, nevertheless, subject to a harmless-error analysis.)

We admit that we have found our efforts to reconcile *Rojas* and *Miller* with *Delva* and *Clark* somewhat troubling. The parties are in agreement that appellant did not dispute in the trial court that an attempted second-degree murder had occurred. His sole defense was that he had not been the perpetrator of that offense. Because only identity was disputed, *Delva* would appear to lead to the conclusion that it was not "fundamental" error to fail to instruct the jury regarding justifiable and excusable homicide as a part of the charge on the lesser-included offense of attempted manslaughter. Likewise, if one were to apply a harmless-error analysis to the failure to give such an instruction, as suggested by *Clark*, there can be little question but that, "beyond a reasonable doubt[,] . . . the error did not affect the verdict" and was,

therefore, harmless. *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). Nevertheless, after considerable reflection, we conclude that the court intended when it decided *Rojas* that, in cases such as this, failure to explain justifiable and excusable homicide as part of an instruction on manslaughter is both "fundamental" and per se reversible error (i.e., that the issue may be raised for the first time on appeal, and that it is not subject to a harmless-error analysis).

Interpretation of *Rojas* is made somewhat more difficult because the court did not recite what facts, if any, it regarded as relevant to its decision. However, reference to the district court opinion which was subsequently quashed reveals that the district court had held that the failure to give an instruction on justifiable and excusable homicide was neither "fundamental" nor harmful error, at least in part, because there was "*no* evidence which could have supported a self-defense instruction." *Rojas v. State*, 535 So. 2d 674, 676 (Fla. 5th DCA 1988). In quashing the district court's decision, the supreme court said, "we cannot accept the harmless error analysis adopted by the Fifth District Court of Appeal in the instant case." 552 So. 2d at 916. Additional support for the conclusion that the court intended that an explanation of justifiable and excusable homicide be given as a part of the manslaughter charge regardless of whether the facts warranted it (i.e., that failure to do so not be subject to a harmless-error analysis) is found in footnote 3 of the opinion which, in relevant part, reads as follows:

> This opinion is directed only to the failure to instruct on justifiable and excusable homicide as it relates to the definition of manslaughter. In those cases in which there is evidence to support the defenses of justifiable or excusable homicide, the standard jury instructions provide for longer and more explicit instructions to be given on these defenses.

Id. at 916 n.3.

We believe that the subsequent decision in *Miller* further supports the conclusion that a failure to explain justifiable and excusable homicide as a part of the charge on manslaughter in such cases is both "fundamental" and per se reversible error. The factual recitation in *Miller* is very sketchy. However, again, reference to the district court opinion reflects that "no view of the evidence could support a finding of justifiable or excusable homicide." *Miller v. State*, 549 So. 2d 1106, 1110 (Fla. 2d DCA 1989). Nevertheless, the supreme court treated the error as "fundamental" and quashed that portion of the district court's opinion which had affirmed the manslaughter convictions.

Additional support for our conclusion is found in *Standard Jury Instructions—Criminal Cases*, 603 So. 2d 1175 (Fla. 1992). There, the court expressly rejected the suggestion that justifiable and excusable homicide be explained as part of a charge on manslaughter only when there is some support for such an explanation in the evidence:

> [W]e do not concur with the committee's suggestion that no portion of the excusable homicide instruction need be read when it has no basis in the evidence. We say this because Florida case law has consistently held that manslaughter is a residual offense which cannot be properly defined without an explanation that justifiable homicide and excusable homicide are excluded from the crime. *Rojas v. State*, 552 So. 2d 914 (Fla. 1989); *Hedges v. State*, 172 So. 2d 824 (Fla. 1965). Because a manslaughter instruction will have to be given in every homicide case, the instruction on excusable homicide will also have to be included.

Id. at 1176.

Finally, we note that at least two other district courts have reached the conclusion that we now reach. *Rinaldi v. State*, 614 So. 2d 1197 (Fla. 2d DCA 1993); *Hayes v. State*, 564 So. 2d 161 (Fla. 2d DCA 1990); *Armstrong v. State*, 566 So. 2d 943 (Fla. 5th DCA 1990) (en banc), *approved on other grounds*, 579 So. 2d 734 (Fla. 1991).

Based upon the foregoing analysis, we conclude that we must reverse appellant's conviction of attempted second-degree murder and remand for a new trial on that charge. However, we certify to the Supreme Court the following, which we believe to be a question of great public importance:

> WHEN A DEFENDANT HAS BEEN CONVICTED OF EITHER MANSLAUGHTER OR A GREATER OFFENSE NOT MORE THAN ONE STEP REMOVED, DOES FAILURE TO EXPLAIN JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION ALWAYS CONSTITUTE BOTH "FUNDAMENTAL" AND PER SE REVERSIBLE ERROR, WHICH MAY BE RAISED FOR THE FIRST TIME ON APPEAL AND MAY NOT BE SUBJECTED TO A HARMLESS-ERROR ANALYSIS, REGARDLESS OF WHETHER THE EVIDENCE COULD SUPPORT A FINDING OF EITHER JUSTIFIABLE OR EXCUSABLE HOMICIDE?

Appellant's remaining arguments addressed to his convictions merit neither discussion nor reversal.

The first sentencing issue raised by appellant is that it was error to sentence him as an habitual violent felony offender without finding that the necessary predicate conviction had not been pardoned or set aside. This issue is now controlled by the decision in *State v. Rucker*, 613 So. 2d 460 (Fla. 1993). The state introduced a certified copy of a prior conviction which qualifies as a predicate offense under section 775.084(1)(b), Florida Statutes (1991). As in *Rucker*, the evidence offered by the state was unrebutted, and appellant has never asserted that the predicate conviction has been pardoned or set aside. Accordingly, as in *Rucker*, the failure to make more specific findings is harmless.

The second sentencing issue raised by appellant is that the guidelines life sentence imposed upon him for sexual battery (a life felony) became a departure sentence when it was imposed to run consecutively to the habitual violent felony offender sentences which were also imposed. This issue is now controlled by *Gipson v. State*, 616 So. 2d 992 (Fla. 1993), in which the court held that imposing a guidelines maximum sentence to run consecutively to an habitual offender sentence does not result in a guidelines departure.

Finally, appellant argues that it was error to impose consecutive habitual violent felony offender sentences (including mandatory minimum sentences) for convictions arising out of the same criminal episode. This issue is now controlled by *Daniels v. State*, 595 So. 2d 952 (Fla. 1992); and *Hale v. State*, 18 Fla. L. Weekly S535 (Fla. Oct. 14, 1993). In the former, the court held that mandatory minimum sentences imposed pursuant to the habitual offender law must be concurrent. In the latter, the court held that the habitual offender sentences, themselves, must be concurrent. Accordingly, we are constrained to vacate appellant's habitual violent felony offender sentences for robbery with a deadly weapon and kidnapping, and to remand with directions that appellant be resentenced. Assuming that the trial court again elects to sentence appellant as an habitual violent felony offender, both the sentences and the mandatory minimum portions thereof must be imposed to run concurrently.

In summary, we reverse appellant's conviction of attempted second-degree murder, and remand for a new trial on that charge. We affirm appellant's convictions of robbery with a deadly weapon and kidnapping. However, we vacate appellant's sentences for those two convictions, and remand for resentencing consistent with this opinion. Finally, we affirm both appellant's conviction and his sentence for sexual battery.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED, with directions. (BARFIELD and ALLEN, JJ., CONCUR.)

* * *

Criminal law—Jurors—Challenge—Peremptory—Issue of allegedly illegal peremptory strikes of potential jurors not preserved for appeal

LORENZO WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 1st