

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DAMANI SPENCER,

Respondent.

Case No.: SC16-54

Lower Case No.: 1D14-5663

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page#
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
<u>ISSUE:</u> WHETHER THE JURY INSTRUCTION ON MANSLAUGHTER GIVEN BY THE TRIAL COURT CONSTITUTED FUNDAMENTAL ERROR WHERE IT FAILED TO INSTRUCT ON JUSTIFIABLE OR EXCUSABLE HOMICIDE EVEN WHERE THE RECORD REFLECTS THERE WAS NO DISPUTE AS TO THIS ISSUE AND THERE WAS NO EVIDENCE PRESENTED FROM WHICH THE JURY COULD FIND JUSTIFIABLE OR EXCUSABLE HOMICIDE.	5
CONCLUSION	17
CERTIFICATE OF SERVICE	18
CERTIFICATE OF COMPLIANCE	18

TABLE OF CITATIONS

Cases

Brown v. State,

124 So. 2d 481 (Fla. 1960) 6

Cox v. State,

966 So. 2d 337 (Fla.2007) 12

Davis v. State,

661 So. 2d 1193 (Fla. 1995) 14

Haygood v. State,

109 So. 3d 735 (Fla. 2013) 5

Johnson v. State,

53 So. 3d 1003 (Fla. 2010) 13

Mack v. State,

823 So. 2d 746 (Fla. 2002) 14

Moore v. State,

114 So. 3d 486 (Fla. 1st DCA 2013) 3, 5

Rodas v. State,

967 So. 2d 444 (Fla. 4th DCA 2007) 12, 13

Merricks v. State,

831 So. 2d 156 (Fla. 2002) 13

Spencer v. State,

40 Fla. L. Weekly D2819 (Fla. 1st DCA December 22, 2015) *passim*

State v. Abreau,

363 So. 2d 1063 (Fla. 1978) 8, 9, 14

State v. Delva,

575 So. 2d 643 (Fla. 1991) 6, 7

State v. Lucas,

645 So. 2d 425 (Fla. 1994) *passim*

Stewart v. State,

420 So. 2d 862 (Fla.1982) 6, 7

PRELIMINARY STATEMENT

Respondent, Damani Spencer, was the defendant in the trial court; this brief will refer to him as "Defendant" or "Respondent." Petitioner, the State of Florida, was the prosecution below; the brief will refer to Petitioner as such or "the State."

This appeal consists of three volumes of record. The first volume is the individually numbered Record on Appeal containing the clerk's record and will be referenced as "R." followed by any corresponding page number(s). The transcript from Appellant's trial is individually numbered as volumes I and II, and will be referenced as "T." followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

The First District summarized the relevant facts as follows:

Appellant's convictions arose out of an attempted robbery during a drug transaction. The crimes occurred outside of a home. At the time of the incident, the male and female victims were seated in a vehicle. They were approached by appellant and another man who attempted to rob them at gunpoint. Appellant later gave a statement to police admitting that he was the man who walked up to the passenger side of the vehicle, pulled out a gun from his waistband, and demanded the drugs. As the victims drove away, appellant and the second man shot at their vehicle multiple times.

Spencer v. State, 40 Fla. L. Weekly D2819, *1 (Fla. 1st DCA December 22, 2015). As a result of this incident, Defendant was charged with two counts of attempted first degree premeditated murder. (R. 29). After trial, the jury found Defendant was guilty of two counts of the lesser included crime

of attempted second degree murder. (R. 92-95). During trial, the jury was instructed that attempted manslaughter by act was also a lesser included offense of attempted first degree murder, however the jury was not instructed that Defendant cannot be guilty of manslaughter if the attempted killings were either justifiable or excusable homicide. (R. 66; T.II, 175). Specifically, the jury was instructed as follows:

To prove the crime of Attempted Manslaughter by Act, the State must prove the following element beyond a reasonable doubt:

1. Damani Spencer intentionally committed an act which would have resulted in the death of the victim except that someone prevented Damani Spencer from killing the victim or he failed to do so.

However, the defendant cannot be guilty of Attempted Manslaughter by Act by committing a merely negligent act.

Each of us has a duty to act reasonably and use ordinary care toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence.

In order to convict of Attempted Manslaughter by Act, it is not necessary for the State to prove that Damani Spencer had an intent to cause death, only an intent to commit an act which would have caused death.

(R.I, 66). Defendant did not object to this instruction. (T.II, 175). On appeal to the First District Court of Appeal, Defendant alleged fundamental error this instruction failed to instruct on justifiable and excusable homicide. Spencer, 40 Fla. L. Weekly D2819 at *1.

The First District Court of Appeal noted this omission in the jury instructions, also noting counsel failed to request this instruction or to

object to the instructions as given. Id. Additionally, the court found that nothing in the record indicated the attempted killings were justifiable or excusable. Id. at *2. However, the court “reluctantly” reversed Defendant’s convictions because the trial court failed to instruct the jury that attempted manslaughter does not include either justifiable or excusable homicide. Id. at *1-2. The court explained it was constrained to find this way because of this Court’s ruling in State v. Lucas, 645 So. 2d 425 (Fla. 1994). Id. at 2. The court went on to certify the same question as it certified in Moore v. State, 114 So. 3d 486, 493 (Fla. 1st DCA 2013) (review dismissed by State v. Moore, 181 So. 3d 1186 (Fla. 2016)), as one of great public importance. Id. That question was best articulated below as follows:

Thus, the Moore court certified a question of great public importance asking if the failure to instruct on justifiable or excusable homicide is fundamental error “even where the record reflects there was no dispute as to this issue and there was no evidence presented from which the jury could find justifiable or excusable homicide.”

Id. at 1 (quoting Moore, 114 So. 3d at 494).

SUMMARY OF ARGUMENT

This Court should recede from its decision in Lucas v. State, 645 So. 2d 425 (Fla. 1994). In Lucas, this Court held that when a defendant has been convicted of either manslaughter or a greater offense not more than one step removed, failure to explain justifiable and excusable homicide as part of the manslaughter instruction always constitutes 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. However, the holding from Lucas is contrary to this Court's holdings in Delva, Reed, and Pena. In these three cases this Court analyzed fundamental error within the jury instructions based upon the determination of whether the error in the instructions went to a disputed issue on a pertinent or material determination that the jury must make. In Delva, Reed, and Pena, this Court undertook a proper fundamental error analysis to determine if the flaw in the instructions reached down into the validity of the trial itself, such that the verdict of guilty could not have been obtained without the assistance of the error. This Court should apply this analysis to the instant case to find that because the error was on an undisputed issue, it could not constitute fundamental error.

ARGUMENT

ISSUE: WHETHER THE JURY INSTRUCTION ON MANSLAUGHTER GIVEN BY THE TRIAL COURT CONSTITUTED FUNDAMENTAL ERROR WHERE IT FAILED TO INSTRUCT ON JUSTIFIABLE OR EXCUSABLE HOMICIDE EVEN WHERE THE RECORD REFLECTS THERE WAS NO DISPUTE AS TO THIS ISSUE AND THERE WAS NO EVIDENCE PRESENTED FROM WHICH THE JURY COULD FIND JUSTIFIABLE OR EXCUSABLE HOMICIDE.

Standard of Review

The question before this Court is solely a legal question, therefore this issue is reviewed *de novo*. See Haygood v. State, 109 So. 3d 735, 739 (Fla. 2013).

The Certified Question

In the case below, the First District Court of Appeal certified "the same question as certified in Moore¹ as one of great public importance." Spencer v. State, 40 Fla. L. Weekly D2819, *1 (Fla. 1st DCA December 22, 2015). In this regard, the First District explained the following:

[T]he Moore court certified a question of great public importance asking if the failure to instruct on justifiable or excusable homicide is fundamental error 'even where the record reflects there was no dispute as to this issue and there was no evidence presented from which the jury could find justifiable or excusable homicide.'"

Id. (citing Moore v. State, 114 So. 3d 486, 494 (Fla. 1st DCA 2013)). This question should be answered in the negative, and the contrary holding of

¹ Moore v. State, 114 So. 3d 486, 493 (Fla. 1st DCA 2013).

State v. Lucas, 645 So. 2d 425 (Fla. 1994), should be receded from, because Lucas is in irreconcilable conflict with this Court's analysis of fundamental error.

"The general rule is that a reversal in a criminal case must be based on a prejudicial error that was preserved by a timely objection in the trial court." Rodas v. State, 967, So.2d 444 (Fla. 4th DCA 2007). However, a fundamental error is an exception to the contemporaneous objection rule. Id. Fundamental error can only occur when an error reaches "down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991) (quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960)). "In other words, 'fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.'" Id. at 645 (quoting Stewart v. State, 420 So. 2d 862, 863 (Fla.1982), cert denied, 460 U.S. 1103 (1983)).

This Court has consistently held that failing to instruct the jury on an undisputed element does not rise to fundamental error. See id. In Delva, the defendant was convicted of trafficking in cocaine. Id. at 643. At trial, however, the jury was never instructed that the defendant's knowledge that the substance he possessed was cocaine was an element of the crime.² Id. at 644. The defendant never requested such an instruction, and the

² The events of Delva took place prior the enactment of §893.101, Fla. Stat., which made clear that knowledge of the illicit nature of a substance was not an element for crimes in Chapter 893, Florida Statutes.

standard instruction at the time of the defendant's trial did not include this element. Id. The defendant's knowledge of the illicit nature of the cocaine was not an issue in the trial; rather, as this Court stated,

There was no suggestion that Delva was arguing that while he knew of the existence of the package he did not know what it contained. Hence, the issue which was raised in Dominguez and corrected by the addition to the standard jury instruction was not involved in Delva's case. Because knowledge that the substance in the package was cocaine was not at issue as a defense, the failure to instruct the jury on that element of the crime could not be fundamental error and could only be preserved for appeal by a proper objection.

Id. at 645. Thus, when an unpreserved error occurs regarding an instruction on an element of an offense, such error cannot be fundamental when the element was not in dispute.

Later, in Reed this Court relied on Delva when it concluded that fundamental error occurred because the jury instructions failed to correctly define a disputed element. Reed v. State, 837 So. 2d 366, 369 (Fla. 2002). This Court acknowledged that Delva "recognized a distinction regarding fundamental error between a disputed element of a crime and an element of a crime about which there is no dispute in the case." Id. Ultimately, this Court outlined that it is fundamental error for the trial court to inaccurately define a disputed element at trial where that inaccurate definition "is pertinent or material to what the jury must consider in order to convict." Id. (quoting Stewart v. State, 420 So. 2d 862, 863 (Fla.1982)).

Lastly, in Pena this Court again explained fundamental error in the context of erroneous jury instructions on undisputed elements. Pena v.

State, 901 So. 2d 781 (Fla. 2005). In Pena, the trial court failed to instruct the jury on an element of Pena's conviction. Id. at 783. In particular, the omitted instruction was about Pena's age, an element which was not disputed at trial. Id. This Court looked to Delva and Reed to note the distinction between the two cases; finding that fundamental error occurs when "the element contained in the erroneous jury instruction was disputed at trial." Id. at 784. Accordingly, this Court held that the trial court's failure to instruct the jury on the age requirement of Pena's conviction was not fundamental error because the issue was not disputed. Id. at 784-85.

Additionally, in Pena, this Court also appears to have embraced the possibility of the factual analysis for errors in the manslaughter instruction. Pena was charged with First Degree Murder resulting from unlawful distribution of an illegal drug. Id. at 782-83. Knowledge of the overdose or intent to kill are not elements of the offense. Id. at 787. In Pena, the trial court also failed to instruct the jury on justifiable and excusable homicide, which was a lesser included offense two steps removed from the charged offense. Id. at 787-88. This Court held that the error in the manslaughter instruction was not fundamental because manslaughter was more than two steps removed, citing to State v. Abreau, 363 So. 2d 1063 (Fla. 1978), and this Court also noted that under the factual content of this case "justifiable and excusable homicide were not material issues." Id. at 787. This Court stated the following: "We agree with the district court that in this case the jury would have found nothing useful in these instructions in

its determination of whether Pena was guilty of first-degree murder or the next lesser offense of second-degree murder." Id.

Here, the omission from the manslaughter instruction was not fundamental error because it was on an undisputed element of Defendant's conviction. In the case at bar, Defendant was charged with two counts of attempted first degree premeditated murder. (R. 29). The jury found Defendant was guilty of two counts of the lesser included crime of attempted second degree murder. (R. 92-95). During trial, the jury was instructed that attempted manslaughter by act was also a lesser included offense of attempted first degree murder, but the jury was not instructed that Defendant cannot be guilty of manslaughter if the attempted killings were either justifiable or excusable homicide. (R. 66; T.II, 175). However, this instruction was not at issue because the defendants attempted to rob the victims at gun point and shot at the victims as the victims fled the scene. Moreover, the issue for the jury--despite Appellant's confession--was about the killer's identity and not whether the shooting was justifiable or excusable. (T.II, 216-19). Therefore, the erroneously omitted instruction did not go to a disputed issue at trial. Accordingly, Delva Reed, and Pena should control mandating that the error was not fundamental because it was not pertinent or material to what the jury must consider in order to convict Defendant.

However, the decision below found that although "[t]here is nothing in the record that indicates justifiable or excusable homicide[,] " it must "reluctantly" reverse Defendant's convictions because the trial court failed

to instruct the jury that attempted manslaughter does not include either justifiable or excusable homicide. Spencer 40 Fla. L. Weekly D2819 at *1-2. The court explained it was constrained to find this way because of this Court's ruling in State v. Lucas, 645 So. 2d 425 (Fla. 1994). This Court should recede from Lucas, because it is in contradiction to the well-established rule that fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.

In Lucas, the defendant was convicted of armed robbery, kidnapping, sexual battery, and attempted second-degree murder. Id. His defense had nothing to do with whether the crimes were justifiable or excusable; rather, he claimed he was not the person who committed the crimes. Id. The jury was instructed as to attempted manslaughter, a one-step removed lesser-included offense of attempted second-degree murder. Id. The attempted manslaughter instruction failed to define justifiable and excusable homicide as required, but this error was unobjected to. Id. Based on these facts, the First District certified the following as 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?

Id. at 426. This Court answered the question in the affirmative, thereby holding that this particular error was per se reversible and fundamental, regardless of whether the erroneous portion of an instruction was disputed at trial. Id. at 427.

Thus, the holding in Lucas, in contrast to the principles set forth in in Delva, Reed, and Pena discussing fundamental error in jury instructions has led to a rule that while unobjected to jury instructions may be reviewed for fundamental error for any other offense, an error in the manslaughter instruction is always fundamental requiring reversal regardless of whether the issue is in disputed issue. Some courts have attempted to explain the existence of this rift by partially attributing it to the fact that "manslaughter is a residual offense, defined by reference to what it is not." Lucas, 645 So. 2d at 427. However, this neither explains nor mandates that error in a manslaughter instruction is always fundamental, whereas error in the instruction on other crimes may not be fundamental. What truly guides the fundamental error analysis is the consideration of whether the error was pertinent or material to the defendant's conviction. Regardless of whether the type of crime proven was residual or strictly elemental, in every case where an unobjected to flaw occurred within the jury's instructions the proper question is whether that flaw was pertinent to the jury's consideration of guilt.

Thus, in this case if Defendant's theory had been that he shot because he thought the victims were intending to hurt him, the instructions would be pertinent. However, because the defense was that Defendant was not the one

who committed the crime; whether the shooting was justifiable or excusable was no more pertinent to the jury's decision on the residual charge of manslaughter than it was for the elemental charge of robbery charge. Manslaughter--and other more traditionally elemental crimes--still require the jury to make certain determinations. Where the jury was erroneously instructed on how to make those determinations it is only a fundamental error where the error reached down into the validity of the trial itself, such that the verdict of guilty could not have been obtained without its assistance. An error on an undisputed issue cannot meet this rigorous standard.

Part of the problem with Lucas's per se reversible approach appears to stem from the phrases: fundamental error, harmless error, and per se reversible error. This Court has previously noted the inner workings of these three concepts as follows:

Both per se reversible error and harmful error analysis apply only if the issue is properly preserved for appellate review. See Rodas v. State, 967 So. 2d 444, 446-47 (Fla. 4th DCA 2007) ("There is a difference between 'per se reversible error' and 'fundamental error.' The general rule is that a reversal in a criminal case must be based on a prejudicial error that was preserved by a timely objection in the trial court. A fundamental error is an exception to the contemporaneous objection rule.... A per se reversible error means that a reviewing court does not undertake harmless error analysis.... A per se reversible error is not necessarily a fundamental one." (citations omitted)). This is in contrast to fundamental error, which applies when an issue is not preserved. Cox v. State, 966 So. 2d 337, 347 (Fla.2007) ("[A] claim of error that is not preserved by an objection during trial is procedurally barred on appeal unless it constitutes fundamental error.").

Johnson v. State, 53 So. 3d 1003, 1007 n.5 (Fla. 2010). A preserved error properly brings a potential error to the trial court's attention, which gives the trial court an opportunity to correct the error. If the error was overruled, it becomes the State's burden on appeal--as the beneficiary of the error--to show that the error had no reasonable effect on the jury's verdict. However, there are some errors that are structural in nature and are always presumed to be harmful, and therefore are per se reversible errors. See Merricks v. State, 831 So. 2d 156, 159-61 (Fla. 2002) (finding per se reversible error when a bailiff engages in an ex parte communication with the jury on a question during their deliberation). As noted in Johnson, per se reversible errors are limited to preserved errors and not all per se reversible errors are fundamental. Johnson, 53 So. 3d at 1007 n.5; see also Rodas v. State, 967 So.2d 444 (Fla. 4th DCA 2007) (providing that a per se reversible error must be preserved by an objection). Accordingly, when an error is not preserved for appeal, it becomes the defendant's burden to show how the nature of the error vitiated the entire trial. If the judge erroneously instructed a jury on a disputed element of an offense, the error would be fundamental because it misinformed the jury on what it must consider to reach a verdict. However, if the error was about an undisputed element, a defendant is unable to show that it vitiated the entire trial.

In Lucas, this Court's opinion appears to take for granted the fundamental error analysis by holding as follows:

[F]ailure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless-error analysis where the defendant has been convicted of either manslaughter or a greater offense not more than one step removed, such as second degree murder.

Id. at 427.³ This holding disregards that fundamental error can only occur when the error was pertinent or material to the defendant's conviction. Additionally, fundamental error can only occur on an unpreserved claim; whereas harmless and per se reversible error occur only where the claim was preserved by objection. Part of the more rigorous review for fundamental error is to discourage gamesmanship. See Davis v. State, 661 So. 2d 1193, 1197 (Fla. 1995) ("[The contemporaneous objection rule] prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client.") (disapproved on other grounds by Mack v. State, 823 So. 2d 746 (Fla. 2002)). Therefore, it is not that the court is undertaking a harmless or per se error analysis, but rather determining if the omission vitiated the defendant's trial. Similar to the analysis of Delva, Reed, and Pena, when the omitted instruction did not reach down into the validity of

³ Part of the problem in Lucas is that the Court misapplied State v. Abreau, 363 So. 2d 1063 (Fla. 1978) and attempted to combine review for fundamental error and the per se reversible error analysis for the failure to give a lesser included instruction one step removed without looking to preservation. Abreau addressed preserved error. Abreau recognized that while the failure to give a requested instruction of a lesser included offense one step removed from the charged offense was per se reversible, the failure to give a requested instruction two steps removed was harmless. *Id.* at 1064.

the trial because it was on an undisputed issue, the error cannot be said to be fundamental.

Additionally, the Lucas holding cannot be reconciled with Delva, Reed, and Pena, because Lucas requires a finding of fundamental error on the mere possibility of a jury pardon due to an error in an instruction of a lesser included offense even if the defendant was convicted of a greater offense, whereas the latter cases held it is not fundamental error to erroneously instruct the jury on an element of a convicted offense. Accordingly, the Lucas opinion seems to be at odds with the opinions in Delva, Reed, and Pena. The incomplete manslaughter instruction given in Lucas--and the instant case--was on the lesser included charge of manslaughter. Whereas, in Delva, Reed, and Pena, the erroneous instruction occurred on the crimes for which the defendants were convicted. More, specifically, in Delva the trial court omitted an instruction requiring that the defendant knew the substance was cocaine, in Reed the trial court improperly defined malice, and in Pena the jury was never instructed that the defendant needed to be over the age of eighteen in order to be convicted. These three cases lacked elements generally critical to proving a defendant's crime, but the fundamental error analysis turned on whether those errors were disputed at trial. It is inapposite to find that the error contained in a conviction's instruction may not be fundamental, but a similar type of error on the lesser charge one step below the defendant's conviction is always fundamental error no matter the facts of the case. This is highlighted by the jury's instruction requiring the following: "If you return a verdict of guilty, it should be

for the highest offense which has been proven beyond a reasonable doubt.” Fla. Std. Jury Instr. (Crim.) 3.12; (R. 74). This instruction outlines that the jury is tasked with returning the highest crime proved by the State, Accordingly, when error arises in the jury’s instructions on a lesser included charge, and that error is about an undisputed issue, it cannot be fundamental.

This Court’s decision in Lucas should be receded from because fundamental error will not always occur when the jury was improperly instructed on manslaughter as a lesser included crime one step removed from a defendant’s conviction. Fundamental error occurs when the error relates to a disputed element that is pertinent and material to what the jury must consider in order to convict. When the instruction on justifiable and excusable homicide is omitted from the manslaughter instruction, and that issue was not in dispute at trial, the error will not reach down into the validity of the trial. Accordingly, this Court should follow its decisions in Delva, Reed, and Pena to determine that fundamental error did not occur here because justifiable or excusable homicide were not disputed at trial.

CONCLUSION

Based on the foregoing discussions, Petitioner respectfully requests this Honorable Court recede from Lucas v. State, 645 So. 2d 425 (Fla. 1994), quash the decision below, affirm Defendant's judgement and sentence, and answer the certified question in the negative.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by electronic mail to the following: Baya Harrison III, counsel for Respondent, at bayalaw@aol.com, this 18th day of April, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this document was computer generated using Courier New 12-point font.

Certified,
Pamela Jo Bondi
Attorney General

/s/ Matthew Pavese
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STATE OF FLORIDA,

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DAMANI SPENCER,

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INDEX TO APPENDIX

1. Spencer v. State, 40 Fla. L. Weekly D2819 (Fla. 1st DCA December 22, 2015)



KeyCite Yellow Flag - Negative Treatment

Review Granted by State v. Spencer, Fla., February 19, 2016

2015 WL 9287020

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,
First District.

Damani SPENCER, Appellant,

v.

STATE of Florida, Appellee.

No. 1D14-5663.

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Dec. 22, 2015.

Synopsis

Background: Defendant was convicted in the Circuit Court, Leon County, Dawn Caloca-Johnson, J., of attempted second-degree murder and carrying a concealed firearm. Defendant appealed.

Holdings: The District Court of Appeal, Wolf, J., held that:

[1] failure to instruct jury that defendant could not be guilty of attempted manslaughter if attempted killings were either justifiable or excusable homicide was fundamental error, and

[2] evidence suggested that defendant concealed a firearm, and thus conviction for carrying a concealed firearm was not fundamental error.

Affirmed in part, reversed in part, and question certified.

An appeal from the Circuit Court for Leon County. Dawn Caloca-Johnson, Judge.

Attorneys and Law Firms

Baya Harrison, III, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Jessica DaSilva, Assistant Attorney General, Tallahassee, for Appellee.

Opinion

WOLF, J.

*1 Appellant challenges his convictions for two counts of attempted second-degree murder, attempted robbery, and carrying a concealed firearm. He raises two issues on appeal. The first issue is whether the jury instruction on manslaughter given by the trial court constituted fundamental error because it failed to instruct on justifiable or excusable homicide. The second issue is whether fundamental error occurred because the evidence was wholly insufficient to prove carrying a concealed firearm. As to the first issue, we are reluctantly required to reverse the attempted second-degree murder convictions based on *State v. Lucas*, 645 So.2d 425 (Fla.1994). We, however, certify a question of great public importance as to this issue. As to the second issue, we affirm because appellant's statements to police, coupled with the testimony of the victims, were sufficient evidence to uphold the conviction for carrying a concealed firearm.

Facts

Appellant's convictions arose out of an attempted robbery during a drug transaction. The crimes occurred outside of a home. At the time of the incident, the male and female victims were seated in a vehicle. They were approached by appellant and another man who attempted to rob them at gunpoint. Appellant later gave a statement to police admitting that he was the man who walked up to the passenger side of the vehicle, pulled out a gun from his waistband, and demanded the drugs. As the victims drove away, appellant and the second man shot at their vehicle multiple times.

I. Jury Instruction

[1] Appellant argues his convictions for second-degree murder are fundamental error because when giving the jury instruction for the lesser-included offense of attempted manslaughter, the court failed to instruct that appellant could not be guilty of attempted manslaughter if the attempted killings were either justifiable or excusable homicide. Counsel failed to request this instruction or to object to the jury instructions as given. However, in *Moore v. State*, 114 So.3d 486, 493 (Fla. 1st DCA 2013), *review granted*, 168 So.3d 229 (Fla.2014), this court found that *Lucas*, 645 So.2d 425, held this error was fundamental if the

defendant was convicted of either manslaughter or an offense one step removed from manslaughter, even where “there was no dispute as to whether the killing was justifiable or excusable homicide. [Moore's] theory of defense was identity.” However, this court believed that *Lucas* was in contradiction to the well-established rule that “‘fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict. Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error....’ ” *Id.* (quoting *Garzon v. State*, 980 So.2d 1038, 1042 (Fla.2008)). Thus, the *Moore* court certified a question of great public importance asking if the failure to instruct on justifiable or excusable homicide is fundamental error “even where the record reflects there was no dispute as to this issue and there was no evidence presented from which the jury could find justifiable or excusable homicide.” *Id.* at 494.

*2 The same situation occurs in this case. There is nothing in this record that indicates justifiable or excusable homicide. We, therefore, certify the same question as certified in *Moore* as one of great public importance. Because appellant's attempted second-degree murder convictions are only one step removed from attempted manslaughter, we are constrained to find that the error in failing to instruct on justifiable or excusable homicide was fundamental error. Thus, we reverse those convictions and remand for a new trial on the attempted second-degree murder counts.

II. Carrying a Concealed Firearm

[2] Appellant argues his conviction for carrying a concealed firearm is fundamental error because there was no evidence whatsoever from which the jury could have found the concealment element of the offense. A “concealed firearm” is defined as “any firearm ... which is carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person.” § 790.001(2), Fla. Stat. (2012).

In his statement to police, appellant said he walked up to the passenger side of the car with the gun “on my waist” or “in” his “waist.” He concedes this statement indicates that he carried the gun in his waistband. However, he argues he did not specify whether the gun was concealed under his shirt or otherwise obscured from view. He argues courts have held that a firearm that is visibly sticking out from a waistband or pocket is not concealed. *See, e.g., Powell v. State*, 369 So.2d

108, 109 (Fla. 1st DCA 1979). He further argues that neither eyewitness testified that he carried a concealed firearm. Thus, he argues there was no evidence whatsoever from which the jury could have found the element of concealment.

[3] [4] [5] Appellant did not properly preserve this issue for appeal. “The state's failure to prove all elements of a charged offense does not constitute ‘fundamental error’ which may be raised for the first time on appeal.” *Sanders v. State*, 765 So.2d 778 (Fla. 1st DCA 2000). Instead, in order to prove fundamental error, the evidence must be “insufficient to show that a crime was committed at all.” *F.B. v. State*, 852 So.2d 226, 230 (Fla.2003). Stated differently, “ ‘a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error.’ ” *Id.* (quoting *Troedel v. State*, 462 So.2d 392, 399 (Fla.1984)). If the evidence at least “suggests” and “indicates” the essential elements of a crime were committed, there is no fundamental error. *Young v. State*, 141 So.3d 161, 165 (Fla.2013).

Here, the evidence suggests that appellant concealed the firearm. Appellant is correct that neither witness testified he was the gunman on the passenger side. However, appellant confessed to being the gunman on the passenger side, and the eyewitness' testimony suggests that the passenger-side gunman had his firearm concealed. The male victim testified he watched the gunman come down the stairs, and he did not see a weapon on that person “at first,” but “as he approached ... I was looking to see if he pulled out money or anything, and then I realized he pulled out the gun and cocked it back.” This testimony suggests that the gun was concealed at first. The female victim similarly testified that the passenger-side gunman “pulled out the gun,” which suggests that it was pulled out from a concealed place, rather than being openly displayed.

*3 The female witness believed appellant was the man standing on the driver's side of the car. She never testified that she saw appellant with a gun. Appellant's testimony and the forensic evidence, however, indicate that shots were fired by two shooters, appellant and the co-defendant. The fact that the female victim did not see a gun on appellant suggests that he had his gun concealed. Thus, appellant's argument that there was “no evidence whatsoever” from which a jury could have found the gun was concealed is without merit. In fact, it appears there may have been sufficient evidence to sustain a conviction if the issue had properly been preserved. We, therefore, affirm as to this issue.

REVERSED IN PART, AFFIRMED IN PART, QUESTION
CERTIFIED.

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--- So.3d ----, 2015 WL 9287020, 40 Fla. L. Weekly D2819

WETHERELL and MARSTILLER, JJ., concur.

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