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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DAMANI SPENCER,

Respondent.

Case No.: SC16-54

Lower Case No.: 1D14-5663

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ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF ON THE MERITS

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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.

Reply

Respondent avers that the error which occurred here was "both fundamental and per se reversible." (RB.[1] 6 n.1). However, during trial Defendant did not object to the reading of the erroneous jury instruction. Spencer v. State, 40 Fla. L. Weekly D2819, *1 (Fla. 1st DCA December 22, 2015). Therefore, the error was unpreserved. Id. For an error to be "per se reversible" the issue must have been properly preserved for appellate review. Johnson v. State, 53 So. 3d 1003, 1007 n.5 (Fla. 2010). Accordingly, the question before this Court is whether the failure to instruct on justifiable or excusable homicide was fundamental error even where there was nothing in the record indicating a justifiable or excusable homicide. Spencer, 40 Fla. L. Weekly D2819 at *1.

A defendant bears the burden of establishing fundamental error; which requires a showing that the 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). Respondent argues that fundamental error occurred

[1] References to Respondents Answer Brief on the Merits will be made as "RB." followed by the appropriate page number(s).

because of "manslaughter's unique status as a residual offense that is defined by what it is not." (RB. 7). Petitioner concedes that manslaughter is a residual offense. (IB.[2] 11). However, this unique status fails to explain why manslaughter is treated separate from elemental offenses for purposes of fundamental error. Regardless of how a crime is defined, any error in the jury's instruction as to what the State must prove can only vitiate a defendant's trial where the omission was pertinent and material to the jury's consideration. See id.; see also Reed v. State, 837 So. 2d 366 (Fla. 2002); see also Pena v. State, 901 So. 2d 781 (Fla. 2005). To the extent State v. Lucas, 645 So. 2d 425 (Fla. 1994), holds to the contrary, it should be receded from as outlined by Petitioner's Initial Brief on the Merits.

An erroneous manslaughter instruction should not result in a mandatory finding of fundamental error solely because this offense is uniquely residual. For example: If, the facts of a case outlined a killing where a defendant shot a mother and her baby in the back of their heads while they were kneeling and bound, the crime could hardly be deemed to be justifiable and excusable. This would be even more clear if the defendant claimed an alibi at trial. Under these facts, the intent with which the defendant acted would not be at issue, and the failure to explain that manslaughter is a killing which is not justifiable and excusable would not have had an effect on the defendant's verdict. Rather, the sole question

[2] References to Petitioner's Initial Brief on the Merits will be made as "IB." followed by the appropriate page number(s).

would be whether or not it was defendant who pulled the trigger. Therefore, a mandatory finding of fundamental error in every erroneous manslaughter instruction is contrary to the principals that the error must reach down into the validity of the trial itself.

Contrary to Respondent's assertion, the cases should be reviewed on a case-by-case basis to determine if the failure to instruct was material to the defendant's conviction. (RB. 7). Even where the jury was improperly instructed about what constitutes manslaughter, if the defendant fails to object he cannot meet his burden on appeal that the error vitiated his trial where nothing supports that the crime was justifiable or excusable. Accordingly, fundamental error will not always occur when the jury was improperly instructed on manslaughter.

CONCLUSION

Based on the foregoing discussions, Petitioner respectfully requests this Honorable Court reverse the decision below.

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 25th day of May, 2016.

CERTIFICATE OF COMPLIANCE

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

Certified,
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