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IN THE SUPREME COURT OF FLORIDA

ARNOLD JEROME KNIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC18-309

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE#

TABLE OF CONTENTS i

TABLE OF CITATIONS ..... ii-iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2-8

SUMMARY OF ARGUMENT 9-11

ARGUMENT 12-38

ISSUE I
WHETHER DEFENSE COUNSEL AFFIRMATIVELY AGREEING TO A FLAWED JURY INSTRUCTION CONSTITUTES WAIVER (RESTATED) 12-24

ISSUE II
WHETHER THE JURY PARDON DOCTRINE HAS BEEN ABROGATED (RESTATED) 25-38

CONCLUSION 39

CERTIFICATE OF SERVICE 40

CERTIFICATE OF COMPLIANCE 40

TABLE OF CITATIONS

CASES PAGE#

Calloway v. State, 37 So. 3d 891 (Fla. 1st DCA 2010) 16

Caruthers v. State, 235 So. 3d 931 (Fla. 4th DCA 2017) 25, 29

Dean v. State, 230 So. 3d 420 (Fla. 2017) 25, 26, 27, 29

F.B. v. State, 852 So. 2d 226 (Fla. 2003) 13, 16

Griffin v. State, 160 So. 3d 63 (Fla. 2015) 34, 35

Haygood v. State, 109 So. 3d 735 (Fla. 2013) 12, 32, 33

Insko v. State, 969 So. 2d 992 (Fla. 2007) 13, 14

Joyner v. State, 41 So. 3d 306 (Fla. 1st DCA 2010) 16

Knight v. State, 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018) 16, 17, 24, 25

Lamb v. State, 18 So. 3d 734 (Fla. 1st DCA 2009) 19

McCloud v. State, 208 So. 3d 668 (Fla. 2016) 13

Moore v. State, 114 So. 3d 486 (Fla. 1st DCA 2013), rev. dismissed, 191 So. 3d 1186 (Fla. 2016) 22

Phillips v. State, 207 So. 3d 212 (Fla. 2016) 37

Ray v. State, 403 So. 2nd 956 (Fla. 1981) 13, 23

Sanders v. State, 946 So. 2d 953 (Fla. 2006) 29

State v. Abreau, 363 So. 2d 1063 (Fla. 1978) 29

State v. Delva, 575 So. 2d 643 (Fla. 1991) 13

State v. Montgomery, 39 So. 3d 252 (Fla. 2010) 19, 26

State v. Wimberly, 498 So. 2d 929 (Fla. 1986) 29

Strickland v. Washington, 466 U.S. 668 (1984) 30

Williams v. State, 123 So. 3d 23 (Fla. 2013) 19

Williams v. State, 987 So. 2d 1 (Fla. 2008) 15

OTHER SOURCES

Article V, §3(b)(4), Fla. Const. 12

Article V, §3(b)(3), Fla. Const. 25

In re Standard Jury Instructions in Criminal Cases—Instruction 6.6, 132 So. 3d 1124 (Fla. 2014) 19

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Knight, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Appellant, Petitioner or by proper name.

The trial record on appeal consists of three volumes. Each volume will be referenced as V, VI or VII, followed by the page number. "IB" will designate Petitioner's Initial Brief. That symbol will be followed by the appropriate page number. A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts subject to the following supplementations and corrections:

Petitioner was charged with attempted first-degree murder with a deadly weapon, and violation of a domestic violence injunction. (V-69). During opening statements, defense counsel argued that "[o]ur position is that this is not something that he did, and I think that the evidence will bear that out." (V-80). Defense counsel stated "my client never intended to kill anyone. Never planned anything. He never wanted to do it. And the evidence will bear that out. He's not guilty of this crime." (V-80).

The victim, Mary Strange, testified that she met Petitioner in May or June of 2012, and they began a relationship. (V-89). Petitioner moved in with Ms. Strange in August of 2012. (V-90). Ms. Strange testified that the relationship quickly soured because Petitioner began drinking heavily, and eventually her eighteen-year old son had to force Petitioner to move out. (V-93). Ms. Strange testified that Petitioner threatened her, saying, "If you leave me, I will kill you." (V-93). Petitioner moved out at the end of August. (V-93). For approximately one month after moving out, Petitioner called and texted the victim every two to five minutes, leaving threatening, vulgar, and angry voicemails on her phone. (V-94). One of the voicemails was played in court. (V-96). Ms. Strange testified that on September 25, 2012, she went to court and had a domestic violence injunction issued against Petitioner because she feared for her life. (V-

97). The State introduced an audio recording from the hearing for the domestic violence injunction where Ms. Strange stated that Petitioner had threatened to kill her if she left him. (V-133). Deputy Grundin testified and confirmed that he served a domestic violence injunction on Petitioner on September 25, 2012 at 9:06 pm. (V-87).

Ms. Strange testified that at that time of the attack, she had a regular routine in the morning. (V-97). Ms. Strange drove a shuttle for the airport. Every morning around 5:50 she went out to the car she drove for her job, made sure it was clean and ready for the day, and then took her son to school before going to work. (V-97). Ms. Strange testified that on September 26, 2012 at around 5:50 in the morning she went outside as she usually did to check the car. (V-99). As she was putting her key in the car door, she heard a trashcan fall and saw Petitioner coming out from the patio on the side of her house. (V-99). Petitioner had his right hand raised in the air and was holding what looked like a pipe. (V-98-99). Ms. Strange testified that she ran and Petitioner chased her as she shouted for help. (V-99). Ms. Strange testified that Petitioner caught her on the passenger side of the car, and she put her right arm up to try to protect herself as he began striking her with the object he was holding. (V-100). Ms. Strange stated that after the first blow, she did not remember anything else. (V-100). Ms. Strange woke up in the Pensacola Trauma Unit with a fractured wrist, fractured eye sockets, lacerations to her face and head, and head injuries that caused her to have double vision and vertigo. (V-

101). Ms. Strange was hospitalized for two weeks following the attack. (V-117).

During cross-examination, defense counsel asked the victim what she did with Petitioner's belongings after he moved out of her home. (V-113). The victim stated that she put Petitioner's possessions on her patio and he picked them up. (V-113). Defense counsel repeatedly asked the victim if the day of the attack was trash day, and the victim said that it was not. (V-118).

The State entered a videotaped deposition of the victim's son, Judah Strange, into evidence. (V-142). Judah Strange testified that on the morning of September 26, 2012, he woke up and went outside to meet his mother at the car as was usual. (V-144). Strange testified that when he went outside, he saw Petitioner next to the car, facing him, with an object in his hand beating his mother. (V-144). Strange testified that he couldn't see his mother, but assumed she was on the ground blocked by the car. (V-144). Strange stated that it appeared that Petitioner was beating his mother with the object he was holding in his hand. (V-144). When Petitioner noticed Strange, Petitioner walked towards Strange and "asked me what do I want." (V-144). Strange stated that he immediately went inside, locked the door, and called 911. (V-145). On cross-examination, defense counsel inquired about what happened to Petitioner's belongings after he moved out. (V-163). Strange testified that Petitioner took his belongings, but that some of the items were packed up and put outside and Petitioner came and

got those items. (V-163).

The victim's daughter, Atara Strange, testified that her brother woke her up on the morning of September 26, 2012 screaming that Petitioner was beating their mother. (VI-207). Atara Strange ran downstairs and recognized Petitioner running away from their home as she looked through the peephole on their door. (VI-209). Atara Strange testified that she could see a pipe or stick in Petitioner's hand as he fled. (VI-210). Atara Strange heard something brush against the front door and realized her mother had managed to crawl to the door. (VI-209). Atara pulled her mother inside and laid her on the couch, where she saw that she was severely injured. (VI-209). On cross-examination, defense counsel again asked about Petitioner's belongings. (VI-217). Atara Strange said that she was not involved with Petitioner's belongings, but that she believed the items had been packed up and left outside for Petitioner to pick up. (VI-217).

The responding paramedic testified that when he arrived, the victim had injuries that indicated skull fractures, fractured eye sockets, injuries to the jaw, and a large laceration to the head so deep you could see her skull. (V-226). The paramedic testified that the victim's injuries were so severe that the decision was made to life flight the victim to a hospital in Pensacola with a trauma center. (V-228).

Dr. Christy Barkhyizen, the emergency medicine physician from the trauma center testified. The victim had two fractures to the floor of her right eye that had trapped the eye muscle in the broken bone. (VI-239). The

victim had lacerations to the head that needed stiches, bruising and swelling, and a broken wrist. Dr. Barkhyizen testified that it would take a blow of great force to fracture the internal eye bone. (VI-240).

Deputy Coveney testified that he spotted Petitioner walking down the road as he responded to the 911 call from the Strange home. (VII-194). Deputy Coveney testified that he saw Petitioner, and after confirming the description of the suspect, Deputy Coveney stopped and detained the Petitioner. (VII-195). Deputy Kirkpatrick testified that the location where Petitioner was arrested was about three-quarters of a mile from the victim's home. (VII-259).

Deputy Kirkpatrick testified that after he responded to the scene he attempted to find the weapon used to attack the victim. Deputy Kirkpatrick got in his car and drove the route he thought Petitioner would have taken to get away from the victim's home. (VI-260). The Deputy said as he drove he saw a piece of pipe sticking out of a culvert. (VI-260). Deputy Kirkpatrick collected the item, which was the metal handle from a hydraulic jack used on vehicles. (VI-265). The jack handle was tested and found to contain the DNA of both the victim and Petitioner. (VI-313, 378).

Investigator Brake testified that when he arrived at the scene, the area by the patio had sand that showed signs of being walked on, and there were several broken branches in the area. (VI-286). The investigator testified that these factors, plus the threatening messages and voicemails, indicated that Petitioner had been waiting for the victim and planned to

kill her. (VI-305).

At the end of the second day of trial, the proposed jury instructions were given to both parties. The judge told the State and defense to look through the instructions overnight and be ready to discuss them in the morning. (VI-327). The next day, the court reconvened and the judge asked if either party had an issue with the jury instructions. The State said they did not, and defense counsel said:

> No objection, Judge. I did read through these last night and I didn't really have a problem with any of the instructions.

(VII-334).

The defense and State then had an extensive conversation about other elements of the jury instructions. Defense counsel consulted the Petitioner directly about certain aspects of the instructions. (VII-334-346). After more witnesses, the jury instructions were further discussed. (VII-388). The Court asked the attorneys how they wanted the jury instructions read. (VII-394). During that conversation, more changes were made to the instructions. (VII-395).

The only defense witness was the victim, Mary Strange, who was recalled. (VII-396). The defense attorney again questioned the victim about whether the attack was on trash day. (VII-396). Again, the victim said that to her recollection, it was not trash day. (VII-396-397). Defense counsel inquired again about what happened to Petitioner's belongings, and the victim stated that they were packed in suitcases and placed outside in the

brick patio area, and that he picked them up. (VII-398-399).

After the defense witness, the court took another recess to finalize the jury instructions. (VII-401). The instructions were read before closing argument, without objection. The instruction for attempted manslaughter incorrectly included an intent requirement. (VII-409). This portion of the instruction had not been challenged in any of the conversations about jury instruction during the trial.

In closing argument, defense counsel argued that Petitioner was not the man who beat Mary Strange with the jack handle. Defense counsel contested the motive, the DNA evidence found on the weapon, the identifications, and if the crime were premeditated. (VII-434-446). Defense counsel denied that Petitioner was there or that he committed the crime.

Defense counsel also argued that:

> Now, when he moved out, testimony from Ms. Strange was that she had set his stuff out in the bricked enclosure where the garbage can was and she had left his stuff by the trash. And that's where he picked it up. He was served with an injunction. Their relationship, for all intents and purposes, was now done. He went back to that location to kill her or perhaps he went there to get whatever was left of his stuff. Same location it was previously. And it was trash day. It was trash day. Evident from the photographs and officer testified this was five o'clock in the morning, six o'clock in the morning. The trash cans were all lined out. The stuff was about to be thrown away.

(VII-443).

The jury found Petitioner guilty of attempted second-degree murder with a weapon, and guilty of violation of injunction for protection against domestic violence. (VII-461).

SUMMARY OF THE ARGUMENT

ISSUE I

The current system surrounding the waiver of fundamental error in jury instructions has created an untenable situation where defense attorneys are rendered more effective at their job by remaining silent in the face of erroneous jury instructions. Case law reflects that defense attorneys are presumed to know the law. To assume otherwise, as suggested by Petitioner, would result in an unworkable, cyclical system where the State would have to prove that a defense attorney was aware of the law to show waiver, and a trial judge would have to disbelieve defense attorneys when they tell the court that they have read and accept jury instructions. The ruling by the First District provides a fair, logical system that considers the totality of the circumstances surrounding an error in jury instructions, and truly assesses if an error vitiated the trial.

In the current case, the totality of the circumstances show that the error was waived. Defense counsel was intimately involved in the creation of the jury instructions. Defense counsel was given the erroneous instructions the night before and indicated orally to the court that he had read the instructions and accepted them. The law impacting the erroneous portion of the instruction was well established and should have been known to all parties, including defense counsel. Based on the totality of the circumstances in this this case, the error in the instructions was waived.

ISSUE II

Dean represents an abrogation, or at least a limitation, of the jury pardon doctrine. In Dean a majority of the Justices of this Court found an error in jury instructions harmless that would previously have been fundamental pursuant to the jury pardon doctrine. This ruling represents a shift in the jury pardon doctrine that is applicable to other cases, including this one. As in Dean, the erroneous manslaughter instruction in the current case constitutes harmless error because Petitioner was found guilty of attempted second-degree murder. Regardless of the correctness of the attempted manslaughter instruction, the State proved the charge of attempted second-degree murder beyond a reasonable doubt and the jury was required to find Petitioner guilty of that charge. The jury pardon doctrine should not be used to ask for the chance to have a new jury speculate, and possibly ignore the evidence and the law.

Further, there was no basis on which the jury could have found Petitioner guilty of attempted manslaughter, a fact which supports finding the error in the jury instructions harmless. Petitioner's defense at trial was to deny his involvement and attempt to poke holes in the State's evidence. While Petitioner did argue intent, the argument only addressed the distinction between first and second-degree murder, and it was one argument among many. Petitioner attacked the identification, questioned the investigation, argued that the attack was not premeditated, and attacked the scientific evidence. None of these arguments were genuinely at issue

based on the evidence. To vitiate the trial, an error must be an issue that is contested and in dispute, not merely mentioned by defense counsel. A finding of harmless error, a possibility allowed by Dean, is appropriate given the specific facts and circumstances of this case.

ARGUMENT

ISSUE I: WHETHER DEFENSE COUNSEL AFFIRMATIVELY AGREEING TO A FLAWED JURY INSTRUCTION CONSTITUTES WAIVER

STANDARD OF REVIEW

The question certified by the First District is a legal question that is reviewed de novo. Haygood v. State, 109 So. 3d 735 (Fla. 2013).

JURISDICTION

This Court has jurisdiction based on the question certified by the First District Court of Appeals. See Article V, §3(b)(4).

> In order for counsel to waive an error in a jury instruction that would otherwise be fundamental, is it only necessary that counsel affirmatively agree to the instruction, or is it also necessary for counsel to affirmatively agree to the portion of the instruction that is error and/or to be aware that the instruction is erroneous?

MERITS

Petitioner argues that the First District incorrectly found that defense counsel waived an error in the attempted manslaughter jury instruction. The State disagrees. The current system surrounding the waiver of fundamental error in jury instructions is flawed, and fixing it requires this Court to answer the first part of the certified question with a yes, and the second part with a no. The current system has created an untenable situation where defense attorneys are rendered more effective by remaining silent in the face of erroneous jury instructions. The ruling by the First District provides a method to waive fundamental error that takes into consideration the totality of the circumstances surrounding an error in

jury instructions. In the current case, the law regarding the jury instruction was well established and should have been known to all parties. Defense counsel was given the erroneous instructions the night before, read them, and indicated orally to the court that he accepted the instructions, an act which has long been acknowledged as constituting waiver of the issue. Based on the facts of this case, the error in the instructions was waived, and the decision of the First District should be affirmed.

This Court has long held that jury instructions are subject to the contemporaneous objection rule, requiring an immediate objection to preserve an error for review. State v. Delva, 575 So. 2d 643, 644 (Fla. 1991). This Court noted that the contemporaneous objection rule "not only affords trial judges the opportunity to address and possibly redress a claimed error, it also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client's tactical advantage." F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003); Insko v. State, 969 So. 2d 992, 1001 (Fla. 2007).

This Court has previously held that "[w]here a trial court has extended counsel an opportunity to cure an error, and counsel fails to take advantage of such an opportunity, the error is considered acquiesced to and does not warrant reversal." McCloud v. State, 208 So. 3d 668, 684 (Fla. 2016). As noted by the First District, it is indisputable that even a fundamental error can be waived in a jury instruction. See Ray v. State, 403 So. 2nd 956 (Fla. 1981)(Finding that "objecting to erroneous

instructions is the responsibility of a defendant's attorney, and the attorney's failure to object to such instructions can properly constitute a waiver of any defects."); Insko v. State, 969 So. 2d 992, 1002 (Fla. 2007)(Finding a claim that the jury instructions were erroneous was not preserved because the defendant was "required to object to preserve the error and, having failed to do so, waived it.").

Petitioner advocates for a system of waiver where the contemporaneous objection rule is eradicated as to jury instructions, and where defense counsel "would have had to specifically request the erroneous instruction. For waiver to apply, he would have had to accept the erroneous part of the instruction explicitly and with knowledge of the error." (IB-10). Petitioner is advocating for a cyclical system that would make it almost impossible for an error in instruction to be waived. Petitioner's argument would create a system where, to waive an error, a defense attorney must bring the error to the attention of the trial judge and prosecutor and essentially preserve that issue for appellate review. This requirement is illogical because if an error were highlighted in this manner, the State and trial judge would correct the problem and a there would be no error to waive.

Petitioner's position also asks that this Court and the trial courts assume ignorance on the part of defense attorneys. Petitioner is requesting a system where, when a defense attorney tells the Court that they agree with jury instructions, the trial judge and State cannot rely on that

representation and must assume ignorance on the part of the attorney. A new burden would be created for the State to find all error in the instructions and prove that defense counsel knew about the error to prove that it was waived. This flies in the face of well-established law that defense attorneys are presumed to know the law. See R. Regulating Fla. Bar 4-1.1; Williams v. State, 987 So. 2d 1, 11-12 (Fla. 2008)(Ineffective assistance of counsel found because a defense attorney "who is presumed to know the law" failed to present mitigating evidence to the court.).

Requiring this level of specificity to waive an error would make it impossible to find that an error in the jury instructions was waived. It would entrench the problems of the current system by incentivizing silence in the face of error on the part of defense counsel and would allow convictions to be overturned without consideration for the totality of the circumstances and a determination if the error were truly fundamental.

A. Incentivizing Error and Encouraging Sandbagging

A system that requires a defense attorney to specifically acknowledge an erroneous jury instruction before that error can be deemed waived creates a conundrum for defense attorneys. Under this system, a defense attorney serves his client's interests by remaining silent when confronted with erroneous jury instructions. Silence in the face of an erroneous instruction, like the one in this case, all but assures defense counsel that the client will receive a new trial if found guilty because the error is fundamental. If the attorney objects to the error, it will likely be

corrected and the entitlement for a new trial would vanish.[1] Essentially, under the current system, it is easier to obtain relief when the issue is unpreserved than when it is preserved. This is the exact opposite of the rationale that the F.B. decision is based on. F.B. v. State, 852 So. 2d 226 (Fla. 2003).

A defense attorney calling attention to the deficiency in the instruction would "risk being found incompetent as a consequence," since they are eliminating a possibility for a new trial for the client. Calloway v. State, 37 So. 3d 891 (Fla. 1st DCA 2010); see also Joyner v. State, 41 So. 3d 306, 307 (Fla. 1st DCA 2010)("[W]here defense counsel agrees to a standard jury instruction and then challenges the conviction based upon fundamental error in that instruction, reversal would have the unintended consequence of encouraging defense counsel to 'stand mute and if necessary, agree to an erroneous instruction' or sacrifice his client's opportunity for a second trial."). As noted by the First District in this case, this situation creates a "bizarre incentive" for defense attorneys to allow erroneous instructions to be presented to the jury. Knight, 2018 WL at 7.

[1] A new trial can be a desirable outcome in a case such as this, where the State has overwhelming evidence of guilt. While the odds of the jury acquitting the defendant may be slim, there is often a higher probability that the State will be unable to prove the case a second time. Memories fade, and witnesses often move away and are difficult to locate as time passes. Particularly in domestic cases, even if witnesses can be located, they may be reluctant or unwilling to testify at trial a second time.

Petitioner argues that the prosecutor and judge share the blame in the current case, and he is correct. All parties, including defense counsel, the judge, and the prosecutor should have realized the error in the instructions and corrected it. However, shared blame does not change the fact that only the defense benefits from a mistake of this nature. Ignoring the perverse incentive that is unique to defense attorneys in this situation is shortsighted, particularly when the analysis proposed by the First District would dramatically reduce the possibility of sandbagging, while also allowing a finding that an error in a jury instruction was fundamental and necessitates a new trial when necessary.

The First District has not proposed an analysis where general acquiescence instantly waives an error in the instructions. The First District is advocating for a system where the court engages in an analysis of the totality of the circumstances surrounding an unpreserved error in jury instructions. The First District stated that:

> We must, therefore, continue to resolve the question of waiver on a case-by-case basis in light of the specific facts and the totality of the circumstances in each case. These circumstances here include (1) the existence of a plausible tactical reason for allowing the erroneous instruction to go to the jury; (2) the long time that had passed since the jury instruction had been invalidated; and (3) defense counsel's conduct including his express representation that he had read the jury instructions and had no objections to them; and his substantial involvement in formulating, revising, and approving the jury instructions as a whole after discussion before trial, before closing arguments, and after closing arguments.

Knight, 2018 WL at 6.

This approach would protect the rights of the defendant by still allowing fundamental error to be found when appropriate, such as when a defense attorney did not have a chance to review or comment on instructions.[2] A totality of the circumstances analysis could also allow a finding that fundamental error in a jury instruction can be waived when a defense attorney agrees to the instruction, even if that agreement did not acknowledge the error in the instruction, as in this case.

B. Well-Settled Law

In determining if a fundamental error in a jury instruction has been waived, consideration should be given to the nature of the error and the requirement that defense attorneys stay abreast of changes in the law that impact their clients. Petitioner argues that the instruction in question had only recently been approved, and as such it is improper to assume that defense should have known about the change. This is not the case. The law on this issue had been prominently litigated for five years before Petitioner's trial and was fully settled prior to the start of the trial. The length of time that this issue was being litigated supports the First District's position that defense counsel's conduct constitutes waiver.

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[2] A totality of the circumstances analysis would also not preclude defendants whose attorneys were ineffective from obtaining relief. Post-conviction motions would still allow a defendant to challenge his attorney's waiver of an erroneous jury instruction, particularly if the attorney waived the error because of ignorance of the law.

Petitioner acknowledges that Montgomery, the case that called the validity of the manslaughter instruction into question, was decided by the First District in 2009, and by the Florida Supreme Court in 2010. State v. Montgomery, 39 So. 3d 252 (Fla. 2010); (IB-18). Petitioner argues that the issue of attempted manslaughter was not raised until this Court's ruling in Williams v. State, 123 So. 3d 23 (Fla. 2013), a case decided a year before the instant case went to trial. Williams explicitly extended Montgomery's analysis to the attempted manslaughter jury instructions. Id. However, Petitioner's brief neglects to mention Lamb v. State, 18 So. 3d 734 (Fla. 1st DCA 2009), which extended the Montgomery analysis to a case of attempted manslaughter in the First District in 2009, a full five years before Petitioner's trial and four years before this Court's decision in Williams.

While Petitioner is correct in noting that litigation over these cases continued following the decisions, the issues were significant, had been ongoing for years, and were settled prior to Petitioner's trial. The fact that Lamb and Williams had been decided by 2013 means that the legal community was on notice that the attempted manslaughter jury instructions were invalid. The only piece missing was the amended jury instruction suggesting what could be said in the place of the flawed language. The amended instructions which provided the correct language were released a few weeks before trial. In re Standard Jury Instructions in Criminal Cases—Instruction 6.6, 132 So. 3d 1124 (Fla. 2014).

All attorneys have an obligation to stay informed about developments in the law that impact their representation of clients. A major change in the requirements for manslaughter and attempted manslaughter jury instructions would certainly qualify as a development impacting the representation of Petitioner. The magnitude of this legal issue, and the amount of time it had been settled prior to trial is a factor properly considered in determining if defense counsel's affirmative acceptance of the issue constitutes waiver. Because this was not an issue decided the day or week before a trial, and because it is not an uncommon issue tangential to criminal practice, it should be weighed against the defense in determining if the jury instruction error was waived.

C. Error Was Waived

Petitioner's trial attorney was extensively involved in the creation of the jury instructions. The instructions were discussed repeatedly on different days during the trial. At the end of the second day of trial, the proposed jury instructions were given to both parties. The judge told both the State and defense to look through the instructions overnight and be ready to discuss them in the morning. (VI-327). The next day, the court reconvened, and the judge asked if either party had an issue with the jury instructions. The State said they did not, and defense counsel said:

> **No objection, Judge. I did read through these last night and I didn't really have a problem with any of the instructions.**

(VII-334) (emphasis added)

Throughout the remainder of the trial, the defense and State had an extensive conversation about other elements of the jury instructions. Defense counsel requested that portions of the instructions be removed, that other portions be added. Defense counsel even consulted Petitioner directly about certain aspects of the instructions and made stipulations to guarantee the inclusion of more favorable lesser included offenses. (VII-334-346). After more witnesses testified, the jury instructions were further discussed. (VII-388). At no time did defense counsel object to the attempted manslaughter instructions.

The error in the attempted manslaughter instruction is not minor. The facts of this case do not represent inaction on the part of defense counsel, nor do they represent that a defense attorney was denied the ability to properly review and comment on jury instructions. They reflect a defense attorney who was intimately involved in the creation of the instructions, and whose action in saying that he did not object to the attempted manslaughter instruction constitutes waiver.[3]

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[3] Defense counsel's involvement with the instructions and argument for specific provisions and changes in other parts of the instructions increases the likelihood that one of the following two things occurred. Counsel either detected the error in the manslaughter instruction and was deliberately silent, or if defense counsel's actions were not deliberate, then the "intent" language was not an important consideration for the defense. The second option is just as likely as the first, considering the facts of this case. Petitioner laid in wait for the victim, ambushed her,

Petitioner repeatedly references the Moore case, which contained the same certified question regarding waiver as the current case. Moore v. State, 114 So. 3d 486 (Fla. 1st DCA 2013), rev. dismissed, 191 So. 3d 1186 Fla. 2016). This Court dispensed with jurisdiction in Moore following briefing and oral argument. Id. In Moore, defense counsel's attention was specifically called to the deficient manslaughter instruction, and counsel agreed to use the instructions anyway. Id. There is no doubt that it is easier to find waiver in a situation where a defense attorney explicitly acknowledges the error in an instruction. However, waiver cannot be limited to those rare occurrences. Such a ruling would again, enforce the most negative aspects of the current system, and continue to incentivize defense attorneys to sit silently when confronted with an erroneous instruction. The fact specific, totality of the circumstances analysis proposed by the First District removes the incentive for defense counsel to sit silently.

In this case, the trial judge made a notable effort to get the jury instructions right. The judge gave the attorneys the instructions overnight to examine, held multiple conferences on the instructions, allowed the defense to request and receive changes, and even solicited input about how and when to read the instructions. The conduct of the defense attorney and

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and only ceased his attack when interrupted by the victim's son. This indication from defense counsel supports the State's position that the error in the instruction was waived.

the effort of the trial judge support a finding of waiver.

D. Fundamental Error

Even if this Court does not find that defense counsel waived the error in these instructions, the State urges this Court to review what is considered fundamental error. In a situation where an error is preserved for appellate review, the State must show that the element is in dispute and prove beyond a reasonable doubt that it did not influence the verdict. Unpreserved, fundamental error requires that Petitioner prove that the mistake vitiated the trial. The current system, where certain errors in jury instructions are almost automatically considered fundamental error ignores the meaning of fundamental error and disregards the fact that an error must vitiate the trial. It creates a system where it is easier to receive a new trial based on an unpreserved, fundamental error analysis than on an argument when an issue is preserved for appellate review.

In Ray v. State, 403 So. 2d 956, 960 (Fla. 1981) this Court cautioned against hasty determinations that an error is fundamental, saying:

> Fundamental error has been defined as "error which goes to the foundation of the case or goes to the merits of the cause of action." Sanford v. Rubin, 237 So.2d 134, 137 (Fla.1970). **The appellate courts, however, have been cautioned to exercise their discretion concerning fundamental error "very guardedly."** Id. We agree with Judge Hubbart's observation that **the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application.**
>
> (emphasis added)

Finding that an error of this nature is always fundamental error

diminishes the meaning of the term. Fundamental error must be considered in the context of the totality of the circumstances of a case, its facts, and the importance of the erroneous instruction to the overall defense. This is a point that the majority of the First District makes repeatedly in their opinion. Judge Kelsey is explicit that the finding of waiver in this case is contingent on the specific facts and circumstances of this case. Knight, 2018 WL at 9.

Ultimately, the facts strongly support a finding of waiver based on the affirmative acceptance of the jury instructions. Defense counsel affirmatively said he had no objection to the instructions, was intimately involved in crafting the instructions, was given extensive time to review them, orally stated he had read them and had no issue with them, and the legal issue had been extensively and publicly litigated and settled before trial. The decision of the First District should be affirmed, and this Court should answer the first part of the certified question with a yes, and the second part with a no.

ISSUE II: WHETHER THE JURY PARDON DOCTRINE HAS BEEN ABROGATED (RESTATED)

STANDARD OF REVIEW

This Court has jurisdiction based on a conflict between the First and Fourth District's interpretation of this Court's decision in Dean v. State, 230 So. 3d 420 (Fla. 2017). Because this conflict is a legal matter, the standard of review is de novo.

JURISDICTION

This Court has jurisdiction based on a conflict between the First District's decision in Knight v. State, 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018) and the Fourth District's decision in Caruthers v. State, 235 So. 3d 931 (Fla. 4th DCA 2017). See Article V, §3(b)(3).

MERITS

The First District found that Petitioner's trial counsel waived the error in the attempted manslaughter jury instruction, and that this Court's ruling in Dean v. State represents an abrogation of the jury pardon doctrine. Petitioner argues that Dean is a plurality opinion, a position supported by the Fourth District's opinion in Caruthers v. State. The State disagrees. Dean represents an abrogation, or at least a limitation, of the jury pardon doctrine. In Dean a majority of the Justices of this Court found an error in jury instructions harmless that would previously have been fundamental pursuant to the jury pardon doctrine. This ruling represents a shift in the jury pardon doctrine that can be applied to other cases, including this one. As in Dean, the erroneous attempted manslaughter

instruction in the current case constitutes harmless error because Petitioner was found guilty of second-degree murder. Regardless of the correctness of the attempted manslaughter instruction, the State proved the charge of attempted second-degree murder beyond a reasonable doubt, and the jury was required to find Petitioner guilty of that charge. The jury pardon doctrine should not be used to ask for the chance to have a new jury ignore the law that a prior jury found proven by the evidence.

Further, there was no basis on which the jury could have found Petitioner guilty of attempted manslaughter, a fact which supports finding the error in the jury instructions harmless. Petitioner argues that intent was a key issue at trial, but the evidence from the trial shows that intent was not at issue based on the facts. Petitioner's main argument was total denial of his involvement in crime. While Petitioner did argue intent, it was aimed at the difference in intent between first and second-degree murder, and was one argument among many. Petitioner also argued against the eyewitness identifications, questioned the investigation, and attacked the veracity of the DNA evidence. None of these arguments were genuinely at issue based on the evidence. A finding of harmless error, a possibility allowed by Dean, is appropriate given the specific facts of this case.

A. Dean and the Jury Pardon Doctrine

This Court previously held in Montgomery that, pursuant to the jury pardon doctrine, an erroneous manslaughter jury instruction is fundamental error. State v. Montgomery, 39 So. 3d 252 (Fla. 2010). In Dean v. State,

230 So. 3d 420 (Fla. 2017), four of the seven Justices of this Court found an error in jury instructions harmless that would previously be considered fundamental pursuant to the jury pardon doctrine. Regardless of whether this represents a full abrogation of the pardon power, Dean represents a change in how an erroneous jury instruction is analyzed and treated.[4]

In Dean, the defendant was convicted of second-degree felony murder and the jury was not instructed on manslaughter as a lesser included offense, despite the defendant's request that it be included. Id. The Fourth District affirmed the defendant's conviction, and this Court affirmed the ruling by the Fourth District. In Dean the majority opinion, which was joined by Justices Lewis, Canady and Lawson, states that "manslaughter is a necessarily lesser included offense of second-degree felony murder." Id. at 424. The majority further stated that: "for the reasons expressed in Justice Polston's concurring opinion and Justice Quince's concurring in result only opinion, we approve the result of the Fourth District's decision to affirm Dean's convictions." Id. This

[4] The State acknowledges that the conflict over the ruling in Dean comes down to the position of Justice Lewis. Justice Lewis can clarify his position if he desires. While the State believes that Dean represents an abrogation of the pardon power, determining if Dean is a majority or plurality decision is not the deciding factor in the instant case. Regardless of the formal state of the jury pardon doctrine, the holding in Dean opens a door to the argument that a previously reversible error in jury instructions can be harmless.

statement shows that the reasoning of Justice Polston's concurrence has been incorporated into the majority opinion.

Justice Polston's concurrence states:

> I acknowledge that under this Court's precedent the trial court's failure to give a requested jury instruction on a necessarily lesser included offense one step removed from the charged offense is per se reversible error. However, this rule, and the requirement that a trial judge always give such a requested instruction, "is bottomed upon a recognition of the jury's right to exercise its 'pardon power.'" This 'pardon power' allows the jury to acquit a defendant of a greater offense and convict him or her of a lesser one even though the evidence supports both crimes...
>
> In cases such as this one, where the evidence supports the charged offense as well as the requested instruction on a necessarily lesser included offense, any error in failing to give the requested instruction is harmless **because the defendant is not entitled to an opportunity for a jury pardon.** Here, the jury's verdict as to Dean's guilt establishes that the State proved the elements of second-degree felony murder beyond a reasonable doubt. Therefore, even if the trial court had given an instruction on manslaughter as Dean requested, the jury would still have been required to find Dean guilty of second-degree felony murder. Accordingly, the trial court's failure to give the manslaughter instruction was harmless, and the Fourth District properly affirmed Dean's convictions.

(Id. at 4-5)(emphasis added).

Four justices, a majority, seem to agree that the jury pardon power should be limited or fully abrogated. The opinion notes that Justices Canady and Lawson explicitly concur with Justice Polston's position. Id. at 4. Justice Lewis joined the majority. Id. at 4. As previously noted, the majority opinion in Dean incorporates Justice Polston's concurrence that explicitly affirms based on the abrogation of the pardon power. This

breakdown supports the First District's holding that Dean abrogates the pardon power and disproves the Fourth District's position in Caruthers that Dean represents a plurality and is not binding. Caruthers v. State, 232 So. 3d 441 (Fla. 4th DCA 2017).

However, even if Justice Lewis did not intend to support Justice Polston's position abrogating the pardon power, the most important aspect of Dean is the fact that the majority could not have reached the conclusion that manslaughter is a necessarily lesser included offense of second-degree felony murder and affirm the Fourth District without determining that the jury pardon power no longer justifies an immediate finding of reversible error. As noted by Justice Polston, the jury pardon is the origin of the legal concept that it is fundamental error to not instruct on lesser included offenses. See Dean at 4; Sanders v. State, 946 So. 2d 953 (Fla. 2006); State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986); State v. Abreau, 363 So. 2d 1063 (Fla. 1978). There is no way to reach a ruling that affirms the Fourth District and confirms that manslaughter is a necessarily lesser included offense without finding that the nature of the pardon power has changed.

The jury pardon doctrine should no longer be acknowledged as a legal possibility that justifies an instant finding of fundamental error. See Sanders v. State, 946 So. 2d 953 (Fla. 2006)("As shown above, the jury must anchor its verdict in, and only in, the applicable law and the evidence presented. Nothing else may influence its decision. When a jury convicts a

defendant of a criminal offense, it has decided that the evidence demonstrated beyond a reasonable doubt that the defendant committed the crime charged. To assume that, given the choice, the jury would now acquit the defendant of the same crime of which it convicted him, and instead convict of a lesser offense, is to assume that the jury would disregard its oath and the trial court's instructions.").

The United States Supreme Court held in Strickland that the possibility of a jury pardon has no place in granting postconviction relief.

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. **An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.**

Strickland v. Washington, 466 U.S. 668, 694-95 (1984) (emphasis added).

Strickland's analysis is echoed in the majority's harmless error analysis in Dean, and both are applicable in the case at bar. Juries are instructed to find a defendant guilty of the highest charged offense that the evidence supports. In this case, the jury found Petitioner guilty of attempted second-degree murder. Regardless of the correctness of the attempted manslaughter instruction, the State proved the charge of attempted second-degree murder beyond a reasonable doubt and the jury was required to find Petitioner guilty of that charge. Because the jury in this

case believed that the evidence supported a charge of second-degree murder, it is illogical to argue that an error in a jury instruction for a lesser offense justifies a new trial. The jury pardon doctrine should not be used to ask for the chance to have a new jury ignore the law that a prior jury found proven by the evidence. Under the analysis from Dean, the jury instruction error in this case should be found harmless because Petitioner was convicted of a higher offense.

B. Intent as a Defense

Petitioner next argues that the jury pardon doctrine is irrelevant to his conviction because "the evidence and theory of defense argued by Knight's counsel placed his intent to cause death squarely in dispute." (IB-31). The State strongly disagrees with this characterization of the evidence and of the defense at trial. At trial, defense counsel's position was that Petitioner was innocent and not involved in the crime in any way, despite overwhelming evidence to the contrary. Defense counsel argued intent, but he also argued lack of motive, incorrect identification, and scientific error. The only intent argument defense counsel made was to attempt to challenge the difference in intent between attempted first and attempted second-degree murder. The evidence in this case was overwhelming, and based on the facts of the attack, no jury could convict Petitioner of attempted manslaughter. Because intent was never at issue, the erroneous intent instruction in the attempted manslaughter instruction is irrelevant and distinguishable from Haygood.

Petitioner argues that the abrogation of the jury pardon doctrine by the Dean court is irrelevant because the issue of intent was raised below. Petitioner cites Haygood v. State, 109 So. 3d 735 (Fla. 2013) to support this position. Petitioner argues that Haygood represents a "choice of mens rea rationale" that is an acceptable alternative theory to the jury pardon doctrine. (IB-31). The majority in Haygood stated that the jury pardon doctrine did not justify their holding that the erroneous instruction was fundamental error because "the erroneously instructed element was placed in dispute by the evidence; thus there was a basis on which the jury could find that the lesser included offense was proven." Id. at 742. In Haygood, the evidence showed that the defendant got angry with the victim and engaged in a physical fight with her. During the fight, the victim hit her head and became unresponsive. Haygood, 109 So. 3d at 737. The defendant in Haygood made direct statements that he did not mean to kill the victim but was angry with her over infidelity. Id.

This is distinctly different from the case at bar. The facts in this case cannot support a finding of manslaughter. Petitioner had threatened to kill the victim if she left him and called her every few minutes in the days leading up to the attack. Petitioner repeatedly left threatening and vulgar voicemails for the victim. (V-93, 94). Petitioner's harassment and threats became so serious that the victim obtained a domestic violence restraining order against Petitioner, which was served just a few hours before the attack. Petitioner waited for the victim outside her home,

emerged from her porch and attacked her with a jack handle as she walked to her car to go to work. (V-99). The lead Detective testified that the grass and dirt was "tamped down" outside the patio where Petitioner was waiting for the victim. (V-305). The jack handle was recovered, and DNA on the handle matched the victim and Petitioner. (V-378). **The victim's adult son testified to walking outside and seeing Petitioner standing over his mother, beating her with what looked like a pipe or a crowbar as she lay on the ground, only stopping when he interrupted Petitioner's attack.** (V-144) (emphasis added). The victim's adult daughter identified Petitioner as he ran away. (VI-209). Both the victim and her children knew Petitioner and had lived with him.

The victim suffered extensive injuries from the attack including being beaten so severely in the head that her skull was exposed. (V-226). She also had a broken wrist, lacerations that required stiches, severe bruising to the face, and broken internal eye sockets. (V-101). The victim's injuries were so serious that the decision was made to Life Flight her on a helicopter to a trauma center. (VI-237). Dr. Christy Barkhuizen testified that she treated the victim in the emergency room after she arrived at the trauma center, and that the victim had "major" injuries to her head and face caused by direct blows using great force. (VI-237-240).

The evidence adduced at trial simply does not support a finding of manslaughter, and is distinguishable from Haygood, where the victim fell during a physical fight, hit her head and died. In the instant case,

Petitioner stood over the victim as she lay on the ground and repeatedly beat her with a metal jack handle in the head. The victim's injuries were not sustained because of any sort of accident or mistake on the part of Petitioner. These injuries were inflicted deliberately to execute the threats Petitioner made, and the forceful nature of the injuries proves Petitioner's intent to kill.

The State also believes that this case is distinguishable from this Court's ruling in Griffin v. State, 160 So. 3d 63 (Fla. 2015). In Griffin, the defendant was charged and convicted of second-degree murder. Id. at 65. As in the current case, the manslaughter instruction erroneously included the intent to kill requirement. Id. at 66. The defendant's only defense was that of misidentification. Id. at 67. The question before the court in Griffin was whether the giving of an erroneous manslaughter by act jury instruction cannot be fundamental error if the defendant's sole defense is misidentification. Id. at 65. This court ruled that a defense only as to one element of a crime did not concede every other element of the crime, saying:

> Manslaughter is a category one lesser included offense of second-degree murder for which a defendant is entitled to a correct instruction. Both second-degree murder and manslaughter are homicide offenses that involve the issue of "intent"—either ill will, hatred, spite, or evil intent as is embodied in the depraved mind element of second-degree murder or the lack of any intent to kill as in the offense of manslaughter. Thus, the intent with which a homicide occurs is a matter that is pertinent or material to what the jury must consider in order to convict a defendant of either crime. Because Griffin was convicted of second-degree murder, an offense only one step

> removed from manslaughter, and because he did not concede the intent by which the homicide was committed, proof of that issue remained on the State, and remained in dispute notwithstanding Griffin's defense of misidentification.
>
> Id. at 70.

Like Griffin, Petitioner argued misidentification at trial. However, the distinction between Griffin and the case at bar is that the evidence of intent was genuinely at issue in Griffin. In Griffin, the victim was shot through a car window. It is easy to contemplate scenarios in which a single gunshot could be a mistake, accident, or not intended to cause death. This is not the case here. Unlike Griffin, Petitioner's intent to kill is obvious. Petitioner was seen standing over the victim repeatedly beating her with a metal jack handle. He unmistakably intended to kill her. It is difficult to imagine a jury could find the lack of intent necessary to deliver a verdict of manslaughter based on these facts.

While this case is distinguishable from Griffin, the State urges this Court to reconsider its position in Griffin. The ruling in Griffin entrenches the problem of automatic findings of fundamental error in certain cases, without consideration of the evidence presented at trial. This position is discussed in Issue I. A fundamental error must vitiate a trial, and in this case, the issue of intent was not in dispute based on the facts of the case. The evidence in this case shows that it was not a close call in determining if Petitioner committed murder or manslaughter. The State agrees that in any trial the prosecution must prove each element

of the case beyond a reasonable doubt regardless of what the defense is. However, in a case like this where the evidence overwhelmingly proves an element of the crime and there is no legitimate argument against it, the fact that it was "in dispute" should not be grounds for a new trial. Vitiate the trial must mean that an issue is truly contested, not merely mentioned, or not conceded, by defense counsel.

C. Harmless Error

The facts of the case not only distinguish it from Haygood and Griffin, but they also support a finding that any error in the jury instructions was harmless. The facts do not support a verdict of manslaughter. Petitioner's theory of defense was that he did not commit the crime at all. (V-80). The overall defense strategy was to poke holes in the State's case. Defense counsel called into doubt why text messages and voicemails were deleted, how Petitioner could be an alcoholic, if Petitioner could have been identified by the victim's adult children, why certain investigative steps were not taken, and a myriad of other arguments that tried to cast doubt on the State's theory and evidence. (V-434-446).

The State acknowledges that Petitioner did, minimally, argue intent in a likely effort to prove second-degree murder. This was not an argument aimed at establishing manslaughter. Defense counsel repeatedly questioned the members of the Strange family about what happened to Petitioner's possessions and if the day of the attack was trash day. (V-113, 118, 163; VI-217). The only witness defense counsel called was the victim, and he

questioned her again about Petitioner's possessions and if the day of the attack was trash day. (VII-396-397).

During closing argument, defense counsel fleshed out their theory surrounding trash day and Petitioner's possessions, saying:

> Now, when he moved out, testimony from Ms. Strange was that she had set his stuff out in the bricked enclosure where the garbage can was and she had left his stuff by the trash. And that's where he picked it up. He was served with an injunction. Their relationship, for all intents and purposes, was now done. He went back to that location to kill her or perhaps he went there to get whatever was left of his stuff. Same location it was previously. And it was trash day. It was trash day. Evident from the photographs and officer testified this was five o'clock in the morning, six o'clock in the morning. The trash cans were all lined out. The stuff was about to be thrown away.

(VII-443).

The argument presents the unreasonable proposition that Petitioner was served with an injunction, found his possessions in the garbage, and became so recklessly angry that he beat the victim almost to death. This is an argument for second-degree murder and is an attempt to counter the State's position that Petitioner committed premeditated, first-degree murder when he went to the victim's house and ambushed her as she left for work. "Premeditation is the essential element which distinguished first-degree murder from second-degree murder," and this argument from defense counsel is an argument against the existence of premeditation. Phillips v. State, 207 So. 3d 212, 219 (Fla. 2016). Petitioner's brief argument on this point was not that he committed attempted manslaughter, but that he committed attempted second-degree murder.

Just because defense counsel briefly argued the lack of intent to kill does not mean that it legitimately places the issue into dispute. Again, this is not a case where the victim was hit one time and fell during a fight. In this case, the victim was repeatedly hit with great force in her head with a metal jack handle. The only significant defense theories advanced at trial were total denial of involvement and challenging premeditation. The facts of this case do not support the argument that Petitioner did not intend to kill the victim. This distinguishes this case from Haygood, and strongly supports a finding that the error in the manslaughter jury instructions was harmless error, as in Dean.

CONCLUSION

Based on the foregoing argument, the State respectfully requests that this Court affirm the decision of the First District Court of Appeals and uphold Petitioner's conviction and sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by electronic mail to GLEN P. GIFFORD, Esq., at glen.gifford@flpd2.com, this 17th day of September, 2018.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
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