

IN THE SUPREME COURT OF FLORIDA

ARNOLD JEROME KNIGHT,

Petitioner,

vs.

Case No. SC18-309

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

In a case involving the error in instructing on attempted manslaughter recognized in Williams v. State, 123 So. 3d 23 (Fla. 2013), the First District Court of Appeal erroneously departed from settled law on waiver of fundamental error in jury instructions. The court further erred by finding that Dean v. State, 230 So. 3d 420, 425 (Fla. 2017), abrogated this Court's decisions spanning decades on reversible error in instruction on lesser included offenses. The First DCA's decision should be quashed and the case remanded with directions to grant Knight a new trial.

Under well-settled precedent, the uninvited, unwaived error in instructing the jury that attempted manslaughter includes intent to cause death necessitates reversal of Knight's conviction of attempted manslaughter and remand for a new trial.

In this brief, the record on appeal is cited as "R" with a volume number.

STATEMENT OF THE CASE AND FACTS

The state charged Knight with attempted first-degree, premeditated murder with a weapon and violation of an injunction against domestic violence. (R.1.111) Knight went to jury trial on February 28, 2014.

Mary Strange testified that Knight lived with her for three weeks in August, 2012. (R5.89-90) She said he told her in the middle of August that if she ever left him, he would kill her. (R5.93) At the request of Strange's son Luther, Knight moved out at the end of August. (R5.109) Knight returned once to pick up his belongings. (R5.113) About a week after moving out, Knight persuaded Strange to give him a ride from his job to his new residence. (R11-12) Knight brought Strange plants and patio furniture around her birthday on September 8. (R6.219, 224) Knight's multiple texts and calls to Strange, some of them profane, led her to obtain a no-contact injunction. (R5.94-97)

On September 25, an officer served Knight with the injunction. (R1.138, R5.84-87) Strange testified that the next morning, September 26, 2012, she saw Knight standing nearby when she went outside to her car. (R5.98) He had his right hand up, holding what looked like a pipe. (R5.98-99) He leaned down as if he would come after her. (R5.99) She tried to run away, but Knight caught up and hit her with the object. (R5.100) Strange next remembered awakening in a hospital. (R5.100-01) She had fractures in her wrist and eye sockets. (R5.101). Strange had

no doubt Knight was the person who hit her. (R5.124) Strange's son, Luther, testified that he saw Knight outside the house that morning, apparently attacking his mother. (R5.144) Alerted to the attack, Strange's daughter, Atara, looked outside to see a man resembling Knight running away. (R6. 207-10)

Christy Barkhuizen, an emergency medicine physician, testified that she treated Strange on September 26, 2012. (R6. 236) Strange had trauma to her face and head, including multiple broken bones. (R6.237-38) According to Barkhuizen, the injuries would require a direct blow of great force. (R6.240)

Shortly after the report of the assault, an officer found and arrested Knight about three-quarters of a mile from Strange's house. (R6.195-97, 259) Police retrieved a metal pipe on the route between Strange's house and the spot where Knight was stopped. (R6-260-61) The pipe appeared to be a handle from a hydraulic jack for lifting a vehicle. (R6.265) An analyst found DNA matching both Knight and Strange on the pipe. (R7.377-79)

Knight did not testify. In both his opening statement and closing argument, defense counsel argued that the evidence was inconsistent with any intent to kill Strange, by premeditation or otherwise. (R5.80, R7.436-46)

The parties' discussion of the final jury instructions reflects they were prepared and revised by the prosecutor. (R7.334-46, 386-88, 395) Following an overnight break in the trial, defense counsel said he had read the instructions and

“didn’t really have a problem with any of” them. (R7.334) The sole mention of the instruction on attempted manslaughter came from the court during discussion of the definition of a weapon:

THE COURT: First, 3.3(b), for purposes of attempted first degree murder with a weapon, a weapon is. Then in the next 3.3(b), to be consistent, for the purposes of attempted second-degree murder with a weapon comma. And the next 3.3(b), for purposes of attempted voluntary manslaughter with a weapon, a weapon is.

(R7.388)

The jury received an instruction on attempted manslaughter as a lesser included offense which specified, in pertinent part:

To prove the crime of attempted voluntary manslaughter, the State must prove the following element beyond a reasonable doubt:

Arnold Jerome Knight committed an act or procured the commission of an act which was intended to cause the death of Mary Lou Strange and would have resulted in the death of Mary Lou Strange except that someone prevented Arnold Jerome Knight from killing Mary Lou Strange or he failed to do so.

(R2.282, R7.409-10)).

Less than a year earlier, this Court had ruled that in including intent to cause death as an element, the standard instruction for attempted manslaughter constituted fundamental error in an appeal from a second-degree murder conviction. Williams v. State, 123 So. 3d 23 (Fla. Feb. 14, 2013). Less than a

month before Knight's trial, this Court approved a standard instruction that eliminated the error. In re Standard Jury Instructions in Criminal Cases—Instruction 6.6, 132 So. 3d 1124 (Fla. Feb. 6, 2014). Evidently, the standard instructions prepared by the prosecutor did not reflect the change. When the court and parties settled on the final instructions, no one had mentioned Williams, its precursor, State v. Montgomery, 39 So. 3d 252 (Fla. 2010), or the amendments to the standard instructions that followed both decisions. Defense counsel did not discuss attempted manslaughter in closing argument. (R7.436-46)

The jury found Knight guilty of attempted second-degree murder with a weapon and violation of a domestic-violence injunction. (R2.301, R7.461). The court sentenced him to 30 years in prison as a prison release reoffender for the attempted murder. (R4.563)

On appeal, Knight argued that under Williams, the erroneous instruction on attempted manslaughter constituted fundamental error requiring reversal of the attempted second-degree murder conviction and remand for a new trial. Rather than reverse in reliance on Williams, the three-judge panel blazed a new trail. In a two-to-one decision, the panel found that defense counsel waived the fundamental error of instructing the jury that attempted manslaughter included intent to cause death by agreeing *in general* to the instruction, although no one—not defense counsel, judge, or prosecutor--mentioned Montgomery, Williams, or the flaw in

the instruction. Knight v. State, 2016 WL 4036091 (Fla. 1st DCA July 28, 2016). Appellant sought rehearing and rehearing *en banc*. Rehearing *en banc* was denied, but the panel’s decision on rehearing in February 2018, followed two rounds of court-ordered supplemental briefing. In its second opinion, the panel certified a question of great public importance:

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?

Knight v. State, 2018 WL 944663, at *9 (Fla. 1st DCA Feb. 19, 2018) (on rehearing). The First DCA previously certified the same question in Moore v. State, 114 So. 3d 486 (Fla. 1st DCA 2013), rev. dismissed, 181 So. 3d 1186 (Fla. 2016). There the court reversed a second-degree murder conviction for failure to instruct on justifiable and excusable homicide. Montgomery error also occurred in Moore, but the First DCA found the error was waived by defense counsel’s express agreement to the instruction. It distinguished counsel’s “affirmative agreement” to the fundamental Montgomery error from his mere failure to object to the omission of an instruction on justifiable and excusable homicide:

[C]ounsel and the court discussed the contents of the manslaughter instruction at length, and appellant repeatedly stated he agreed with the version that was read to the jury. Further, in deciding which version to read to

the jury, he reviewed and relied on the standard jury instruction, which includes an instruction on justifiable and excusable homicide. However, he repeatedly agreed to use the version that was read to the jury, which lacked the instruction on justifiable or excusable homicide. The court even specifically asked appellant's counsel if he was “requesting anything else regarding that” instruction, and he responded that he was not. As such, he “affirmatively agreed” to the instruction.

However, there was no discussion below as to whether the manslaughter instruction should inform the jury on justifiable or excusable homicide, nor was there any indication that counsel was alerted to the fact the instruction was incomplete, which distinguishes this issue from the error in the intent language discussed above. Thus, while it is clear counsel affirmatively agreed to the manslaughter instruction as read to the jury, he did not specifically and affirmatively agree to exclude the required instruction on justifiable or excusable homicide. Instead, he failed to object to that error. Merely failing to object cannot waive fundamental error.

Id. at 492 (citation omitted). In this case, the First DCA panel recognized that its affirmance was an “extension of Moore to find a waiver” although there was no discussion at trial of the intent element in the attempted manslaughter instruction or express recognition by counsel that the instruction was erroneous under Montgomery and Williams. Knight, 2018 WL 944663, at *7-8.

The panel found the Montgomery error not only waived but also harmless. Following a second round of court-ordered supplemental briefing in late 2017, the panel deduced from the plurality, concurring, concurring-in-result, and partially dissenting opinions in Dean v. State, 230 So. 3d 420, 425 (Fla. 2017), that this

Court receded from the “jury pardon” doctrine, which the panel deemed essential to the grant of relief in Montgomery. Knight, 2018 WL 944663, at *4-5. Thus liberated from precedent holding that a jury must have the ability to partially pardon a defendant by finding him guilty of a necessarily lesser included offense, the panel then found the error in including intent to kill in the attempted manslaughter instruction to be harmless.

The panel certified that its interpretation of Dean conflicts with Caruthers v. State, 232 So. 3d 441 (Fla. 4th DCA 2017)(on rehearing), rev. denied, 2018 WL 987286 (Fla. Feb. 20, 2018). In Caruthers, the Fourth DCA had reversed convictions of aggravated assault with a firearm for failure to instruct on improper exhibition of a firearm. Caruthers v. State, 235 So. 3d 931 (Fla. 4th DCA 2017). The state asserted on rehearing that this Court receded from the jury pardon doctrine in Dean, rendering the failure to instruct on a one-step-removed lesser offense harmless error. The Fourth DCA denied rehearing, concluding that “Dean did not involve a majority” because only three justices stated that “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.”” Caruthers, 232 So. 3d at 441 (on rehearing). With all seven Justices

in agreement, this Court denied the state's petition for discretionary review in Caruthers, leaving undisturbed the reversal and remand for a new trial.

Judge Wolf, a First DCA judge since 1990 and author of the majority opinion in Moore, dissented from the panel opinion, which he said "conflicts with all existing case law generally concerning the concept of waiver and specifically pertaining to waiver of fundamental error contained in a jury instruction." 2018 WL 944663, at *9. Judge Makar dissented from denial of rehearing *en banc*, stating that "the panel's decision formulates an entirely new approach to implied waiver that cannot be reconciled with our precedent." Id. at *11.

This brief follows the Court's grant of discretionary review.

SUMMARY OF THE ARGUMENT

I. Knight's jury received a standard instruction on attempted manslaughter that this Court held to be fundamental error less than a year earlier and replaced with a new standard instruction less than a month before trial. Defense counsel neither invited nor waived the fundamental error. To invite the error, 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. The record demonstrates only unknowing acquiescence.

Relying on precedent involving the standard instructions on manslaughter and attempted manslaughter, the First DCA panel wrongly found that counsel waived the error because it had been obvious for as many as five years. However, the correctness of the attempted manslaughter instruction remained unclear as late as the month of Knight's trial. Had the invalidity of the instruction been settled law, the prosecutor would not have included it in the proposed instructions. The panel also suggested that defense counsel intentionally let the instruction stand to create reversible error. This is rank speculation that fails to reflect the likelihood of a per curiam affirmance without opinion that would have buried the error forever. In appeals from felony convictions in this state, sandbagging is a fool's bet.

Knight's case merited a routine reversal. This Court should end, finally, the First DCA panel's quixotic quest for affirmance.

II. Daugherty v. State, 211 So. 3d 29 (Fla. 2017), is directly on point and requires reversal of Knight's attempted second-degree murder conviction for the fundamental error of instructing the jury that a conviction of attempted manslaughter required intent to cause death. The First DCA panel was wrong in concluding that Dean v. State, 230 So. 3d 420 (Fla. 2017), abrogated the jury pardon doctrine as grounds for reversal. As the Fourth DCA correctly concluded, this Court's precedent holding that error in an instruction on a lesser included offense one step removed from the conviction constitutes fundamental error withstood Dean, and remains the law of the state. Justice Lewis, part of the four-vote Dean majority, may have disagreed with the three Justices who wished to jettison the jury pardon doctrine while agreeing with Justice Quince that Dean was not entitled to an instruction and verdict choice on manslaughter by act as a lesser included offense of felony murder.

Further, reversal of Knight's second-degree murder conviction does not hinge on the jury pardon doctrine. Attempted manslaughter requires a different—not merely a lesser—mens rea than attempted second-degree murder. This Court has stated that a correct manslaughter instruction is necessary for the jury to determine whether lack of intent to kill, combined with the other evidence, fits the

definition of manslaughter as an alternative to “depraved mind” murder. Intent to kill was in dispute in Knight’s trial. The jury rejected premeditated intent to kill and found instead that Knight acted with a depraved mind but without intent to kill. If given the choice, jurors could well have found instead that he committed an intentional act that could have caused death, making him guilty of attempted manslaughter.

ARGUMENT

I. A defendant does not waive fundamental error in jury instructions prepared by the state by merely accepting the proposed instructions in general.

Standard of review: The First DCA panel concluded that defense counsel waived the fundamentally flawed standard instruction on attempted manslaughter by accepting the instruction without ever discussing its contents with the prosecutor or judge on the record. The court recertified a question first certified in Moore v. State, 114 So. 3d 486 (Fla. 1st DCA 2013), rev. dismissed, 181 So. 3d 1186 (Fla. 2016):

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?

Both the ruling and certified question present questions of law. Review is de novo. See Haygood v. State, 109 So.3d 735, 739 (Fla. 2013).

Discussion: Knight's jury received a standard instruction on attempted manslaughter held to be fundamental error by this Court less than a year before his trial and replaced by a new standard instruction less than a month before trial. In merely accepting the flawed instruction provided by the prosecutor, defense counsel did not waive the fundamental error. As the First DCA panel recognized,

Moore involved affirmative agreement to the flawed instruction, and is therefore distinguishable. See Knight, 2018 WL 944663, at *7 (acknowledging its decision is an “extension of Moore to find a waiver on these facts”). Petitioner suggests that the certified question repeated from Moore be narrowed to distinguish mere acquiescence from waiver and invited error:

Is fundamental error in instructing on a lesser included offense one step removed from the crime of conviction waived by a defendant’s general acceptance of the instruction, or must the record demonstrate that the defense specifically invited the error by affirmatively requesting the instruction or explicitly accepted the instruction with knowledge of the error?

The Court should answer this two-part question with a no and a yes. No, mere acceptance in general of a fundamentally flawed jury instruction one step removed from the crime of conviction does not waive the error. Yes, the record must demonstrate that the defense specifically requested the instruction or explicitly accepted the instruction with knowledge of the error. This case falls under the first scenario. Moore is an example of the second.

During the charge conference in Moore,

the trial court and the State expressed concern that the State's proposed jury instruction for manslaughter erroneously required a finding of intent, and the court offered to strike the intent language. Appellant's counsel did not respond. Later during the charge conference, the parties referenced what appears to be the 2008 amended version of the standard jury instruction on manslaughter,

which required the jury to find the defendant “intentionally caused the death of” the victim. *See In re Standard Jury Instructions in Criminal Cases—Report No. 2007–10*, 997 So.2d 403 (Fla.2008). The State suggested using the intent language from the standard jury instruction, and appellant's counsel responded, “I'm agreeing with [the State], intentionally caused the death under the manslaughter instruction.”

The State then read out loud the agreed-upon instruction to ensure it was correct. It stated in full:

To prove the crime of manslaughter, the State must prove the following two elements beyond a reasonable doubt:

Number One, [the victim] is dead.

Number Two, [appellant] intentionally caused the death of [the victim].

In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that [appellant] had a premeditated intent to cause death, only an intent to commit an act which caused death.

The trial court asked appellant's counsel if he agreed with the instruction, and he responded that he did. The court then asked, “Not requesting anything else regarding that?” He responded, “No.” Later in the proceedings, the trial court gave appellant's counsel a printed copy of the instruction that would be read to the jury, and again he stated he had no objection. The trial court instructed the jury on manslaughter as agreed by the parties, without objection.

114 So. 3d at 488. The First DCA concluded:

Here, the trial court specifically brought to counsel's attention the problem of the intent language in the proposed jury instruction and offered to strike that language. However, counsel specifically requested the

language from the standard jury instruction that erroneously instructed the jury that manslaughter required an intent to kill. Thereafter, the trial court gave counsel additional opportunities to object, but he stated he agreed with the instruction. Therefore, appellant waived this error.

Id. at 489. This Court accepted and then dismissed review, leaving in place the reversal of Moore’s conviction of second-degree murder because of the unwaived error of failure to instruct on justifiable and excusable homicide in defining manslaughter.

The result in Moore—both as to the inclusion of intent to cause death in the manslaughter instruction and the omission of an instruction on justifiable and excusable homicide—is consistent with the law of waiver in Florida. In his partial dissent, Judge Wolf, the author of Moore, agreed with the Knight majority’s definition of waiver as “the **voluntary** and **intentional** relinquishment of a **known right**, or conduct which implies the **voluntary** and **intentional** relinquishment of a known right.” 2018 WL 954663, at *6, *10 (citing to Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 n. 12 (Fla. 2001)) (emphasis by Judge Wolf)

However, because the record in this case “reflects nothing more than mere acquiescence,” he correctly concluded that the finding of a waiver “conflicts with all existing case law generally concerning the concept of waiver and specifically

pertaining to waiver of fundamental error contained in a jury instruction.” Id., at *9-10 (Wolf, J., dissenting in part).

Here, in contrast to the affirmative waiver in Moore, neither the court nor the prosecutor brought to defense counsel’s attention any concern over the standard instruction on attempted manslaughter included in the packet of instructions provided by the prosecutor. Also, defense counsel did not invite the error by affirmatively requesting the erroneous instruction on attempted manslaughter. Cf. Armstrong v. State, 579 So. 2d 734, 735 (Fla. 1991) (“By affirmatively requesting the instruction he now challenges, Armstrong has waived any claim of error in the instruction.”); Richards v. State, 128 So.3d 959, 964 (Fla. 2d DCA 2013) (“Mr. Richards waived the error because he affirmatively requested the jury instruction he now challenges.”).

From the majority opinion below:

Defense counsel asserted at the beginning of trial that he had read and had no objections to the jury instructions. As the discussion developed, he requested changes and additions, adding three lesser battery offenses to the instructions and verdict form, and thereby gave the jury plenty of opportunities to exercise its pardon power if it was inclined to do so. He consulted with his client, and made a stipulation to obtain instructions on more favorable lesser offenses.

During a recess after the state rested, the parties placed on the record additional changes to the jury instructions discussed between counsel with respect to the instruction for aggravated battery and the definition

of a weapon for the weapon aggravation instruction, specifically including the voluntary manslaughter instruction. Defense counsel agreed to have the court read the instructions to the jury before closing arguments. No other discussion focused on the manslaughter instruction in general or specifically on the erroneous intent-to-kill language in that instruction. The court orally instructed the jury prior to closing arguments, without objection from either party.

2018 WL 944663, at *8 (emphasis supplied)

The panel concluded that counsel waived the error because (1) the flaw in the instruction had been obvious for as many as five years, since the First DCA decision in Montgomery, id. at *6, and (2) defense counsel may have had a strategic reason to forgo objection, so reversal would “incentivize” [sic] error. Id. at * 7. The panel is wrong on both points.

First, although the First DCA decided Montgomery in 2009 and this Court approved its decision in 2010, that case involved a flawed instruction on manslaughter—not attempted manslaughter. Only in its February 2013 decision in Williams v. State, 123 So. 3d 23 (Fla. 2013), less than a year before Knight’s trial, did this Court extend Montgomery to error in instructing on attempted manslaughter. With the benefit of hindsight, the First DCA panel in this case concluded that the invalidity of the standard instruction on attempted manslaughter was “settled in Montgomery.” 2018 WL 944663, at *6. Not so. Actions by both the Office of the Attorney General and this Court reflect doubt that Montgomery

invalidated the standard instruction on attempted manslaughter. In Williams, the state asserted the continuing validity of the standard instruction on attempted manslaughter that included intent to cause death. (See August 23, 2011, Answer Brief, Case No. SC10-1458) Even after this Court decided Williams, the state did not abandon the cause. Its motion for rehearing delayed the issuance of the mandate until June 13, 2013 and the amendment to the standard instruction to eliminate the error until the following February, weeks before Knight's trial. In re Standard Jury Instructions in Criminal Cases—Instruction 6.6, 132 So. 3d 1124 (Fla. Feb. 6, 2014).

This Court's reluctance to amend the standard instruction on attempted manslaughter following Montgomery suggests it also questioned the necessity of revision. The Committee on Standard Instructions in Criminal Cases proposed the revision in December, 2010. The court severed the proposal on amended manslaughter from the proposal to amend the standard instruction on completed manslaughter and ordered its consideration in a new case while Williams was pending. Id. at 1125 n.1. Only after Williams became final did the Court approve the revision eliminating the error. If the law had been as settled when Knight was tried as the First DCA panel perceived, perhaps the prosecutor would not have brought to court a packet of proposed instructions that included the erroneous charge on attempted manslaughter.

The panel wholly ignored the obligations of the prosecutor, who “has the responsibility of a minister of justice and not merely that of an advocate.” R. Reg. Fla. Bar 4-3.8 cmt. Nor does the panel find fault with the trial judge, who was “charged with the responsibility to determine and properly instruct the jury on the prevailing law.” Standard Jury Instructions in Criminal Cases (95-1), 657 So.2d 1152, 1153 (Fla.1995). See also Fla. Code Jud. Conduct Canon 3(E)1 (“A judge shall be faithful to the law and maintain professional competence in it.”). The majority’s exclusive focus on the professionalism and motives of defense counsel prompted Judge Makar to observe:

Indeed, by symmetric thinking, presumably both the trial judge and the prosecutor—who also have an obligation to stay abreast of changes in the law—were aware of the erroneous jury instruction and intentionally overlooked it, rather than being merely remiss or inattentive; each shares some degree of responsibility for ensuring the correctness of jury instructions used in criminal cases of this type where a retrial would necessarily impose avoidable costs on the judicial system, great inconvenience for witnesses, and further trauma to victims. The crime here was atrocious, making it all the more important for the trial judge, defense counsel, and prosecutor to apply the correct law and avoid a retrial and its collateral costs and impacts on those involved.

2018 WL 944663, at *13 (Makar, J., dissenting from denial of rehearing en banc).

The prosecutor and judge in Moore were more vigilant; hence the finding of waiver by defense counsel in declining the invitation to object. Neither the judge

nor the prosecutor took similar steps to avoid error in Knight's trial. Nonetheless, the majority blames only appointed defense counsel. 2018 WL 944663, at *7. As Judge Makar asked below, "[w]hy impute intentional inaction and ill motive to defense counsel when neither the prosecutor nor the trial judge caught the error?" Id. at *13 (Makar, J., dissenting from denial of rehearing en banc).

The majority's alternative suggestion that defense counsel strategically refrained from objecting to the erroneous instruction is insupportable. As the majority notes, counsel asserted that Knight had no intent to kill. Why, then, would counsel intentionally forgo an objection to an instruction connoting attempted manslaughter with an intent to cause death? The error could only have driven the jury to the next higher offense, attempted second-degree murder, which does not require an intent to kill. See Montgomery, 39 So. 3d at 256 (stating that imposing intent to kill as an element of manslaughter, "would impose a more stringent finding of intent upon manslaughter than upon second-degree murder, which, like manslaughter, does not require proof that the defendant intended to kill the victim").

The panel below speculated that defense counsel attempted to create reversible error in the event of conviction of attempted second-degree murder. But given that the vast bulk of criminal appeals end in per curiam affirmance without opinion, which are unreviewable, any decision to deliberately sabotage the

instructions in hopes of reversal would have been more a fool's bet than a crafty stratagem.¹ Given counsel's argument that Knight lacked intent to kill, a more sensible course would have been to ensure the jury was correctly instructed on attempted manslaughter with a deadly weapon, a second-degree felony punishable by a fifteen-year sentence² rather than the 30-year term he is now serving for the first-degree felony of attempted second-degree murder with a deadly weapon.³

Further, as Judge Makar recognized, a finding of waiver cannot rest on the unsubstantiated possibility of a strategic reason for declining to object to an erroneous instruction:

[N]o record evidence shows that defense counsel knew of or was made aware of the erroneous instruction as precedent requires; the trial judge and prosecutor both missed it too. And nothing but supposition supports the belief that defense counsel knowingly and intentionally engaged in a stratagem or ploy to dupe the court and create reversible error on appeal.

...

.... To conclude that defense counsel must have known the jury instruction was erroneous, and cunningly ignored it as a stratagem (thereby ascribing knowledge,

1. See generally Ezequiel Lugo, "The Conflict PCA: When an Affirmance Without Opinion Conflicts with a Written Opinion," The Florida Bar Journal, April 2011, page 46. Citing reports by a Judicial Management Council committee and Office of the State Courts Administrator, the author noted that about two-thirds of decisions at the district court level include "no opinion at all."

2. §§ 775.082(3)(d)1, 775.087(1)(c), 777.04(4)(d)1, 782.07(1), Fla. Stat. (2012).

3. §§ 775.082(3)(b), 775.087(1)(b), 777.04(4)(c), 782.04(2), Fla. Stat. (2012).

bad motive, and intentional conduct), is pure speculation on this record... Other than supposition, nothing suggests that defense counsel failed to challenge the erroneous instruction as a deliberate tactic or ploy for strategic advantage.

2018 WL 944663, at *12, *13 (Makar, J, dissenting from denial of rehearing en banc).

In sum, the majority arrived at a novel standard for invited error, a standard far beyond the limits marked out by settled precedent. Judge Wolf correctly diagnosed that the majority's newly minted standard "conflicts with all case law generally concerning waiver." Id. at *9. Judge Makar testified to the majority's falsehood in suggesting "that defense counsel agreed to the specific erroneous instruction; he did not." Id., at *14.

This case involves a run-of-the-mill Montgomery/Williams error that should have resulted in a reversal and remand for a new trial in mid-2016, when the DCA panel issued its first opinion. Its ultimate holding cannot be upheld without dismantling the law of waiver in general and waiver of error in criminal jury instructions in particular. This Court should reject the request of the panel below to "bless its handiwork" and "alter the contours of waiver law." Id. at *15 (Makar, J., dissenting from denial of rehearing en banc). It should hold that mere general acceptance of a fundamentally flawed jury instruction one step removed from the crime of conviction does not waive the error. Instead, the record must demonstrate

that the defense specifically requested the flawed instruction or explicitly approved the erroneous portion of the instruction. Applied to this case, the correct answers to the certified question, either as posed by the First DCA or as modified herein, necessitate that the decision below be quashed and the case remanded with directions to grant Knight a new trial.

II. When intent is in dispute, an attempted manslaughter instruction that erroneously includes an element of intent to cause death causes harmful error by depriving the jury of a reliable alternative to its verdict of attempted second-degree murder.

Standard of review: Relying on Dean v. State, 230 So. 3d 420, 425 (Fla. 2017), the First DCA panel concluded that the erroneous attempted manslaughter instruction constituted harmless error. The court concluded that in light of the verdict finding Knight guilty of attempted second-degree murder, jurors could have found Knight guilty of attempted manslaughter only by exercising their partial pardon power, and defendants are not entitled to a jury pardon. 2018 WL at 944663, at *4-5. The panel certified conflict with Caruthers v. State, 232 So. 3d 441 (Fla. 4th DCA 2017), rev. denied, 2018 WL 987286 (Fla. Feb. 20, 2018), in which the Fourth DCA concluded that no clear majority held in Dean that erroneous instruction on a lesser included offense one step below the crime of conviction constitutes harmless error. These are legal questions on which the standard of review is de novo.

Discussion: In Montgomery, Williams, and many other decisions, this Court has held that an erroneous instruction on a disputed element of an offense one step below the crime of conviction constitutes reversible error. As recently as its January 2017 decision in Daugherty v. State, 211 So. 3d 29 (Fla. 2017), the Court ruled that instructions making intent to kill an element of manslaughter by

act and attempted manslaughter constituted fundamental error in an appeal from convictions of second-degree murder and attempted second-degree murder. Justice Perry joined the majority opinion.

In Dean, decided August 31, 2017, this Court approved a Fourth DCA decision affirming a conviction of second-degree felony murder despite the trial court's error in denying a request for an instruction on the lesser included offense of manslaughter by act. The four-Justice majority concluded that attempted manslaughter is a necessarily (or Category One) lesser include offense of attempted second-degree felony murder. However, the majority approved affirmance of the second-degree felony murder conviction “[f]or the reasons expressed in Justice Polston’s concurring opinion and Justice Quince’s concurring in result only opinion.” 230 So. 3d at 425. Justice Lawson, who replaced Justice Perry, was part of the majority.

Justice Polston’s concurrence, in which he was joined by Justices Canady and Lawson, supported affirmance of the conviction on the rationale that the jury implicitly rejected manslaughter by act in finding Dean guilty of second-degree felony murder. Id. at 425-26. Under this view, reversal for error in incorrectly instructing, or wholly failing to instruct, on a necessarily lesser included offense would wrongly presume the jury would have violated its sworn obligation to convict of the highest offense proven beyond a reasonable doubt. In other words,

“the defendant is not entitled to an opportunity for a jury pardon.” Id. at 426. Justice Quince disagreed with this view, stating that “if manslaughter by act is a necessarily lesser included offense, the appropriate remedy is to remand for a new trial.” Id. at 428. (Quince, J., concurring in result only.) However, she further concluded, contrary to the plurality opinion, that manslaughter by act is a permissible (or Category 2) lesser included offense of second-degree felony murder. According to Justice Quince, the denial of an instruction on manslaughter did not constitute error in Dean’s case because “the facts did not support a finding of manslaughter by act.” Id. at 429.

The Fourth DCA correctly concluded in Caruthers that Dean does not contain a majority opinion which abrogates this Court’s precedent specifying that error in an instruction on a lesser included offense one step removed from the conviction deprives the jury of its pardon power and results in reversible error. 232 So. 3d at 441. In a seven-to-zero vote, this Court denied the state’s petition for review challenging the Fourth DCA’s interpretation of Dean. State v. Caruthers, 2018 WL 987286 (Fla. Feb. 20, 2018).

When no single rationale explaining the result has the assent of an appellate court’s majority, “the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds.” State v. Lebron, 979 So. 2d 1093, 1095 (Fla. 3d DCA 2008) (quoting Marks v. United

States, 430 U.S. 188, 193 (1977), and Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). Dean lacks a single rationale for affirmance shared by four of the Court’s seven Justices. Justices Polston, Canady, and Lawson would have abrogated the “jury pardon doctrine.” Justice Quince would have retained it. Justice Pariente viewed the case “not [as] a pardon power case” but as one in which a correctly instructed jury could have found the defendant guilty of manslaughter. Dean, 230 So. 3d at 430 (Pariente, J., dissenting).

Justice Lewis did not explain his concurrence in the majority opinion in Dean. In this case, the First DCA panel incorrectly counted him as the fourth Justice “who concurred in the abrogation of the jury pardon doctrine.” Knight, 2018 WL 944663, at *4. A more plausible inference from his decision not to join Justice Polston’s concurrence is that Justice Lewis opted to retain the jury pardon doctrine, but agreed with Justice Quince’s view that Dean was not entitled to an instruction and verdict choice on manslaughter by act as a necessarily lesser included offense of attempted second-degree felony murder. Justice Lewis had concurred in the majority opinion in Daugherty seven months earlier. To the extent that Daugherty is perceived as relying on the jury pardon rationale, Justice Lewis has not expressly retreated from that rationale for ruling that reversible error results from failing to instruct, or incorrectly instructing on, an offense one step removed from the crime of conviction.

To approve the First DCA finding of harmless error, this Court must expressly recede from Daugherty, along with Montgomery, Williams, and other decisions reversing convictions for erroneous instructions on disputed elements of offenses one step removed from the crime of conviction.⁴ Daugherty is not cited in any of the opinions in Dean. This Court does not intentionally overrule itself *sub silentio*. State v. Ruiz, 863 So. 2d 1205, 1210 (Fla. 2003). To the extent that the panel deemed reversal of Knight’s conviction dependent on the “jury pardon

4. In chronological order, the decisions are Rojas v. State, 552 So. 2d 914 (Fla. 1989) (holding failure to instruct on justifiable and excusable homicide as part of manslaughter instruction is reversible error on second-degree murder conviction, and rejecting argument error can be harmless); Stockton v. State, 544 So. 2d 1006 (Fla. 1989) (holding refusal to include definition of justifiable and excusable homicide is reversible error on conviction of second-degree murder); Garcia v. State, 552 So. 2d 202 (Fla. 1989) (same as Stockton); State v. Lucas, 645 So. 2d 425 (Fla. 1994) (holding Rojas error requires reversal of conviction of manslaughter or second-degree murder; declining to recede from prior decisions including Rojas.); State v. Montgomery, 39 So. 3d 252 (Fla. 2010) (holding erroneous instruction on manslaughter requiring intent to cause death requires reversal of second-degree murder conviction); Haygood v. State, 109 So. 3d 735 (Fla. 2013) (holding Montgomery error requires reversal of second-degree murder conviction if evidence does not support verdict on alternative of manslaughter by culpable negligence); Williams v. State, 123 So. 3d 23 (Fla. 2013) (extending Montgomery to erroneous attempted manslaughter instruction); Griffin v. State, 160 So. 3d 63 (Fla. 2015) (holding Montgomery error necessitates reversal of second-degree murder conviction even if sole defense was misidentification); Daugherty v. State, 211 So. 3d 29 (Fla. 2017) (holding Montgomery error compels reversal of second-degree murder conviction despite intervening verdict choice of third-degree felony murder); Walton v. State, 208 So. 3d 60 (Fla. 2016) (holding failing to instruct on attempted manslaughter by act is reversible error in appeal from attempted second-degree murder conviction); Roberts v. State, 242 So. 3d 296 (Fla. 2018) (same as Walton).

doctrine,” that rationale remains viable following Dean. Daugherty is still controlling precedent, entitled to the full weight of stare decisis. Justice Canady last laid out his full rationale for abrogation of the pardon power in a dissenting opinion in State v. Spencer, 216 So. 3d 481 (Fla. 2017). Nothing has changed since then, not even—as of the date of this brief—the Court’s personnel. Because of the alternative rationales for the result in Dean, Justice Lewis’ concurrence in the majority opinion in that case falls short of a holding that renders Montgomery/Williams error harmless as a matter of law.

Further, reversal of Knight’s conviction does not hinge on the “jury pardon doctrine.” In Haygood v. State, 109 So. 3d 735 (Fla. 2013), this Court rejected the view that error in instructing that manslaughter requires intent to cause death is reversible only because it deprives the jury of the opportunity to partially pardon the defendant from commission of second-degree murder:

The dissent appears to be based on the assumption that the only justification for instructing the jury on manslaughter would be to provide an opportunity for a jury pardon. However, this puts the cart before the horse. The reason for properly instructing the jury on manslaughter is to enable the jury to determine what degree of crime, if any, is proven. The dissent also concludes that the evidence in this case proved only second-degree murder and, thus, the jury could not possibly have found manslaughter without aid of the jury pardon. That conclusion is unjustified. It is up to the jury to hear the evidence, find the facts, and apply the law to

reach a proper and fair verdict. That process was short-circuited in this case by the faulty instruction.

The jury's verdict of second-degree murder is proof that it necessarily found Haygood lacked intent to kill. But, because of the faulty instruction on manslaughter, the jury was deprived of the ability to decide whether Haygood's lack of intent to kill, when considered with all the other evidence, fit within the elements of the offense of manslaughter. Based on the evidence presented, the only nonintentional homicide offense remaining for the jury's consideration in this case was second-degree murder. The result of incorrectly instructing on a necessarily lesser included offense, or even jettisoning the requirement of instruction on necessarily lesser included offenses as the dissent suggests, is that the jury is deprived of all the tools it needs to reach a proper verdict in the case before it.

Id. at 743 (emphasis supplied).

Perhaps no reasonable jury could have found Dean guilty of manslaughter if given the choice, except by partial jury pardon. This is a plausible reading of Justice Polston's concurrence in Dean. However, the evidence and theory of defense argued by Knight's counsel placed his intent to cause death squarely in dispute. If given the choice, the jury that found Knight acted with a depraved mind but without intent to kill could well have concluded instead that he committed an intentional act that was neither excusable nor justifiable and could have caused death—attempted manslaughter.

Under either the “jury pardon” rationale that remains viable following Dean or the “choice of mens rea” rationale of Haygood, the trial court's erroneous

attempted manslaughter instruction in this case constituted fundamental error which was not rendered harmless by the attempted second-degree murder verdict. Accordingly, this Court should quash the First DCA decision ruling the Williams error harmless, approve the Fourth DCA decision in Caruthers, and remand with directions to grant Knight a new trial.

CONCLUSION

Based on the arguments herein, Petitioner requests that this Court hold that waiver of a fundamentally erroneous jury instruction on a necessarily lesser included offense requires that the defense specifically request the instruction or explicitly agree to the erroneous portion of the instruction, and reaffirm that an error in instructing on a disputed element of a necessarily lesser included offense one step removed from the crime of conviction necessitates reversal of the conviction and remand for a new trial.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Kaitlin Weiss, Assistant Attorney General; Gary Lee Caldwell, amicus counsel for the Florida Public Defender Association; and Rocco J. Carbone, amicus counsel for the Florida Association of Criminal Defense Lawyers, this 19th day of July, 2018. I certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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