IN THE SUPREME COURT OF FLORIDA

ARNOLD JEROME KNIGHT,

Petitioner,

vs. Case No. SC18-309

STATE OF FLORIDA, First DCA No. 1D14-2382

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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INTRODUCTION

The decision of the First District Court of Appeal strays widely from this Court's precedent on fundamental error and waiver, creating uncertainty in the state's trial and appellate courts. Review is necessary to alleviate the confusion. The decision provides three grounds for discretionary review: (1) a certified question of great public importance; (2) certified direct conflict; and (3) express and direct conflict with this Court's decisions. Any of these grounds creates jurisdiction, which this Court should exercise to clarify and unify the law on fundamental error in jury instructions on lesser included offenses.

STATEMENT OF THE CASE AND FACTS

Knight sought reversal of his attempted second-degree murder conviction following a 2014 trial. Rather than grant relief in reliance on the well-established precedent of State v. Montgomery, 39 So. 3d 252 (Fla. 2010), and Williams v. State, 123 So. 3d 23 (Fla. 2013), the three-judge panel blazed a new trail. In a 2-1 decision, the panel found that defense counsel waived the fundamental error of including intent to kill in an instruction on attempted manslaughter 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 (Fla. 1st DCA Feb. 19, 2018). The First DCA had 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 ruled it 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 manslaughter instruction or express recognition by counsel that the instruction was error 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 conflicted with Caruthers v. State, 232 So. 3d 441 (Fla. 4th DCA 2017), rev. denied, 2018 WL 987286 (Fla. Feb. 20, 2018). In Caruthers, the Fourth DCA reversed convictions of aggravated assault with a firearm for failure to instruct on improper exhibition of a firearm. Caruthers v. State, 2017 WL 4990568 (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. 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 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." Id. at *9. Judge Wolf was not alone in this sentiment. 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.

Knight now seeks discretionary review based on the certified question, certified conflict, and express and direct conflict.

SUMMARY OF THE ARGUMENT

Jurisdiction arises from a certified question on the scope of waiver of fundamental error, from express and direct conflict with decisions by this Court finding fundamental error on the same material facts, and from certified conflict between the First and Fourth DCAs on whether this Court abrogated the "jury pardon" doctrine. Because the First DCA departed from well-settled precedent on fundamental error, waiver, and jury pardons, review by this Court is crucial.

Bench and bar await an answer to the certified question and resolution of the conflicts with the decisions of this Court and other district courts.

ARGUMENT

Discretionary review is necessary to resolve uncertainty in the law on fundamental error in instructions on lesser included offenses created by the First District's "implied waiver" rationale and by conflicting district court interpretations of this Court's decision in Dean v. State.

The question of great public importance and interdistrict conflict certified by the First DCA panel give this Court the power to review its decision. Art. V., § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv), (v). The Court should exercise its discretion to order briefing on the merits to resettle the law on fundamental error arising from flawed instructions on manslaughter or attempted manslaughter in appeals from convictions of second-degree murder or attempted second degree murder.

The First DCA held that in light of Dean v. State, 230 So. 3d 420, 425 (Fla. 2017), an incorrect instruction that attempted manslaughter includes intent to kill is no longer fundamental error in an appeal from a conviction of attempted second-degree murder. As the First DCA panel recognized in certifying conflict, the Fourth DCA read Dean differently in Caruthers v. State, 232 So. 3d 441 (Fla. 4th DCA 2017), rev. denied, 2018 WL

987286 (Fla. 2018). This Court should grant review to resolve the certified conflict on whether Dean abrogated the jury pardon doctrine.

Further, although not certified, express and direct conflict arises between the First DCA decision in this case and Roberts v. State, 2018 WL 1100825 (Fla. Mar. 1, 2018), and the decisions cited in Roberts. Seven months after Dean, which had no majority opinion, this Court reaffirmed in a four-to-three decision that instructional error regarding attempted manslaughter remains fundamental error in an appeal from a conviction of attempted second-degree murder. The trial court in Roberts did not instruct on attempted manslaughter; defense counsel did not object. This Court nonetheless quashed the First DCA decision affirming the attempted second-degree murder conviction. On discretionary review, a majority of this Court reaffirmed its holding in Walton v. State, 208 So. 3d 60 (Fla. 2016), that an incorrect instruction imputing intent to kill in attempted manslaughter and the complete omission of an instruction on attempted manslaughter both constitute fundamental error:

> We have repeatedly held that the failure to correctly instruct the jury on a necessarily lesser included offense constitutes fundamental error. See, e.g., Williams v. State, 123 So. 3d 23, 27 (Fla. 2013) (holding that fundamental error occurs when the trial judge gives an incorrect instruction on the necessarily lesser included offense of attempted manslaughter for a defendant

> convicted of attempted second-degree murder); [State v.] Montgomery, [39 So. 3d 252 (Fla. 2010)] at 259 (same). If giving an incorrect instruction on a necessarily lesser included offense constitutes fundamental error, then *a fortiori* giving no instruction at all likewise constitutes fundamental error.
>
> [Walton, 208 So. 3d at 65].
>
> The relevant facts in the present case are nearly identical to those in Walton.

Roberts, 2018 WL 1100825, at *3. The First DCA's holding in this case that error under Montgomery and Williams in instructing on attempted manslaughter is not fundamental error in an appeal from a conviction of attempted second-degree murder expressly and directly conflicts with Montgomery, Williams, Walton, and Roberts. This Court should grant review to resolve the conflict.

Finally, jurisdiction also arises from the First DCA's certified 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?

The First DCA certified the same question while reversing a second-degree murder conviction in Moore v. State, 114 So. 3d 486 (Fla. 1st DCA 2013), rev. dismissed, 181 So. 3d 1186 (Fla. 2016). When it

denied review, this Court declined the opportunity to revisit settled precedent on fundamental error and waiver. Here, with no indication that Knight's counsel had any greater awareness of the Montgomery/Williams error than counsel in Moore had of the error in omitting an instruction on justifiable and excusable homicide, the First DCA found an implied waiver. As noted by dissenting Judges Wolf and Makar, its decision contradicts settled precedent. 2018 WL 944463 at *9, *11.

Unlike the dismissal of review in Moore, denial of review in this case would leave the law on waiver and fundamental error unsettled among the five judicial districts and twenty judicial circuits of the state. The uncertainty creates unpredictability and will lead to different outcomes under materially identical circumstances. This Court should grant review to answer the certified question and alleviate the uncertainty.

CONCLUSION

The First DCA has injected tremendous uncertainty and unpredictability into the law of fundamental error on instructions on lesser included offenses. Its decision expressly and directly conflicts with this Court's precedent—reaffirmed in March 2018--on Montgomery error. This conflict, as well as certified conflict on the effect of this Court's decision in Dean and a certified question on waiver of fundamental error, create discretionary review jurisdiction. This Court should grant review of the decision and resolve the uncertainty it has engendered.

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, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this 5th day of March, 2018. I certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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