IN THE SUPREME COURT OF FLORIDA

LORETTA REED,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC01-1238

# RESPONDENT'S ANSWER BRIEF

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## 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, LORETTA Reed, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of seven volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

The petitioner's statement of the case and facts is inadequate. The state supplements with the following significant facts:

1. The district court below ordered the state to submit a supplemental brief on "whether the trial court's giving the standard jury instruction for aggravated child abuse, without a timely objection from the defense to preserve the issue, constitutes fundamental error, where the instruction given failed to instruct the jury on a disputed element of the crime charged." The state was ordered to address, inter alia, Young v. State, 753 So.2d 725 (Fla. 1st DCA 2000). The state reviewed Young and concluded that it made the failure to correctly instruct the jury on a disputed element of the crime fundamental error. Accordingly, based on this [erroneous] reading of Young, the state conceded error. The district court more closely examined Young, determined that the error there had been properly preserved and that the statement that such error was fundamental was dicta. The district court then held that the error here had not been preserved. The district court further determined that the error was harmless in any event and refused to accept the state's concession of error.

2. As to Issue One, the First District Court, Reed v. State, No. 1D99-2562 (Fla.App. 1 Dist. May 1, 2001), found:

FAILURE TO ALLOW JURY TO VIEW CURRENT INJURIES

The state's second-amended information alleged that between May 1 and October 29, 1997, appellant did "commit an aggravated battery upon and/or willfully torture or maliciously punish" the victim, a child under age 18, by repeatedly hitting her with a stick and/or an electrical cord." (FN1) The trial took place 19 to 24 months after the window period in which the offense had been committed. During the state's case, a detective's photographs of wound marks on the victim's back, leg, buttocks, and side (taken very soon after the injuries had been inflicted and reported to the authorities) were entered in evidence without an objection. Noting the amount of time that had elapsed since the occurrence of the injuries, defense counsel asked that the jury be allowed to view the current appearance of the victim's back and body. The defense's strategy was that if the injuries from the whipping were no longer visible, or were barely visible, this would constitute exculpatory evidence on the disputed issue of the severity and permanency of the wounds. The state objected to a current viewing on the ground that requiring the child to reveal her wounds to a jury of strangers would be traumatic and would constitute an unwarranted invasion of her right to privacy. Alternatively, the state asserted that neither a live viewing nor the taking and disclosure of current photographs of the wounds were appropriate or necessary, in that the victim's treating physician would testify that the wound marks observable in the state's earlier photos had "almost completely" faded. The defense's request, which was renewed at the beginning of its own case over the state's objection, was denied. The court also declined a defense request to inform the jury that the court had refused to allow a current physical display or photographic viewing of the wounds.

A trial court's ruling on the admissibility of evidence is subject to the abuse of discretion standard of review, see Sexton v. State, 697 So.2d 833, 837 (Fla.1997), and comes to this court clothed with a presumption of correctness. See Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963). Appellant concedes that "[t]here is no general constitutional right to discovery in a criminal case." Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). She acknowledges also that witnesses for the state are protected by article I, sections 12 ("searches and

> seizures") and 23 ("right of privacy") of the Florida Constitution. See State v. Brewster, 601 So.2d 1289 (Fla. 5th DCA 1992). We conclude that appellant has not met her burden of demonstrating that the refusal to allow a current viewing or current photographs of the victim's wounds constituted "prejudicial error." § 924.051(7), Fla. Stat. (1997). Here, the victim was not a witness. The state correctly asserts that a current viewing or current photographic evidence of the injuries showing that the wounds had faded was not relevant to the question of whether the injuries had occurred. As no contrary evidence was presented, such evidence was not needed to impeach. Assuming for the sake of argument that a current viewing would have been relevant, we would still conclude that, absent a showing that "strong or compelling reasons" existed for the jury to be permitted to view the current wounds, the trial court properly found no basis for requiring a viewing. See State v. Smith, 260 So.2d 489 (Fla.1972) (holding trial court lacked authority to order witnesses, who might be used by the state to identify persons involved in perpetration of crime alleged to have been committed by defendants, to be examined for visual acuity by specified physician prior to trial); State v. Kuntsman, 643 So.2d 1172 (Fla. 3d DCA 1994) (holding that trial court departed from essential requirements of law by ordering prosecution witnesses to view array of 38 photographs and then be questioned about photos during the course of criminal depositions where defense had failed to present strong or compelling reasons for discovery order). The refusal to allow a current viewing did not in any manner impinge upon appellant's constitutional right to due process. See Fuller v. State, 669 So.2d 273 (Fla. 2d DCA 1996); State v. Farr, 558 So.2d 437 (Fla. 4th DCA 1990). Furthermore, the requested viewing would have merely corroborated the testimony of appellant's pediatrician that the child's wounds had almost completely faded.

3. Concerning Issue Two, the subject of the certified question, the First District Court held: “[w]e affirm based upon Appellant's failure to preserve the issue for appellate review but certify a question of great public importance as to

this issue." The court further decided that the error, however described, was in fact harmless. The court reasoned as follows:

> The statute under which appellant was charged states, in pertinent part:
>
> (2) "Aggravated child abuse" occurs when a person:
>
> (a) Commits aggravated battery on a child;
>
> (b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
>
> (c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.
>
> § 827.03(2), Fla. Stat. (1997). The state's charging instrument essentially tracked subsections (2)(a) and (2)(b).
>
> The standard jury instruction for this crime states, " 'Maliciously' means wrongfully, intentionally, without legal justification or excuse." Fla. Std. Jury Instr. (Crim.) 227. In Young v. State, 753 So.2d 725 (Fla. 1st DCA 2000), we held that the standard jury instruction did not adequately define malice because it did not state that to find the defendant guilty, it must be determined that the accused " 'actually harbored' ill will, hatred, spite or an evil intent." Id. at 729. Unlike the defendant in Young, however, the defendant in this case did not object to the incomplete instruction. (FN2)
>
> In the instant case, the judge instructed the jury in accordance with the standard jury instruction which had been adopted by the supreme court, and he was never alerted to a potential problem with that instruction. The instruction which was read, while overly inclusive, did not totally fail to address the element of malice, and there is no allegation that the prosecutor misused the inaccurate instruction in closing argument.
>
> Fundamental error in a criminal case has been described as "error that reaches down into the validity of the trial itself to the extent that a

verdict of guilty could not have been obtained without the assistance of the alleged error." Barnes v. State, 743 So.2d 1105, 1108 (Fla. 4th DCA) (quoting Kilgore v. State, 688 So.2d 895 (Fla.1996)), rev. denied, 744 So.2d 457 (Fla.1999). Challenges to an inaccurate or erroneous instruction must be preserved for appeal. See State v. Delva, 575 So.2d 643, 644-645 (Fla.1991);see also Archer v. State, 673 So.2d 17, 20 (Fla.1996); Geralds v. State, 674 So.2d 96, 98-99 n. 6 (Fla.1996); Tolbert v. State, 679 So.2d 816, 818 (Fla. 4th DCA 1996) (en banc). Even alleged errors in instruction that are asserted to mislead the jury concerning an element of the crime must be preserved for appeal. See Auger v. State, 725 So.2d 1178, 1178-79 (Fla. 2nd DCA 1998); see also Smith v. State, 772 So.2d 625 (Fla. 4th DCA 2000). But see Hubbard v. State, 751 So.2d 771, 772 (Fla. 5th DCA 2000). If the challenged instructions define either a nonexistent crime or totally fail to address an element of a crime, the alleged error may be considered to be fundamental. See Mosely v. State, 682 So.2d 605, 606 (Fla. 1st DCA 1996) (holding that instructing jury on nonexistent crime constituted fundamental error); Mercer v. State, 656 So.2d 555, 556 (Fla. 1st DCA 1995) (holding that failing to instruct on an essential element of a crime constituted fundamental error). The instant case involves an alleged inaccurate definition of an element of a crime rather than a total failure to address a necessary element.

Appellant relies heavily on language in Young which indicated that giving an inaccurate definition of the term "maliciously" constituted fundamental error. See Young, 753 So.2d at 727. This language was dicta. (FN3) This court specifically stated in Young that the issue "was adequately preserved for appellate review." Id. The two cases cited in Young for the proposition that giving an incorrect instruction on an element of a crime constitutes fundamental error--Mercer and Steele v. State, 561 So.2d 638 (Fla. 1st DCA 1990)--are factually distinguishable from this case and do not stand for the general proposition that the Young court stated. (FN4)

While we understand the dissent's concern (as well as the Young court's concern) about a person being wrongfully convicted of aggravated child abuse without proof that he or she harbored "ill will,

hatred, spite or an evil intent," in the instant case such concerns are not well founded. The facts at issue here reveal repeated serious injuries to the child; testimony from teachers, HRS investigators, and the school nurse about the serious nature of those injuries; testimony from an expert in pediatrics that the injuries were consistent with abuse and not accidental; and the defendant's admission generally to abuse as well as her admission concerning the use of foreign objects and hitting the child when she was angry. There was also evidence of repeated lying and coverup concerning the nature and cause of the child's injuries.

In cases where there is some evidence that an innocent person may have been convicted or the prosecutor has misused the improper instruction, application of the doctrine of fundamental error to the giving of inaccurate jury instructions may be justified. An across-the-board rule is unnecessary, however, and may cause disruption within the court system. (FN5) In this case, utilization of the doctrine of fundamental error is simply not justified in light of the overwhelming evidence of guilt and lack of evidence that the inaccurate instruction was misused. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986). We recognize that the language we are utilizing may be indicative of a harmless error analysis; however, such language has often been used in the context of determining whether an error is fundamental.

We also conclude that even if the error in this case were determined to be fundamental, any such error would be harmless. Both the supreme court and this court have determined that even fundamental error may in fact be harmless. See State v. Clark, 614 So.2d 453, 454 (Fla.1993); Mincey v. State, 684 So.2d 236, 239 (Fla. 1st DCA 1996). In the recent case of Stephens v. State, 26 Fla. L. Weekly S161 (Fla. Mar. 15, 2001), the supreme court reaffirmed the principle that the quantum of evidence supporting the defendant's guilt should be a major factor in determining whether an error was harmless. See Id. at 164 ("Weighing all the evidence in this case and considering the overwhelming evidence of guilt, we find the trial judge acted within his discretion, and any potential error was harmless."). In light of the overwhelming evidence of guilt and the fact that the prosecutor did not misuse the

incorrect instruction, we are convinced beyond a reasonable doubt that any jury instruction error in the case is harmless. We therefore affirm.

We are aware, however, that certain cases cited by the dissent may suggest that fundamental error occurs any time an element of a crime is inaccurately defined for the jury. While we reject the proposition that these cases stand for such an inflexible rule, in order to avoid confusion, we certify the following question to be one of great public importance:

IS THE GIVING OF A STANDARD JURY INSTRUCTION WHICH INACCURATELY DEFINES A DISPUTED ELEMENT OF A CRIME FUNDAMENTAL ERROR IN ALL CASES EVEN WHERE THE EVIDENCE OF GUILT IS OVERWHELMING AND THE PROSECUTOR HAS NOT MADE THE INACCURATE INSTRUCTION A FEATURE OF HIS ARGUMENT?

## SUMMARY OF ARGUMENT

ISSUE I:

The issue of whether the trial court erred by not allowing the jury to see the child's wounds two years after the fact is not within the scope of the certified question nor is it even remotely related. For this reason the State urges this Court to refuse to address the claim. If addressed, there was no reversible error and the district and trial courts should be affirmed.

ISSUE II:

The petitioner improperly fails to address the certified question, except in a most perfunctory manner, and simply adopts the dissenting opinion below. A dissenting opinion is not a brief prepared pursuant to Florida Rule of Appellate Procedure 9.210 and severely disadvantages both the opposing party and the court.

The state suggests that the reasoning and findings of the majority opinion are clearly correct and should be approved by this court. The district court did not err in refusing to accept the state’s concession of error for the reasons set forth in the opinion and the case law cited therein. Further, the order to the state to address the question contained a finding that the failure to give the statutory element, and the element itself, were controverted. As the district court ultimately found, this was not so. Further, the case law is

well settled that a court is not required to accept an erroneous concession of error.

Furthermore, it is well established law that per se reversible error is very narrowly applied to those errors which are always harmful. This court has long favored the harmless error analysis whereby a court reviews the totality of the circumstances.

Therefore, because the error at issue is not always harmful, the majority did not err by finding, based on the totality of the circumstances, that the inaccurate instruction given in this case was not fundamental error and was harmless because there was overwhelming evidence of guilt, and specifically malice, and thus the inaccurate instruction did not constitute reversible error.

## ARGUMENT

### ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING APPELLANT'S PROPERLY PRESERVED MOTION TO REQUIRE THE NON-WITNESS CHILD VICTIM, TWO YEARS AFTER THE INCIDENTS, TO SUBMIT TO A DEFENSE PHOTOGRAPHER TAKING PHOTOS OF HER BACK FOR JURY PRESENTATION? (Restated)

First, it is well established practice for the court to decline to address issues which are not within the scope of the certified conflict or certified question for which the court has granted jurisdiction. McMullen v. State, 714 So.2d 368 (Fla. 1998); Allstate Ins. Co. v. Reliance Ins. Co., 692 So.2d 891 (Fla. 1997); Ratliff v. State, 682 So.2d 556 (Fla. 1996). In the present case, the court certified the following question to be of great public importance:

> IS THE GIVING OF A STANDARD JURY INSTRUCTION WHICH INACCURATELY DEFINES A DISPUTED ELEMENT OF A CRIME FUNDAMENTAL ERROR IN ALL CASES EVEN WHERE THE EVIDENCE OF GUILT IS OVERWHELMING AND THE PROSECUTOR HAS NOT MADE THE INACCURATE INSTRUCTION A FEATURE OF HIS ARGUMENT?

The issue of whether the trial court erred by not allowing the jury to see the child's wounds two years after the fact is not within the scope of the certified question nor is it even remotely related. For this reason the State requests this Court to decline addressing the issue.

Second, even if the court deems it proper to address this issue, the Petitioner's claim is without merit.

The court below thoroughly explained its reasoning in holding that the trial court did not abuse its discretion in

declining Petitioner's request to show the jury the victim's wounds two-years after the fact:

> FAILURE TO ALLOW JURY TO VIEW CURRENT INJURIES:
> The state's second-amended information alleged that between May 1 and October 29, 1997, appellant did "commit an aggravated battery upon and/or willfully torture or maliciously punish" the victim, a child under age 18, by repeatedly hitting her with a stick and/or an electrical cord." (FN1) The trial took place 19 to 24 months after the window period in which the offense had been committed. During the state's case, a detective's photographs of wound marks on the victim's back, leg, buttocks, and side (taken very soon after the injuries had been inflicted and reported to the authorities) were entered in evidence without an objection. Noting the amount of time that had elapsed since the occurrence of the injuries, defense counsel asked that the jury be allowed to view the current appearance of the victim's back and body. The defense's strategy was that if the injuries from the whipping were no longer visible, or were barely visible, this would constitute exculpatory evidence on the disputed issue of the severity and permanency of the wounds. The state objected to a current viewing on the ground that requiring the child to reveal her wounds to a jury of strangers would be traumatic and would constitute an unwarranted invasion of her right to privacy. Alternatively, the state asserted that neither a live viewing nor the taking and disclosure of current photographs of the wounds were appropriate or necessary, in that the victim's treating physician would testify that the wound marks observable in the state's earlier photos had "almost completely" faded. The defense's request, which was renewed at the beginning of its own case over the state's objection, was denied. The court also declined a defense request to inform the jury that the court had refused to allow a current physical display or photographic viewing of the wounds.
>
> A trial court's ruling on the admissibility of evidence is subject to the abuse of discretion standard of review, see Sexton v. State, 697 So.2d 833, 837 (Fla.1997), and comes to this court clothed with a presumption of correctness. See Savage v. State, 156 So.2d 566, 568 (Fla. 1st DCA 1963). Appellant concedes that "[t]here is no general constitutional right to discovery in a criminal

> case." Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). She acknowledges also that witnesses for the state are protected by article I, sections 12 ("searches and seizures") and 23 ("right of privacy") of the Florida Constitution. See State v. Brewster, 601 So.2d 1289 (Fla. 5th DCA 1992). We conclude that appellant has not met her burden of demonstrating that the refusal to allow a current viewing or current photographs of the victim's wounds constituted "prejudicial error." § 924.051(7), Fla. Stat. (1997). Here, the victim was not a witness. The state correctly asserts that a current viewing or current photographic evidence of the injuries showing that the wounds had faded was not relevant to the question of whether the injuries had occurred. As no contrary evidence was presented, such evidence was not needed to impeach. Assuming for the sake of argument that a current viewing would have been relevant, we would still conclude that, absent a showing that "strong or compelling reasons" existed for the jury to be permitted to view the current wounds, the trial court properly found no basis for requiring a viewing. See State v. Smith, 260 So.2d 489 (Fla.1972) (holding trial court lacked authority to order witnesses, who might be used by the state to identify persons involved in perpetration of crime alleged to have been committed by defendants, to be examined for visual acuity by specified physician prior to trial); State v. Kuntsman, 643 So.2d 1172 (Fla. 3d DCA 1994) (holding that trial court departed from essential requirements of law by ordering prosecution witnesses to view array of 38 photographs and then be questioned about photos during the course of criminal depositions where defense had failed to present strong or compelling reasons for discovery order). The refusal to allow a current viewing did not in any manner impinge upon appellant's constitutional right to due process. See Fuller v. State, 669 So.2d 273 (Fla. 2d DCA 1996); State v. Farr, 558 So.2d 437 (Fla. 4th DCA 1990). Furthermore, the requested viewing would have merely corroborated the testimony of appellant's pediatrician that the child's wounds had almost completely faded.

Reed v. State, No. 1D99-2562 (Fla.App. 1 Dist. May 1, 2001).

The First District Court's thorough analysis clearly refutes Petitioner's claim. Accordingly, Petitioner is not entitled to review on this issue, let alone, relief.

## ISSUE II

IS THE GIVING OF A STANDARD JURY INSTRUCTION WHICH INACCURATELY DEFINES A DISPUTED ELEMENT OF A CRIME FUNDAMENTAL ERROR IN ALL CASES EVEN WHERE THE EVIDENCE OF GUILT IS OVERWHELMING AND THE PROSECUTOR HAS NOT MADE THE INACCURATE INSTRUCTION A FEATURE OF HIS ARGUMENT?

The state below erroneously conceded error because it failed to note that the statement in Young re fundamental error did not control the disposition of the case and, thus, was dicta. This constitutes sloppy lawyering, for which the state apologizes, but it does not constitute reversible error. Further, as the district court found, the element in question was not controverted and was overwhelmingly shown by the evidence itself.

In the court below, Reed v. State, No. 1D99-2562 (Fla.App. 1 Dist. May 1, 2001), the First District Court held: “[w]e affirm based upon Appellant's failure to preserve the issue for appellate review but certify a question of great public importance as to this issue.” The court also reviewed the error and determined that it was harmless in any event because the legal malice of the defendant was uncontroverted based on the overwhelming evidence. The court reasoned as follows:

> GIVING AN ERRONEOUS JURY INSTRUCTION ON AN ESSENTIAL ELEMENT
>
> The statute under which appellant was charged states, in pertinent part:
>
> (2) "Aggravated child abuse" occurs when a person:
>
> (a) Commits aggravated battery on a child;

(b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or

(c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.

§ 827.03(2), Fla. Stat. (1997). The state's charging instrument essentially tracked subsections (2)(a) and (2)(b).

The standard jury instruction for this crime states, " 'Maliciously' means wrongfully, intentionally, without legal justification or excuse." Fla. Std. Jury Instr. (Crim.) 227. In Young v. State, 753 So.2d 725 (Fla. 1st DCA 2000), we held that the standard jury instruction did not adequately define malice because it did not state that to find the defendant guilty, it must be determined that the accused " 'actually harbored' ill will, hatred, spite or an evil intent." Id. at 729. Unlike the defendant in Young, however, the defendant in this case did not object to the incomplete instruction. (FN2)

In the instant case, the judge instructed the jury in accordance with the standard jury instruction which had been adopted by the supreme court, and he was never alerted to a potential problem with that instruction. The instruction which was read, while overly inclusive, did not totally fail to address the element of malice, and there is no allegation that the prosecutor misused the inaccurate instruction in closing argument.

Fundamental error in a criminal case has been described as "error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Barnes v. State, 743 So.2d 1105, 1108 (Fla. 4th DCA) (quoting Kilgore v. State, 688 So.2d 895 (Fla.1996)), rev. denied, 744 So.2d 457 (Fla.1999). Challenges to an inaccurate or erroneous instruction must be preserved for appeal. See State v. Delva, 575 So.2d 643, 644-645 (Fla.1991);see also Archer v. State, 673 So.2d 17, 20 (Fla.1996); Geralds v. State, 674 So.2d 96, 98-99 n. 6 (Fla.1996); Tolbert v. State, 679 So.2d 816, 818 (Fla. 4th DCA 1996) (en banc). Even alleged errors in instruction that are asserted to mislead the jury concerning an element

of the crime must be preserved for appeal. See Auger v. State, 725 So.2d 1178, 1178-79 (Fla. 2nd DCA 1998); see also Smith v. State, 772 So.2d 625 (Fla. 4th DCA 2000). But see Hubbard v. State, 751 So.2d 771, 772 (Fla. 5th DCA 2000). If the challenged instructions define either a nonexistent crime or totally fail to address an element of a crime, the alleged error may be considered to be fundamental. See Mosely v. State, 682 So.2d 605, 606 (Fla. 1st DCA 1996) (holding that instructing jury on nonexistent crime constituted fundamental error); Mercer v. State, 656 So.2d 555, 556 (Fla. 1st DCA 1995) (holding that failing to instruct on an essential element of a crime constituted fundamental error). The instant case involves an alleged inaccurate definition of an element of a crime rather than a total failure to address a necessary element.

Appellant relies heavily on language in Young which indicated that giving an inaccurate definition of the term "maliciously" constituted fundamental error. See Young, 753 So.2d at 727. This language was dicta. (FN3) This court specifically stated in Young that the issue "was adequately preserved for appellate review." Id. The two cases cited in Young for the proposition that giving an incorrect instruction on an element of a crime constitutes fundamental error--Mercer and Steele v. State, 561 So.2d 638 (Fla. 1st DCA 1990)--are factually distinguishable from this case and do not stand for the general proposition that the Young court stated. (FN4)

**While we understand the dissent's concern (as well as the Young court's concern) about a person being wrongfully convicted of aggravated child abuse without proof that he or she harbored "ill will, hatred, spite or an evil intent," in the instant case such concerns are not well founded. The facts at issue here reveal repeated serious injuries to the child; testimony from teachers, HRS investigators, and the school nurse about the serious nature of those injuries; testimony from an expert in pediatrics that the injuries were consistent with abuse and not accidental; and the defendant's admission generally to abuse as well as her admission concerning the use of foreign objects and hitting the child when she was angry. There was also evidence of repeated lying and coverup**

**concerning the nature and cause of the child's injuries.** [e.s.]

In cases where there is some evidence that an innocent person may have been convicted or the prosecutor has misused the improper instruction, application of the doctrine of fundamental error to the giving of inaccurate jury instructions may be justified. An across-the-board rule is unnecessary, however, and may cause disruption within the court system. (FN5) In this case, utilization of the doctrine of fundamental error is simply not justified in light of the overwhelming evidence of guilt and lack of evidence that the inaccurate instruction was misused. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986). We recognize that the language we are utilizing may be indicative of a harmless error analysis; however, such language has often been used in the context of determining whether an error is fundamental.

We also conclude that even if the error in this case were determined to be fundamental, any such error would be harmless. Both the supreme court and this court have determined that even fundamental error may in fact be harmless. See State v. Clark, 614 So.2d 453, 454 (Fla.1993); Mincey v. State, 684 So.2d 236, 239 (Fla. 1st DCA 1996). In the recent case of Stephens v. State, 26 Fla. L. Weekly S161 (Fla. Mar. 15, 2001), the supreme court reaffirmed the principle that the quantum of evidence supporting the defendant's guilt should be a major factor in determining whether an error was harmless. See Id. at 164 ("Weighing all the evidence in this case and considering the overwhelming evidence of guilt, we find the trial judge acted within his discretion, and any potential error was harmless."). In light of the overwhelming evidence of guilt and the fact that the prosecutor did not misuse the incorrect instruction, we are convinced beyond a reasonable doubt that any jury instruction error in the case is harmless. We therefore affirm.

We are aware, however, that certain cases cited by the dissent may suggest that fundamental error occurs any time an element of a crime is inaccurately defined for the jury. While we reject the proposition that these cases stand for such an inflexible rule, in order to avoid confusion, we certify the following question to be one of great public importance:

IS THE GIVING OF A STANDARD JURY INSTRUCTION WHICH INACCURATELY DEFINES A DISPUTED ELEMENT OF A CRIME FUNDAMENTAL ERROR IN ALL CASES EVEN WHERE THE EVIDENCE OF GUILT IS OVERWHELMING AND THE PROSECUTOR HAS NOT MADE THE INACCURATE INSTRUCTION A FEATURE OF HIS ARGUMENT?

The standard jury instruction for Aggravated Child Abuse defines one of the elements, " 'Maliciously' means wrongfully, intentionally, without legal justification or excuse." Fla. Std. Jury Instr. (Crim.) 227. In Young v. State, 753 So.2d 725 (Fla. 1st DCA 2000), the First District Court held that the standard jury instruction did not adequately define malice because it did not state that to find the defendant guilty, it must be determined that the accused " 'actually harbored' ill will, hatred, spite or an evil intent." Id. at 729. The Young court found that the erroneous instruction constituted fundamental error.

Petitioner adopts Judge Browning's dissent, in which he advocates, first, that the court must accept the State's concession of error even if the court does not find error; second, that an erroneous jury instruction is per se reversible error not subject to a harmless error analysis; and third, that a court may not sua sponte conduct a harmless error analysis. Well-founded legal precedent contradicts Judge Browning's arguments.

CONCESSION OF ERROR:

Judge Browning, in his dissent, says that the majority in the court below did not have discretion to reject the State's

concession of error. That argument simply is without merit. It is also inconsistent with Judge Browning's vote in e.g., Harvey v. State, 26 Fla. L. Weekly D554, (Fla. 1st DCA 2001), review pending, SC01-1139.

In the court below, Reed v. State, No. 1D99-2562 (Fla.App. 1 Dist. May 1, 2001), the State conceded error in response to the First District Court's order directing the State to file a supplemental answer brief addressing the issue "Whether the trial court's giving the standard jury instruction for aggravated child abuse, without a timely objection from the defense to preserve the issue, constitutes fundamental error, where the instruction given failed to instruct the jury on a disputed element of the crime charged." However, there is a disparity between the question the court posed and the actual finding by the majority in the court below, Reed v. State, No. 1D99-2562 (Fla.App. 1 Dist. May 1, 2001): "The instant case involves an alleged inaccurate definition of an element of a crime rather than a total failure to address a necessary element." Id. at 8. Therefore, the court was justified in refusing to accept a concession of error based on a question that assumes facts which differ from the court's actual findings.

Furthermore, the majority thoroughly addressed the dissent's argument regarding concessions in footnote 2 of the decision below:

> The dissent criticizes this court for failing to accept the state's concession but cites to no authority requiring us to do so.
>
> In fact, it has been the sound practice of Florida's courts to not accept improper concessions by the state. See, e.g., Gomez v. State, 684 So.2d 879 (Fla. 4th DCA 1996); Fichera v. State, 688 So.2d 453 (Fla. 1st DCA 1997); Prieto v. State, 627 So.2d 20 (Fla. 2nd DCA 1993). As Judge Cowart said in his dissent in Matson v. State, 445 So.2d 1121, 1122 (Fla. 5th DCA 1984), "a conclusory concession as to judicial error below, made by a party on appeal, is a most unsatisfactory and dangerous basis for appellate judicial action." In fact, the supreme court has recognized that an inappropriate acceptance of a concession of error by the state can lead to an announcement of an erroneous statement of the law. See Strickland v. State, 437 So.2d 150, 151-52 (Fla.1983).
>
> In addition, we have a constitutional and statutory duty not to accept an inappropriate concession (which concession may come from a young inexperienced lawyer) which might be to the detriment of the victims of crime and/or to the people of the State of Florida. See § 924.051(3), Fla. Stat. (1997)(specifically stating: "[A] judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved...."). We decline to abrogate our responsibilities in this area.

Reed v. State, No. 1D99-2562, FN 2 (Fla.App. 1 Dist. May 1, 2001).

Finally, the dissent in the case below, claims that the majority erred by relying on Heuss v. State, 687 So.2d 823 (Fla. 1996) in refusing the state's concession and doing its own sua sponte harmless error analysis. However, in Heuss, this court affirmed that there is no law that prohibits an appellate court from applying the harmless error test on its own when the State fails to make the argument, adding:

> In Ciccarelli we stated that "if the state has not presented a prima facie case of harmlessness in its argument, the court need go no further." 531 So.2d at 131 (emphasis added). This language is permissive. While the language does not require the courts to apply the harmless error test, it does not prevent them from doing so. The court must still be able to conclude beyond a reasonable doubt, after evaluation of the impact of the error in light of the overall strength of the case and the defenses asserted, that the verdict could not have been affected by the error. See Ciccarelli, 531 So.2d at 132.

Heuss v. State, 687 So.2d 823, 824 (Fla. 1996).

Thus, prevailing law and Judge Browning's own subsequent decisions do not support his position that a court must accept concession of error.

FUNDAMENTAL ERROR:

Next, the dissent disputes the majority's finding that the standard jury instruction for aggravated child abuse given in this case did not constitute fundamental error and is subject to the harmless error analysis. Judge Browning's dissent advocates finding that, despite the totality of the circumstances of a case, if the standard jury instruction at issue was used, then it was fundamental error and thus, per se reversible error. Here again, prevailing precedent opposes such a determination.

Fundamental error has been defined as one that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process. Kilgore v. State, 688 So.2d 895 (Fla.1996) (citing Davis v. Zant, 36 F.3d

1538, 1545 (11th Cir.1994)); Rodriguez v. State, 462 So.2d 1175, 1177 (Fla. 3d DCA 1985), review denied, 471 So.2d 44 (Fla.1985); Castor, 365 So.2d at 704 n. 7.

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) this court solidified its position that "per se reversible" should only be applied to those errors which are "always harmful" :

> The dissenters apparently believe that the rule of harmless error cannot cope with comments on post-arrest silence or failure to testify and that only a per se rule will suffice. This view ignores the far-ranging application of the harmless error rule and does not recognize that a per se rule is nothing more than a determination that certain types of errors are always harmful, i.e., prejudicial. Per se reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23, 87 S.Ct. at 827-28. In other words, those errors which are always harmful. The test of whether a given type of error can be properly categorized as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible. If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless. See for example, Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); United States v. Mechanik, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986); United States v. Lane, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986).
>
> The unique and only function of the rule of per se reversal is to conserve judicial labor by

obviating the need to apply harmless error analysis to errors which are always harmful. It is, in short, a rule of judicial convenience. The unique function of the harmless error rule is to conserve judicial labor by holding harmless those errors which, in the context of the case, do not vitiate the right to a fair trial and, thus, do not require a new trial. Correctly applied in their proper spheres, the two rules work hand in glove. Both provide an equal degree of protection for the constitutional right to a fair trial, free of harmful error.

In Florida, we have adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is "fairly susceptible" of being interpreted as a comment on silence will be treated as such. Kinchen; David v. State, 369 So.2d 943 (Fla.1979). One authority has said that "[c]omments or arguments which can be construed as relating to the defendant's failure to testify are, obviously, of almost unlimited variety." (FN11) The "fairly susceptible" test treats this variety of arguable comments as comments on silence. We are no longer only dealing with clear-cut violations where the prosecutor directly comments on the accused's silence and hammers the point home as in Rowe v. State, 87 Fla. 17, 98 So. 613 (1924). Comments on silence are lumped together in an amorphous mass where no distinction is drawn between the direct or indirect, the advertent from the inadvertent, the emphasized from the casual, the clear from the ambiguous, and, most importantly, the harmful from the harmless. In short, no bright line can be drawn around or within the almost unlimited variety of comments that will place all of the harmful errors on one side and the harmless errors on the other, unless the circumstances of the trial are considered. We must apply harmless error analysis to the "fairly susceptible" comment in order to obtain the requisite discriminatory capacity.

The combination of the fairly susceptible test and the harmless error rule is a happy union. It preserves the accused's constitutional right to a fair trial by requiring the state to show beyond a reasonable doubt that the specific comment(s) did not contribute to the verdict. At the same time, it preserves the public and state interest in finality of verdicts which are free of any harmful error. In view of the heavy burden the harmless error rule

> places on the state, it further serves as a strong deterrent against prosecutors advertently or inadvertently commenting on an accused's silence. It cannot be rationally argued that commenting on an accused's silence is a viable strategy for obtaining convictions. By contrast, a union of the fairly susceptible test and the rule of per se reversal is pernicious in that the former has little, if any, discriminatory capacity and the latter has none. The union which the dissenters urge substitutes mechanics for judgment in the style of nineteenth century English and American appellate courts where error, no matter how harmless, equaled reversal.

Id. at 1135-1136. Furthermore, this court has not found that erroneous jury instructions, without more, are always harmful. See Archer v. State, 673 So.2d 17 (Fla. 1996); Walls v. State, 641 So.2d 381 (Fla. 1994). This Court has long advocated the more logical "totality of the circumstances" approach indicative of the harmless error analysis over the more inflexible and isolated per se reversible approach. See Scoggins v. State, 726 So.2d 762 (Fla. 1999).

In the case below, Reed v. State, No. 1D99-2562 (Fla.App. 1 Dist. May 1, 2001), the majority held:

> In this case, utilization of the doctrine of fundamental error is simply not justified in light of the overwhelming evidence of guilt and lack of evidence that the inaccurate instruction was misused. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Id. at 9-10. The majority below explained that the erroneous standard jury instruction "while overly inclusive, did not totally fail to address the element of malice, and there is no indication that the prosecutor misused the inaccurate instruction in closing argument." Id. at 7. The court

explained that under the totality of the circumstances the erroneous instruction was harmless in this case:

> The facts at issue here reveal repeated serious injuries to the child; testimony from teachers, HRS investigators, and the school nurse about the serious nature of those injuries; testimony from an expert in pediatrics that the injuries were consistent with abuse and not accidental; and the defendant's admission generally to abuse as well as her admission concerning the use of foreign objects and hitting the child when she was angry. There was also evidence of repeated lying and coverup concerning the nature and cause of the child's injuries.

Id. at 9. The court distinguished the facts of the instant case from those relied on by Young ultimately concluding:

> In light of the overwhelming evidence of guilt and the fact that the prosecutor did not misuse the incorrect instruction, we are convinced beyond a reasonable doubt that any jury instruction error in this case is harmless.

Reed v. State at 10-11.

Adopting the per se reversible error argument in this case and all cases where the standard instruction for aggravated child abuse was given, despite the circumstances, would create the very harms that DiGuilio was striving to guard against.

In summary, the dissent's argument, adopted by Petitioner, that the court should not refuse to accept the State's concession of error is meritless for the following reasons: One, there is disparity between the question the state was asked to addressed which inferred that the court failed to given an element of the instruction versus the court's finding that the element was not totally defined; second, there is a

duty on courts not to accept improper concessions and to ensure that reversal is based on prejudicial error; and third, Judge Browning, in a subsequent case, negated this argument by concurring with the court's refusal to accept the States concession of error.

Most importantly, it is well established law that per se reversible error is very narrowly applied to those errors which are always harmful. This court has long favored the harmless error analysis whereby a court reviews the totality of the circumstances.

Therefore, because the error at issue is not always harmful, the majority did not error by finding, based on the totality of the circumstances, that giving an inaccurate instruction in this case was not fundamental error because there was overwhelming evidence of guilt, and the inaccurate instruction was not made a feature of the argument.

## CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal, Reed v. State, No. 1D99-2562 (Fla.App. 1 Dist. May 1, 2001), should be approved, and the conviction entered in the trial court should be affirmed.

## SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jamie Spivey, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on 10 August 2001.

Respectfully submitted and served,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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