IN THE SUPREME COURT OF FLORIDA

LORETTA REED,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC01-1238

# RESPONDENT'S AMENDED SUPPLEMENTAL ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

SHERRI T. ROLLISON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 128635

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## 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 State accepts Petitioner's statement of the facts subject to the inclusion of the following relevant facts:

1. In the court below, Reed v. State, 783 So.2d 1192 (Fla. 1ST DCA 2001), the State did not concede error in its answer brief. However, the State did concede error (not fundamental error) in response to the First District Court's order 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." The majority in the court below, found, "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. The court refused to accept the States concession of error.

2. As to Issue One, the First District Court, Reed v. State, 783 So.2d 1192 (Fla. 1ST DCA 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, Reed v. State, 783 So.2d 1192 (Fla. 1ST DCA 2001) 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 reasoned:

> 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

Precedent solidified by State v. DiGuilio, 491 So.2d 1129 (Fla.1986), and clearly relied on in Morris v. State, 557 So.2d 27 (Fla. 1990), dictates that even if the malicious intent instruction was given in error, the error is not fundamental. Morris v. State, represents precedential authority that an erroneous instruction on the intent element of an offense is not fundamental error because it is not always harmful and because it does not necessarily render a criminal trial fundamentally unfair. Furthermore, in Morris the court looked at the totality of the circumstances in determining that the error was harmless.

Likewise, the standard jury instruction on malicious intent in the instant case, even if found to be inaccurate, is not fundamental error because it is not always harmful and because it did not necessarily render the criminal trial fundamentally unfair.

Looking at the totality of the circumstances, the reading of the standard jury instruction was harmless because there was overwhelming evidence of malicious intent as defined in Gaylord v. State, 356 So.2d 313 (Fla. 1978). Moreover, the prosecutor did not mention the erroneous definition.

## ARGUMENT

**ARGUMENT IN RESPONSE TO THIS COURT'S ORDER TO FILE SUPPLEMENTAL BRIEFS ADDRESSING MORRIS V. STATE, 557 So.2d 27, 29 (Fla. 1990).**

The State, consistent with the position asserted at oral argument, maintains that the standard jury instruction defining malicious intent for aggravated child abuse is correct. However, even if the definition given to the jury was incorrect, Morris v. State, 557 So.2d 27 (Fla. 1990), represents precedential authority that an erroneous instruction on the intent element of an offense is not fundamental error and depending on the totality of the circumstances may be harmless error.

MORRIS v. STATE

In Morris v. State, 557 So.2d 27 (Fla. 1990), Morris was charged with felony murder by aggravated child abuse. The Jury instruction on aggravated child abuse should have read:

> 1) Morris willfully tortured Matthew [the victim];
> or 2) intentionally struck him and in the process thereof, intentionally caused him great bodily harm; and
> 3) Matthew was a child.

Id. at 29. This instruction reflected the statutorily required mental state of intent to cause great bodily harm. Instead, the Jury instruction actually given, erroneously informed the jury that it could find Morris guilty of first-degree murder by aggravated child abuse if it found that

Morris intentionally struck the child, in other words if the underlying offense was simple battery. This incorrect instruction stated:

> 1) Morris willfully tortured Matthew; or
>
> 2) intentionally struck him; or
>
> 3) intentionally caused him great bodily harm; and
>
> 4) Matthew was a child.

Id. at 29. Morris did not object to the erroneous instruction.

On appeal, Morris argued that the error was fundamental. This Court held that giving the incorrect instruction was not fundamental error and further explained its reasoning for finding the error harmless:

> The medical examiner testified that his examination of Matthew showed the following evidence of recent abuse: his penis had been tightly encircled with tape and then taped to his abdomen; he had massive bruising on his buttocks; his liver had been lacerated from a blow; he had numerous bruises on his head and a fractured skull; he had neck injuries indicating strangulation. The liver, head, and neck injuries each may have been fatal. Given the evidence of extensive recent abuse, we conclude that there is no reasonable possibility that the jury could have determined that Morris intended only to strike Matthew rather than to hurt him seriously.

> We hold the error harmless under State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Id. at 29.

This court also found that the Morris trial court erred in instructing the jury on felony murder by trafficking when the only evidence of such an offense was the Defendant's own statements. Nevertheless, this court in holding that the error was harmless, explained:

> However, we find the error harmless here where all parties agree that Morris' in-court account was patently unbelievable and there is no reasonable possibility that the jury returned its verdict based upon the erroneous trafficking instruction.

Id. at 29.

NONFUNDAMENTAL ERROR:

Morris lends further credence to the State's position that even if the court finds the jury instruction on malicious intent given in the instant case to be "overly inclusive,"[1] it does not constitute fundamental error because it is not always harmful[2]. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

---

[1] The court below found that the error was not fundamental because "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.

[2] See Respondent's Notice of Supplemental Authority: Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827, 1833-1835 (1999)(an instruction that omits an element of the offense is not fundamental error because it does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence therefore, the harmless-error analysis has often been applied to cases

HARMLESS ERROR:

Morris also reflects once error is deemed nonfundamental, the harmless error analysis is applied. In the instant case, the court below, Reed v. State, 783 So.2d 1192 (Fla. 1ST DCA 2001), explained that under the totality of the circumstances the erroneous instruction was harmless in this case because the record contained overwhelming evidence of malicious as defined in Gaylord v. State, 356 So.2d 313 (Fla. 1978)[3]:

> 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.

Reed v. State at 9. Furthermore, the definition given in the instruction was not argued or misused by the prosecutor.

SUMMARY

Thus, precedent solidified by DiGuilio, and clearly relied on in Morris, dictates that even if the malicious intent instruction was given in error, the error is not fundamental because it is not always harmful and because it does not

---

involving improper instructions on a single element of the offense.)

[3] In Gaylord v. State, 356 So.2d 313 (Fla. 1978), this court stated: "Malice means ill will, hatred spite, an evil intent."

necessarily render a criminal trial fundamentally unfair. Furthermore, the error is harmless because of the overwhelming evidence of malicious intent in this case and the fact that the prosecutor did not mention the erroneous definition.

## CONCLUSION

Based on the foregoing, the State respectfully submits that the standard jury instruction reflects the correct definition of malicious intent in the context of aggravated child abuse. However, if the standard instruction is found to be inaccurate, the State submits that the certified question should be answered in the negative, the decision of the District Court of Appeal, Reed v. State, No. 783 So.2d 1192 (Fla. 1ST DCA 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 January 22, 2002.

Respectfully submitted and served,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL


_____
JAMES W. ROGERS
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 325791

_____
SHERRI T. ROLLISON
Assistant Attorney General
Florida Bar No. 128635

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)


[AGO# L01-1-8597]

## CERTIFICATE OF COMPLIANCE

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

_____
Sherri T. Rollison
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

LORETTA REED,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. SC01-1238

APPENDIX

Morris v. State, 557 So.2d 27 (Fla. 1990)

[T:\BRIEFS\Briefs - pdf'd\01-1238_suppAns.wpd --- 1/23/02,4:41 PM]