IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-379
L.T.No. 4D98-4341

WILLIE RAFORD,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Bureau Chief, West Palm Beach
Florida Bar No. 656879

MELYNDA L. MELEAR
Assistant Attorney General
Florida Bar No. 765570
1655 Palm Beach Lakes Blvd.,
Third Floor
West Palm Beach, Florida 33401
(561) 688-7759

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PRELIMINARY STATEMENT

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Petitioner, WILLIE RAFORD, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings. The symbol "A." designates the Appendix, which contains a copy of the Fourth District's opinion in this case.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts, but makes the following clarifications and additions:

1. Petitioner was alleged to have acted willfully and maliciously in striking the victim repeatedly on the leg, buttocks, and back (R. 4).

2. Juan Lara, Sr., testified that when he picked up his son, the victim, for visitation on January 4, the victim had black and blue bruises on his buttocks, legs and lower back (T. 230-232). He identified the marks in photographs (T. 232-233).

3. The victim testified that Petitioner hit him when he was at a party at his cousin's house because he pooped in this pants (T. 241). He said that Petitioner struck him with a belt on his butt, back, and leg (T. 241-242). He said that it hurt, and that he cried (T. 242).

On cross-examination, the victim said that he was not playing with a telephone on that day; his brother was (T. 244).

4. J.L., Jr., the victim's brother, testified that he saw Petitioner and the victim go into a room when they were at their cousin's house (T. 248). He said that he heard the victim scream (T. 248). He stated that the victim later showed him bruises (T. 248, 251).

5. Detective Robert Cerak testified that he took photographs

of the victim at around 12:35 on January 4 (T. 252-253). The photographs were admitted into evidence (T. 253-254). The trial court noted, outside the presence of the jury, that the photographs depicted contusions in the left upper back, the left buttocks, and the left leg (T. 275). The prosecutor noted that there was a ruler used in the photos to indicate the size of the injuries (T. 298).

6. Detective Kenneth Kaminsky testified that he interviewed Petitioner, and Petitioner told him that he hit the victim with a belt two or three times (T. 263).

7. The extent of Petitioner's motion for judgment of acquittal was that he did not feel that the State had shown evidence that he acted maliciously, with the intent to see the victim suffer (T. 274, 278).

8. At the charge conference, defense counsel told the trial court that there were two lesser included offenses, child abuse and misdemeanor battery (T. 278). In going over the elements of the "lesser offense of child abuse," defense counsel told the trial court that he thought it had to include the portion of the instruction on great bodily harm, even though the trial court had suggested that it did not apply (T. 279-280). Defense counsel then inquired about the definition of great bodily harm (T. 282). He asked that the trial court read all three categories of this portion of the instruction: great bodily harm, permanent disability, or permanent disfigurement (T. 281-282).

9. In closing argument, defense counsel told the jury that malicious means without justification or excuse (T. 291). He then stated that Petitioner felt that discipline was needed and that corporal punishment was appropriate (T. 291). He said that how Petitioner might have handled the situation differently was not an issue in this case (T. 291).

Defense counsel told the jury that before it could find the lesser offense of child abuse, it would have to find great bodily harm, permanent disability or permanent disfigurement (T. 295). In rebuttal, defense counsel again told the jury that it had to consider permanent disfigurement, permanent disability, and great bodily harm (T. 316).

10. Defense counsel did not object to the trial court's instructions to the jury (T. 318).

11. When the jury asked for definitions of "without legal justification or excuse" and of "great bodily harm," the parties searched for possible definitions (T. 330, 332-333). They Shepardized the statutes in question, and discovered that the trial court had read the elements of aggravated child abuse as a lesser included offense because of the inclusion of great bodily harm, permanent disability, or permanent disfigurement (T. 334-337).

The trial court suggested that it give the jury a correct statement of the law on the lesser included offense, but defense counsel was worried that it would obviate his argument (T. 337).

Defense counsel asked the trial court to tell the jury to refer to the law and just send the case back, or start the whole thing over (T. 337). When the trial court said that it did not see any reason to have to start the whole case over, defense counsel clarified that he meant if the trial court was reinstructing the jury (T. 337). The trial court said that decision was not final, to which defense counsel said, "They've heard the law on the case and that's the law" (T. 337). Defense counsel agreed that the trial court should tell the jury to follow the law as contained in the final instructions (T. 338).

The prosecutor said that they would thereby be asking the jury to find an element that was erroneously given to them (T. 338). In the discussion that followed, defense counsel finally realized that the other child abuse charge on which the jury was instructed was a second degree felony (T. 338). He then suggested that the trial court instruct the jury that the other child abuse offense was no longer a charge for consideration (T. 339). The prosecutor disagreed since the jury had already been instructed on it (T. 339). The trial court then proposed, because it felt that instruction on child abuse was warranted but that the parties had all relied on an additional element, that if the jury found Petitioner guilty of the alternative child abuse, then it would be considered a third degree felony (T. 340).

The trial court reasoned that the elements of aggravated child

abuse under this theory and simple child abuse were the same except for the extent of injury (T. 340). It said that it could not just tell the jury to disregard the additional element, as requested by the State, because defense counsel had relied heavily on it in his argument (T. 341). Defense counsel stated, "I would have a hard time saying I was prejudiced by that one." (T. 340). He told the trial court that if it just told the jury that what it instructed them on was the law, "that's fine with us" (T. 341-342). Defense counsel did not object when the trial court told the jury that it would have to rely on the instructions previously given to it (T. 342).

SUMMARY OF THE ARGUMENT

Point I

Petitioner was properly convicted in this case. Any parental privilege in using corporal punishment did not apply to the facts of this case because Petitioner used excessive punishment.

Point II

Petitioner’s child abuse conviction should stand. Petitioner failed to preserve this issue for appeal because he did not object below on the ground asserted on appeal. In fact, defense counsel told the trial court that child abuse was a lesser included offense. Felony child abuse was properly considered a lesser included offense in this case.

Point III

The trial court did not reversibly err in instructing the jury. Petitioner failed to preserve this issue for review. Petitioner asked for the portion of the instruction later deemed erroneous, and then affirmatively agreed to the trial court’s resolution. Petitioner was not prejudiced by the trial court’s decision.

ARGUMENT

POINT I

PETITIONER'S CHILD ABUSE CONVICTION SHOULD STAND, FOR HIS ACTIONS WERE NOT PRIVILEGED.

Standard of Review

The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. James v. State, 695 So. 2d 1229, 1236 (Fla. 1997). This same standard applies with regard to the trial court's decision on what a supplemental instruction should be. See Henry v. State, 359 So. 2d 864, 866 (Fla. 1978).

Discussion

Under this point, Petitioner argues that both felony child abuse and simple battery are not lesser included offenses of aggravated child abuse as charged. At the charge conference, though, defense counsel told the trial court that there were two lesser included offenses, child abuse and misdemeanor battery (T. 278). Hence, because Petitioner invited any error, he may not be heard to complain about it on appeal. See Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983).

This is especially true since he requested the jury to be instructed on simple battery. See State v. Espinosa, 686 So. 2d 1345, 1348 (Fla. 1996). In Nixon v. State, 773 So. 2d 1213, 1214 (Fla. 1st DCA 2000), the court held that the defendant was precluded

from arguing that his actions were privileged, since he requested instruction on simple child abuse. It stated that the defendant had waived the assertion of any affirmative defense.

In Ray v. State, 403 So. 2d 956 (Fla. 1981), this Court held that it was not fundamental error to convict a defendant under an erroneously given charge, where the defendant requests instruction on the lesser included offense and does not object to instruction on it. In this case, **defense counsel never argued below that felony child abuse or simple battery was not a lesser included offense of the charged aggravated child abuse.** The only thing that defense counsel noted, after the jury had already begun deliberations, was that the charge on which the jury was instructed was aggravated child abuse instead of felony child abuse. Even when he referred to his earlier general objection to any instruction on felony child abuse, he never suggested that the offense was not a lesser included offense.

Petitioner refers to the applicable Schedule of Lesser Included Offenses in arguing that felony child abuse cannot be considered a lesser included offense of malicious punishment.[1]

[1] In the subsequent Schedule of Lesser Included Offenses to the Florida Standard Jury Instructions (2001), child abuse, under the preexisting statute number, Section 827.04(1), is listed as a permissible lesser included offense of most of the subsections under the preexisting aggravated child abuse statute, Section 827.03(b)(c)(d), without the caveat of "only under certain circumstances," citing to Kama v. State, 507 So. 2d 154 (Fla. 1st DCA 1987), which it provides with the reference to simple

However, just because an offense is not listed as a lesser included offense in the schedule, does not mean that it is not a lesser included offense. See Crevitz v. State, 673 So. 2d 168, 169 (Fla. 3d DCA 1996); Barritt v. State, 517 So. 2d 65, 66 (Fla. 1st DCA 1987). After all, if someone other than a parent, or one acting as a parent figure, was alleged to have committed the acts outlined in the aggravated child abuse statute, there would be no impediment to simple battery as a lesser included offense.

Respondent maintains that the parental privilege of corporal discipline does not preclude felony child abuse by a person acting in a parental capacity either. The law will not permit a parent to use extreme measures to meet the duty of discipline and control. Bogues v. Dept. of Health and Rehab. Services, 598 So. 2d 315, 315 (Fla. 5th DCA 1992)(J. Cowart concurring specially). In Kama v. State, 507 So. 2d 154, 158-159 (Fla. 1st DCA 1987), the court stated:

> Whether in any particular case the punishment inflicted was permissible or excessive **must necessarily depend** on the age, condition, and disposition of the child, as well as the attendant circumstances. **This determination must be made by the jury under proper instruction.**

(e.a.).

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battery.

The court explained that a determination that a parent has overstepped the bounds of permissible conduct in the discipline of a child presupposes, amongst other things, that the punishment was motivated by malice, was inflicted upon frivolous pretenses, or was excessive. 507 So. 2d at 156.

The State submits that section 827.03, Florida Statutes (1997), on felony child abuse, contemplates criminal liability for excessive punishment. One cannot be found guilty under this statute unless there is a finding that he intentionally inflicted physical or mental injury, intentionally acted in a way that could reasonably be expected to result in physical or mental injury, or actively encouraged another to commit such an act. These findings are distinct from the lesser required finding under Section 784.03(1), Florida Statutes (1997), on simple battery, that one intentionally touches or strikes another against his will. While the State will agree that corporal punishment necessarily encompasses a touching against the will of a child, it will not agree that this touching necessarily involves, or is calculated to involve, physical or mental injury.

Petitioner suggests that the information did not allege the essential element of injury. Of course, this argument was never made below, and, therefore, is unpreserved for review. Nevertheless, the State submits that the information adequately placed Petitioner on notice of a possible injury element. The

information included the element of willful "torture," and described the act as having repeatedly stricken the victim with a belt on the leg, buttocks, and back (R. 4). In Nicholson v. State, 600 So. 2d 1101, 1103 (Fla. 1992), this Court defined "torture" as meaning unjustifiable "pain and suffering." Compare Overway v. State, 718 So. 2d 308 (Fla. 5th DCA 1998)(no reference to torture or description of act in question indicated).

The State argues that Wilson v. State, 744 So. 2d 1237 (Fla. 1st DCA 1999), on which Petitioner relies as holding that felony child abuse is not a lesser included offense of malicious punishment, and with which the Fourth District certified conflict, was wrongly decided for a few reasons. First, the court erroneously concluded that felony child abuse contains the same elements as simple battery. Felony child abuse, though, requires not just a showing of an unwanted touching, but a greater showing of an infliction of physical or mental injury. Hence, the reasoning of Kama v. State, 507 So. 2d 154, 158 (Fla. 1st DCA 1987), rejecting simple battery as a lesser included offense of aggravated child abuse, is not applicable.

Second, the State would advance, as the Fourth District concluded, that the felony child abuse statute, enacted after the decision in Kama, was likely designed to get around the Kama rationale. In Kama v. State, 507 So. 2d 154, 159 (Fla. 1st DCA 1987), the First District stated:

> Similarly, the trial judge properly found that misdemeanor child abuse was not a lesser included offense of aggravated child abuse in this case. Section 827.04(2), is violated when a person allows a child to be deprived of necessary food, clothing, shelter, or medical treatment, or through culpable negligence permits physical or mental injury to a child. The uncontroverted evidence in this case is that appellant *inflicted* injury upon the child, not that he "permitted" injury to the child, as contemplated by section 827.04(2). The trial court, therefore, did not abuse its discretion in refusing to instruct the jury on misdemeanor child abuse.

Notably, the court in Kama did not apply the parental privilege analysis to child abuse as it did simple battery; it merely found that the child abuse statute did not fit the facts.

While section 827.04(2) at the time of the Kama decision provided for punishment when one "permits the infliction of physical or mental injury to the child," the statute was amended after Kama to provide for punishment when one "**inflicts** or permits the infliction of physical or mental injury." See Chapter 88-151, Section 4, Laws of Florida. The State contends that the additional language included in the amendment supplied the missing factor that the Kama court obviously believed was necessary for a lesser included offense. It submits that this supplementation was intentional on the part of the legislature. See Nicoll v. Baker, 668 So. 2d 989, 990 (Fla. 1996)(court noted presumption that legislature is aware of judicial construction of statutes when it amends them); Capella v. City of Gainesville, 377 So. 2d 658, 660 (Fla. 1979)(principle of statutory construction holds that legislature intended statute to have different meaning than that

accorded to it prior to amendment). After all, the Kama decision, a seminal case in this state on the issue of the parental privilege in corporal punishment, was significant enough to be cited for reference in the Schedule of Lesser Included Offenses.

Third, the court in Wilson dangerously concluded that where "a parent has employed corporal punishment to discipline his or her minor child, . . ., the parent is exempt from prosecution under the felony child abuse statute." 744 So. 2d at 1240. This reasoning would allow a parent to freely batter a child under the name of discipline, regardless of whether the tactics used are unreasonable or injurious, as long as they are deemed to have been used to instruct, rather than to frivolously inflict pain.

However, section 827.03(2), Florida Statutes, on aggravated child abuse, does not have a subsection devoted to "excessive punishment." For this reason, the State contends that the felony child abuse statute encompasses excessive punishment, for as the court warned in Herbert v. State, 526 So. 2d 709, 712 (Fla. 4th DCA 1988), "It is apparent that there is a serious risk of "going too far" every time physical punishment is administered."

Notably, in Nixon v. State, 773 So. 2d 1213, 1215 (Fla. 1st DCA 2000), the First District explained that it did not intend its decision in Wilson to be interpreted as suggesting that child abuse by a parent is a non-existent crime. It clarified that its decision in Wilson only noted that a parent's privilege to inflict

corporal punishment may be asserted as an affirmative defense. This explanation is consistent with the Fourth District's thoughts in the present case (A. 6 n. 2). In this case, such a defense does not apply because Petitioner's conduct was excessive.

Petitioner points to proposed instructions on child abuse printed in the Florida Bar News, stating that they include a statement that felony child abuse is not a lesser included offense of aggravated child abuse when the parental privilege is involved. Of course, these proposed instructions have not been approved or adopted, and are largely advanced by the defense bar. Moreover, the State points out that in the Schedule of Lesser Included Offenses to the Florida Standard Jury Instructions (2001), child abuse, under the preexisting statute number, Section 827.04(1), is listed as a permissible lesser included offense of most of the subsections under the preexisting aggravated child abuse statute, Section 827.03(b)(c)(d), without the caveat of "only under certain circumstances," citing to Kama v. State, 507 So. 2d 154 (Fla. 1st DCA 1987), which it provides with the reference to simple battery.

POINT II

PETITIONER WAS PROPERLY CONVICTED IN THIS CASE.[2]

Standard of Review

It is well settled that a motion for judgment of acquittal should only be granted when it is apparent that no legally sufficient evidence has been submitted under which a jury could find a verdict of guilty. Toole v. State, 472 So. 2d 1174 (Fla. 1985); Lynch v. State, 239 So. 2d 44, 45 (Fla. 1974). In moving for a judgment of acquittal, the defendant admits all facts in the evidence adduced and every reasonable conclusion favorable to the prosecution that a jury might fairly and reasonably infer from the evidence. Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975); Lynch, 293 So. 2d at 45.

Discussion

Whether in any particular case the punishment inflicted was permissible or excessive is a factual issue for the jury to decide in light of the victim's age, condition, and other attendant circumstances. Lowery v. State, 641 So. 2d 489, 490 (Fla. 5th DCA 1994). In this case, the State showed that Petitioner intentionally inflicted physical and mental harm on the victim, in excess of any touching designed to serve as discipline. The evidence showed that Petitioner left the young victim in a

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[2] This point is outside the scope of the issue with which the Fourth District certified conflict (A. 5).

situation in which he was likely to get excited and have an accident, and then some time later, based on what others told him, repeatedly struck the victim with a belt, hard enough to leave bruises on the victim's back, buttocks, and leg.

Juan Lara, Sr., testified that when he picked up his son, the victim, for visitation on January 4, the victim had black and blue bruises on his buttocks, legs and lower back (T. 230-232). He identified the marks in photographs (T. 232-233). The victim testified that Petitioner hit him when he was at a party at his cousin's house because he pooped in this pants (T. 241). He said that Petitioner struck him with a belt on his butt, back and leg (T. 241-242). He said that it hurt, and that he cried (T. 242). J.L., Jr. testified that he saw Petitioner and the victim go into a room when they were at their cousin's house (T. 248). He said that he heard the victim scream (T. 248). He stated that the victim later showed him bruises (T. 248, 251).

Detective Robert Cerak testified that he took photographs of the victim at around 12:35 on January 4 (T. 252-253). The photographs were admitted into evidence (T. 253-254). The trial court noted, outside the presence of the jury, that the photographs depicted contusions in the left upper back, the left buttocks, and the left leg (T. 275). The prosecutor noted that there was a ruler used in the photos to indicate the size of the injuries (T. 298). Certainly, the jury could gleam from the photographs whether the

bruises were significant and whether they were likely to have lasted for a period of time.[3] See B.L. v. Dept. of Health and Rehab. Services, 545 So. 2d 289 (Fla. 1st DCA 1989)(evidence of long lasting bruising constituted evidence of excessive corporal punishment).

In Herbert v. State, 526 So. 2d 709 (Fla. 4th DCA 1988), the court held that there was sufficient evidence from which the jury could find that the defendant committed aggravated child abuse by striking the child a number of times with a belt on his buttocks and other body parts. The court in Lowery v. State, 641 So. 2d 489 (Fla. 5th DCA 1994) also determined that a jury issue was presented as to whether aggravated child abuse was committed by the defendant striking the child with a electrical cord three times on the buttock area. The State submits that the evidence in this case similarly allowed the jury to find that Petitioner intentionally inflicted injury on the child outside the boundaries of permissible discipline. See Honc v. State, 698 S.W. 2d 218 (Tex. App. 1985)(evidence established child abuse resulting in bodily injury where father hit fourteen year old with belt for eating candy, etc., where bruises were left on legs and buttocks).

Indeed, the court in Castro v. State, 708 So. 2d 652, 653 (Fla. 2d DCA 1998) deferred to the trial court's determination that

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[3] The photographs were made part of the supplemental record on appeal.

the defendant committed aggravated child abuse. The trial court's conclusion was based on its viewing of photographs, taken three days after the alleged abuse, which were introduced into evidence. The photos revealed extensive bruising on the child's buttocks. In this case, the photographs of the victim showed bruising not just on the buttocks, but also on the back and leg. Although they were taken one day after the abuse, the jury could have reasonably concluded that the bruises would be long lasting based on their appearance at that time.

The cases cited by Petitioner are not instructive in this case. In M.O. v. Dept. of Health and Rehab. Services, 575 So. 2d 1352 (Fla. 2d DCA 1991), the hearing officer did not base its decision that the corporal punishment was excessive based on the physical evidence. In fact, the marks on the child were described as "red marks," and not bruises. Instead, the hearing officer found that the punishment was egregious because of the use of a paddle which broke, and because the child had special needs, making him more vulnerable. The court rejected these findings, though, because the paddling had been a previously approved form of discipline in light of the child's special needs, and because the paddle broke due to its being glued together.

In J.C. v. Dept. of Children and Families,773 So. 2d 1228 (Fla. 4th DCA 2000) the only evidence of abuse was a photograph of a single bruise on the child, which was taken shortly after the

abuse. The Fourth District, therefore, stated that there was no evidence of significant bruises or welts, necessary to make a finding of temporary disfigurement. In this case, on the other hand, there were multiple bruises of significant size on the victim's buttocks, back, and leg. In addition, the photograph was taken a full day after the abuse.

Finally, in R.S.M. v. Dept. of Health and Rehab. Services, 640 So. 2d 1126 (Fla. 2d DCA 1994), the court suggested that the hearing officer's finding of excessive punishment may have been grounded on an irrebuttable presumption of abuse based on the presence of bruises lasting more than 24 hours, because it stated that it had previously disapproved this type of presumption as a denial of due process. It then stated that based on the facts before it, it could not conclude that there was abuse because the son who called the department did so because he wanted to live with his mother in another state, and that he later recanted his claim that the discipline was abuse. Here, there was evidence that the victim was screaming and crying at the time of the whacks with a belt, and that the resulting bruises were significant.

POINT III

THE TRIAL COURT DID NOT REVERSIBLY ERR IN INSTRUCTING THE JURY.[4]

Standard of Review

The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. James v. State, 695 So. 2d 1229, 1236 (Fla. 1997). This same standard applies with regard to the trial court's decision on what a supplemental instruction should be. See Henry v. State, 359 So. 2d 864, 866 (Fla. 1978).

Discussion

Petitioner argues that retrial is required because the jury was instructed on an offense other than that for which he was convicted. Respondent first contends that Petitioner did not preserve this issue for appeal. Respondent disagrees that Petitioner's general objection to the giving of instruction on simple child abuse is the same as his argument on appeal and review, that the jury was improperly instructed on this offense. Once the decision to give the instruction was made, Petitioner needed to object to any error in the proposed or given instructions. See Tolbert v. State, 679 So. 2d 816, 818 (Fla. 4th DCA 1996)(en banc). This was not done.

Rather, defense counsel, after being informed of the trial

[4] This point is outside the scope of the issue with which the Fourth District certified conflict (A. 5).

court’s intentions in instructing the jury, agreed to the instructions. He went further, over the trial court’s suggestion that the great bodily harm/permanent injury language was not applicable, and asked that the jury be instructed on this element. In other words, **defense counsel requested the language in the instruction later deemed erroneous**. By requesting the given instruction, the invited error was not fundamental. See State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994); Armstrong v. State, 579 So. 2d 734, 735 (Fla. 1991).

In going over the elements of the “lesser offense of child abuse,” defense counsel told the trial court that he thought it had to include the portion of the instruction on great bodily harm, even though the trial court had suggested that it did not apply (T. 279-280). Defense counsel then inquired about the definition of great bodily harm (T. 282). He asked that the trial court read all three categories of this portion of the instruction: great bodily harm, permanent disability, or permanent disfigurement (T. 281-282).

When the trial court read the instructions to the jury, Petitioner did not object to the instructions as given (T. 318). See Castor v. State, 365 So. 2d 701, 703 (Fla. 1978)(alleged errors in jury instructions must be timely asserted in trial court subject only to limited exception of fundamental error). Instead, he had actually anticipated theses instructions in making his closing

argument to the jury, thereby emphasizing them. Defense counsel told the jury that before it could find the lesser offense of child abuse, it would have to find great bodily harm, permanent disability or permanent disfigurement (T. 295, 316).

The issue of the given instructions including the element of aggravated child abuse was not raised until after the jury had retired and submitted questions to the court. See Rule 3.390(d), Florida Rules of Criminal Procedure (no party shall assign as error on appeal the giving of an instruction where he did not object thereto before the jury retired and where he did not distinctly state the grounds of the objection). When the jury asked for definitions of "without legal justification or excuse" and of "great bodily harm," the parties searched for possible definitions (T. 330, 332-333). They Shepardized the statutes in question, and discovered that the trial court had read the elements of aggravated child abuse as a lesser included offense because of the inclusion of great bodily harm, permanent disability, or permanent disfigurement (T. 334-337).

The trial court suggested that it give the jury a correct statement of the law on the lesser included offense, but defense counsel was worried that it would obviate his argument (T. 337). Defense counsel asked the trial court to tell the jury to refer to the law and just send the case back, or start the whole thing over (T. 337). When the trial court said that it did not see any reason

to have to start the whole case over, defense counsel clarified that he meant if the trial court was reinstructing the jury (T. 337). The trial court said that decision was not final, to which defense counsel said, “They’ve heard the law on the case and that’s the law” (T. 337). Defense counsel agreed that the trial court should tell the jury to follow the law as contained in the final instructions (T. 338).

The prosecutor said that they would thereby be asking the jury to find an element that was erroneously given to them (T. 338) In the discussion that followed, defense counsel finally realized that the other child abuse on which the jury was instructed was a second degree felony (T. 338). He then suggested that the trial court instruct the jury that the other child abuse was no longer a charge for consideration (T. 339). The prosecutor disagreed since the jury had already been instructed on it (T. 339). The trial court then proposed, because it felt that instruction on child abuse was warranted but that the parties had all relied on an additional element, that if the jury found Petitioner guilty of the alternative child abuse, then it would be considered a third degree felony (T. 340).

The trial court reasoned that the elements of aggravated child abuse under this theory and simple child abuse were the same except for the extent of injury (T. 340). It said that it could not just tell the jury to disregard the additional element, as requested by

the State, because defense counsel had relied heavily on it in his argument (T. 341). Defense counsel stated, **"I would have a hard time saying I was prejudiced by that one." (T. 340).** He told the trial court that if it just told the jury that what it instructed them to was the law, **"that's fine with us"** (T. 341-342). Defense counsel did not object when the trial court told the jury that it would have to rely on the instructions previously given to it (T. 342).

Hence, even after the issue became clear, **defense counsel affirmatively acquiesced to the given instruction.** See Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)(where trial court extends counsel an opportunity to object, but counsel fails to do so, any error is invited).

In the case of an incomplete instruction, where the defense agrees to it, the error is not fundamental. State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994); Armstrong v. State, 579 So. 2d 734, 735 (Fla. 1991). Arguably, this is also true in the case of an instruction that includes an additional element. After all, by the inclusion of great bodily harm or permanent injury, the State was required to make more of a showing than simple bodily or mental injury, increasing its burden. This fact differentiates this case from the situation where a trial court fails to instruct on an element of a crime, thereby easing the State's burden.

Regardless, fundamental error occurs only in cases "where a

jurisdictional error appears or where the interests of justice present a compelling demand for its applications." Ray v. State, 403 So. 2d 956, 960 (Fla. 1981). The instant case does not fall within this exception. First, generally, erroneous instruction on a lesser included offense is not fundamental error when the improperly charged offense is lesser in degree than the primary offense. Greene v. State, 714 So. 2d 554, 555 (Fla. 2d DCA 1998)(both primary offense and alternatively charged offense third degree felonies). In this case, Petitioner was convicted of a third degree felony instead of the second degree felony for which he was charged.

In addition, the State focused its case on the malicious punishment prong of aggravated child abuse, as noted by Petitioner. See Graves v. State, 704 So. 2d 147, 149 (Fla. 1st DCA 1997)(fundamental error did not occur in instructing jury that sexual battery could be found based on digital union or penetration where State only focused on evidence of penetration).

Moreover, failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error. Hipp v. State, 650 So. 2d 91, 93 (Fla. 4th DCA 1995); Starks v. State, 627 So. 2d 1194, 1197 (Fla. 3d DCA 1993); Evans v. State, 625 So. 2d 915, 916 (Fla. 1st DCA 1993). Here, Petitioner did not contest that he hit the victim with a belt and that bruising resulted. By finding all the elements of aggravated child abuse

marked by great bodily harm or permanent injury, the jury implicitly found bodily harm, the required element under simple child abuse.

Petitioner contends that the giving of instruction on an "uncharged offense," the bodily harm/ permanent injury aggravated child abuse, is fundamental error. However, Petitioner never objected, at any time below, that the elements of great bodily harm or permanent injury where not alleged in the information. The court in Tolbert v. State, 679 So. 2d 816 (Fla. 4th DCA 1996)(en banc) held that fundamental error did not occur when the trial court instructed on aggravated battery as a lesser included offense of sexual battery where the information did not allege great bodily harm.

Petitioner contends that inclusion of a finding of abuse based on injury to the child precluded the jury from considering the privilege of parental discipline. This is not so. The trial court having granted the State's request for instruction on felony child abuse, defense counsel could have asked for instruction on this issue, but failed to do so. He did, however, make the argument that Petitioner was privileged in striking the victim in this case. In closing argument, defense counsel told the jury that malicious means without justification or excuse (T. 291). He then stated that Appellant felt that discipline was needed and that corporal punishment was appropriate (T. 291). He said that how

Appellant might have handled the situation differently was not an issue in this case (T. 291).

The cases on which Appellant relies are distinguishable from this case. In Hubbard v. State, 751 So. 2d 771 (Fla. 5th DCA 2000), the trial court misstated the elements of both the charged offense and the lesser included offense. More significantly, the defendant was convicted and sentenced for aggravated child abuse. Here, Petitioner was convicted and sentenced for the lesser offense of simple child abuse, despite the jury finding all the elements of aggravated child abuse! Thus, the use of the term "lesser" offense was neither misleading nor prejudicial. See Key v. State,2000 WL 1824416 (Fla. 2d DCA 2000)(erroneous inclusion of "great bodily harm" as an element of felony child abuse did not prejudice defendant because it only served to make the heighten State's burden).

Other cases on which Petitioner relies do not deal with the issue of lesser included offenses, but deal with the court instructing on uncharged alternative theories of offenses. See, e.g., Abbate v. State, 745 So. 2d 409 (Fla. 4th DCA 1999); Zwick v. State, 730 So. 2d 759 (Fla. 5th DCA 1999); Gaines v. State, 652 So. 2d 458 (Fla. 4th DCA 1995).

Petitioner's contention that the jury acquitted him on any theory of aggravated battery in this case ignores that the jury actually found, by way of its verdict, all elements of the theory

of aggravated battery on which it was instructed. Regardless, Petitioner clearly was not acquitted of simple child abuse or any lesser included offenses. See generally McLaughlin v. State, 700 So. 2d 392 (Fla. 1st DCA 1997)(State may retry defendant on any lesser included offenses in instructions given at trial). Therefore, he should not be discharged under any circumstances.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, the decision of the District Court of Appeal should be affirmed, and the holding approved.

Respectfully submitted,

ROBERT BUTTERWORTH
Attorney General
Tallahassee, Florida

____

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 656879

____

MELYNDA L. MELEAR
Assistant Attorney General
Florida Bar No. 765570
1655 Palm Beach Lakes Blvd.
Third Floor
West Palm Beach, FL 33401
(561) 688-7759

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Steve Malone, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, FL 33401, on April ___, 2001.

____
Counsel for Respondent

CERTIFICATE OF TYPEFACE

Respondent certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

____
Counsel for Respondent