IN THE SUPREME COURT OF FLORIDA

RONALD NESBITT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	CASE NO. SC02-1723
STATE OF FLORIDA,	)	DCA CASE NO. 5D01-203
	)	
Respondent,	)	
	)	

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S **AMENDED** MERIT BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Ronald Nesbitt, and his wife, Dorothea, had initially discussed the loan the previous week. (T I, 17) [1] Ronald had gotten a thing in the mail and wanted to take a loan out. (T I, 17-18) Dorothea who paid all of the bills had told him that everything was all paid up-to-date, and that they had money in the bank. (T I, 18) They had both decided not to take out a loan, and it had never come up again. (T I, 18)

Ronald went ahead and took out a 2-3 year loan for $3,100 without telling Dorothea, planning to keep it a secret. (T I, 118) His job out-of-town in Cocoa Beach was winding down and he was planning to take some time off. (T I, 118-119) It was also close to Christmas. (T I, 118)

Ronald had gotten a stun gun for Dorothea's protection when he was away. (T I, 122-123) He had not said anything to Dorothea about the stun gun because she didn't think that he was going to be working any more out-of-town jobs. (T I, 123) Although Ronald had relayed his wishes to the company that he be assigned

[1]The record-on-appeal consists of five volumes. The first volume is the transcript of record containing documents filed with the Clerk, and the transcript of the sentencing hearing (R 1-89; R 90-107). Volumes two and three contain the transcript of trial (T I, 1-189; T II, 190-287). The fourth volume is a supplemental record of the transcript of the hearing on the motion to suppress (S 108-130, *viz*., 115-130). The fifth volume is a second supplement containing a transcript of voir dire (S 138-228).

local jobs, Ronald had applied to the Iron Worker's Union and knew that sometimes he would be going out of town. (T I, 123)

The Nesbitts' marriage was very rocky: they had been arguing for the better part of a year of their 3-year marriage. (T I, 119-120) This was Ronald Nesbitt's fourth marriage, although technically Dorothea Nesbitt was his third wife because Ronald had married and divorced one woman twice. (T I, 121-122) The Nesbitts had gone to a marriage counselor three to four times, with Ronald attending sessions twice. (T I, 34, 120) Based upon his previous experience marriage counselors were there to collect their $175 per hour; the counseling had not seemed to help any. (T I, 120)

The Nesbitts had decided to try to get through one week-end without arguing. (T I, 124) Ronald Nesbitt had been outside on the back patio on the morning of December 19, 1999, when Dorothea had returned from the store loudly demanding, "What the hell is this loan?" (T I, 117) Ronald walked past her back into the house, saying that he did not want to get into an argument. (T I, 117) Dorothea was yelling, screaming and cussing at him about the loan paperwork that she had found in their van, and Ronald was getting real worked up about it. (T I, 125) Ronald went over to Dorothea and went to put his hands on her arms to say "c'mon let's stop this" when Dorothea threw her arms back and started kicking at

him. (T I, 125) Ronald wanted Dorothea to stop screaming at him. (T I, 127)

Ronald did not know what made him do it but he went and got the stun gun. (T I, 125-126) Ronald pointed the taser gun at Dorothea and stunned her. (R 3; T I, 125-128) Even as Dorothea slumped to the floor, she was still cussing Ronald out, so he picked up a large pillow and threw it at her. (T I, 128) Ronald could not believe this was happening-- he just wanted Dorothea to stop yelling and screaming at him. (T I, 127-129) Ronald was shaking like a leaf, and stunned Dorothea a total of about 15 seconds, but she was still cussing at him about the money. (T I, 129-130) Ronald told Dorothea that they had to stop this; it had gotten out of hand. (T I, 129)

The entire incident had taken about two to three minutes. (T I, 130) Dorothea sat on the couch lacing up her shoes. (T I, 130) She told Ronald that she was going to go to her daughter's to get away from him. (T I, 130) Dorothea walked out the front door. (T I, 130-131) Ronald called after her to please come back and talk over things, to get it finished, end the relationship, and straighten out their lives. (T I, 130-132) Dorothea turned around and told Ronald "No" that she could not trust him. (T I, 132)

Ronald later thought that if there was some way to save this, his fourth marriage, it would be best if he did not tell the police that Dorothea kicked him first.

(T I, 134-135) For some silly, macho reason he took all of the blame for everything in his statements to the police. (T I, 135)

Nesbitt was charged by information with attempted second-degree murder with a weapon as count one, and aggravated battery with a deadly weapon as count two. (R 4-5)

On November 9-10, 2000, Nesbitt was tried by jury before the Honorable Ronald A. Legendre, Circuit Court Judge, Ninth Judicial Circuit, Osceola County. (R 19, 47-48; T I- T II)

Prior to trial the court denied the defense motion in limine to exclude Dorothea's testimony that she had been treated for heart problems earlier that year. (T I, 4-5) Defense objection to hearsay statements made by Mrs. Nesbitt on the 911 tape, attributed to the Petitioner, was overruled based upon excited utterance and admission exceptions to the rule. (T I, 8-9)

Dorothea Nesbitt testified that she found the loan paperwork in the van when she had gone to the store to get cream for the coffee. (T I, 20) When she had confronted Ronald about it he had told her that it was none of her fucking business. (T I, 21) Both Ronald and Dorothea had become very angry and Dorothea had told Ronald that she would file for divorce and put the house on the market. (T I, 21) He had said that there was no way that he was going to let Dorothea do that

and had walked out. (T I, 21-22)

Dorothea was just about to take a drink of coffee when she felt electricity going through her body. (T I, 22) Dorothea testified that she started screaming and yelling and eventually fell. (T I, 22) Ronald got on top of her and was stunning her with the gun on her chest and the sides of her rib cage. (T I, 23) Ronald kept saying that he had to finish it. (T I, 24) Dorothea was kicking, screaming and crying. (T I, 24) Ronald finally got up as did Dorothea, but then Ronald grabbed her, threw her on the floor and started stunning her again. (T I, 24)

Then Dorothea saw her dog's very large pillow coming towards her face. (T I, 24-25) Ronald pushed the pillow into her face harder every time she screamed. (T I, 25) Dorothea said that Ronald was trying to kill her, and he said that is what he had gotten the stun gun for. (T I, 25-26) Dorothea testified that she then got a burst of energy and kicked Ronald. (T I, 26) Ronald got up off of Dorothea, and when she got up he grabbed her and kept saying he had to finish it. (T I, 26) When Ronald looked away for a moment, Dorothea ran out the door and went to a neighbor's house and the police were called. (T I, 27) Ronald had cooperated with the police and had told them that he had messed up, had gotten a little rough, and he knew he was wrong. (T I, 78)

Over renewed defense objection, Dorothea was allowed to testify that she had been having very bad chest pains in April of that year and had spent three days in the hospital for heart problems. (T I, 23)

When inconsistencies in Dorothea's trial testimony and statements to the police were raised upon cross-examination, she said that she had problems putting things in proper sequence when she was writing. (T I, 42-43) When Dorothea was asked to explain her sworn statement that Ronald had stunned her between 20 and 30 times made under penalty of perjury when she had applied for a restraining order the following day, she said that she had been upset on that day. (T I, 45)

Over defense objections to relevance, Wendy Hilliard, a bartender in Kissimmee, was allowed to testify to her sexual relationship with the Petitioner. (T I, 90-94) The alleged victim was allowed to testify to having found love notes which Hilliard had written to Nesbitt, subsequent to the incident, also over defense objection. (T I, 64-65) Ultimately, the love notes were also allowed into evidence, over defense relevancy objection. (T I, 92-93) Hilliard also testified that Nesbitt had not told her that he was married. (T I, 93)

Defense motion for judgment of acquittal based upon no evidence of serious bodily injury, no expert testimony regarding the stun gun, or its potential to kill or do serious bodily harm, particularly in view of the statutory definition of a stun gun

as "nonlethal" in Section 790.001, Florida Statutes, was denied. (T I, 107-115)

During the charge conference, the defense objected to language in the instruction concerning the weapon(s) allegedly used by the Petitioner which was more expansive than what was alleged in the information, citing to Zwick v. State, 730 So.2d 759 (Fla. 5th DCA 1999). (T II, 191-195, 202-207) The court determined not to give a jury instruction for the stun gun based upon the definition of electronic weapon or device. (T II, 211)

Following extensive discussion and debate of the appropriate instruction for the charged, statutorily-defined "nonlethal," stun gun the court asked the parties if there was agreement on the possible verdicts for lesser-included offenses. (T II, 203) The parties expressed their acceptance of attempted second-degree murder, aggravated assault, battery, and assault as the lesser-included-offenses. (T II, 203) Following instruction of the jury, the defense renewed its earlier objection to the jury instructions. (T II, 279-280)

The jury returned verdicts of *guilty* to aggravated assault as a lesser-included-offense on count one, and battery as a lesser-included offense on count two. (R 50-52) The jury found that "...Nesbitt did carry, display, use, threaten to use, or attempted [sic] to use a weapon" in a special verdict as to count one. (R 51)

At sentencing before Judge Legendre the defense objected to the scoring of 40 victim injury points, and the court deducted them from the scoresheet. (R 92-95) Dorothea Nesbitt addressed the court and asked for the maximum sentence of five years. (R 96-98) The Petitioner addressed the court and explained that he was *truly sorry* and had spent the past year in jail trying to understand his anger problem. (R 100) Nesbitt had voluntarily completed domestic violence classes for 26 weeks and anger management classes for 24 weeks. (R 100)

The State argued that since the Petitioner had chosen not to apologize to the victim and had shown no remorse he should receive the maximum sentence. (R 100-103) The court agreed with the State that the Petitioner had shown no remorse and appeared to have no conscience. (R 103-105) Pursuant to a minimum Criminal Punishment Code score of 37.6, the court imposed the maximum sentence of 5 years in prison with credit for time served of 366 days on count one, and 365 days time served, concurrent, on count two. (R 57-71; 104-105)

Timely appeal was taken and the Fifth District Court of Appeal issued its decision holding that conviction for aggravated assault with a deadly weapon exceeded the allegations of the charging document but that the issue was not fundamental error and had been waived. (R 74, 77-78, 105-106) Nesbitt v. State, 819 So.2d 993 (Fla. 5th DCA 2002). The Court certified conflict with the Second

and Fourth District Courts of Appeal which have held that it is fundamental error to convict one of a crime for which (s)he has not been charged. See Levesque v. State, 778 So.2d 1049 (Fla. 4th DCA 2001); and Mateo v. State, 757 So.2d 1229 (Fla. 2d DCA 2000).

Petitioner filed a notice to invoke discretionary jurisdiction of this Honorable Court in the Fifth District Court of Appeal on July 26, 2002. This Court postponed its decision on jurisdiction and set a schedule for the filing of merit briefs. This appeal follows.

SUMMARY OF ARGUMENT

The Petitioner, charged with the commission of a crime with a weapon, cannot be found guilty of a crime with a deadly weapon. A verdict which exceeds the *allegata* of the charging document is a nullity.

Where an element of the conviction was the use of a deadly weapon and the jury found only that a "weapon" had been used the conviction for a nonexistent crime must be vacated. Each error is fundamental. Reversal is required.

In the alternative, the failure to object to the erroneous lesser-included jury instruction when the specific complaint to construction of the charged weapon as a "deadly weapon" was already on the record does not rise to the affirmative action inviting the error necessary to preclude a remedy on appeal. Even if it does, then ineffective assistance of counsel on the face of the record is cognizable on direct appeal.

ARGUMENT

A VERDICT OF GUILT FOR AN UNCHARGED CRIME IS FUNDAMENTAL ERROR WHICH CANNOT BE WAIVED. WHETHER BECAUSE AGGRAVATED ASSAULT WAS NOT CHARGED OR BECAUSE AGGRAVATED ASSAULT WITH A WEAPON IS A NONEXISTENT CRIME, THE JUDGMENT AND SENTENCE MUST BE VACATED.

It is fundamental, reversible error to allow a defendant to be convicted of a crime with which he is not charged. Dixon v. State, 823 So.2d 792 (Fla. 2d DCA 2001). Where a jury is instructed on uncharged conduct, the corresponding jury verdict is a nullity. O'Bryan v. State, 692 So.2d 290 (Fla. 1st DCA 1997). Here, where the Petitioner was charged and tried for attempted second degree murder with a weapon, and was convicted of aggravated assault with a deadly weapon, the jury verdict is a nullity, and must be vacated and remanded for entry of a judgment and sentence for simple assault.

The Petitioner challenges his conviction for aggravated assault because it was uncharged in the information and as rendered it may have been based upon a nonexistent crime. Each error would be fundamental.

In the alternative, the Petitioner argues that although the defense did not object to the jury instruction on aggravated assault, the issue of the uncharged deadly weapon was not sufficiently waived so as to bar relief on appeal because the

defense had objected to treatment of the nonlethal stun gun as a deadly weapon throughout the trial and did renew its earlier objections following instruction of the jury. See Ray v. State, 403 So.2d 956 (Fla. 1981)(it is not fundamental error to convict a defendant under an erroneous lesser-included charge when he had an opportunity to object to the charge and failed to do so if the improperly charged offense is lesser in degree and penalty than the main offense or defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action). See also Torrence v. State, 440 So.2d 392, 395 (Sharp, J., dissenting, citing Ray v. State)(silence alone as compared to having requested the improper instruction or other affirmative reliance on it by the defense is insufficient basis to uphold a finding of waiver).

Finally, the Petitioner argues in the alternative that even if counsel can be deemed to have waived the issue of conviction for an uncharged and/or nonexistent offense, ineffective assistance of counsel is apparent on the face of the record and justifies review on direct appeal. See Nesbitt, 819 at 995-996 (Harris, J., concurring specially); Eure v. State, 764 So.2d 798 (Fla. 2d DCA 2000).

Finding a defendant guilty of a crime with which he was not charged is fundamental error, reviewable on appeal without objection. L.H. v. State, 766 So.2d 245 (Fla. 4th DCA 2000). Aspects or components of a trial court's

decisions involving legal questions are subject to de novo review. Wilson v. State, 673 So.2d 505 (Fla. 1st DCA) rev. denied, 682 So.2d 1101 (Fla. 1996).

In relevant part, the information that charged attempted second degree murder alleged that the Petitioner did "...by an act imminently dangerous to another, and evincing a depraved mind regardless of human life, attempt to kill Dorothea Nesbitt, by attacking her with a stun gun and placing a pillow on her face, and in the course of committing said offense, Ronald Nesbitt did carry, display, use threaten to use, or attempt to use a *weapon*." (R 4) [Emphasis added.]

Defense counsel had objected to a proposed instruction which would have defined the alleged weapon more expansively than had been charged in the information, had argued the nonlethal nature of the two charged instrumentalities in the incident as part of the motion for judgment of acquittal, and had renewed both the objection and the motion. However, following these extensive discussions and debate the court asked the parties if there was agreement on the possible verdicts for lesser-included offenses. The parties expressed their acceptance of attempted second-degree murder, aggravated assault, battery, and assault as the lesser-included-offenses.

The jury returned verdicts of *guilty* to aggravated assault as a lesser-included-offense on count one, and battery as a lesser-included offense on count

two. The jury found that "...Nesbitt did carry, display, use, threaten to use, or attempted [sic] to use a weapon" in a special verdict as to count one.

The decision of the Fifth District Court of Appeal in Nesbitt relies upon the distinguishable authority of this Court in Ray v. State, 403 So.2d 956 (Fla. 1981) to hold that a defendant may be convicted of the uncharged crime of aggravated assault as a permissive lesser-included offense of attempted second-degree murder based upon the failure of Nesbitt's trial counsel to object to the instruction. In so holding the Nesbitt Court recognizes some of the conflicting line of cases which hold that this is fundamental error and certifies the conflict to this Court. See Levesque v. State, 778 So.2d 1049 (Fla. 4th DCA 2001); Mateo v. State, 757 So.2d 1229 (Fla. 2d DCA 2000). See also State v. Gray, 435 So.2d 816(Fla. 1983)(the complete failure of the accusatory instrument to charge one or more of the essential elements of a crime for which one is convicted is a denial of due process of law which can be raised at any time); Abbate v. State, 745 So.2d 409 (Fla. 4th DCA 1999)(conviction of a crime not charged is fundamental error); Hendricks v. State, 744 So.2d 542 (Fla. 1st DCA 1999)(the trial court erred in instructing the jury on an alternative method of commission of the crime which had not been charged in the information); O'Bryan v. State, 692 So.2d 290 (Fla. 1st DCA 1997)(same).

This issue is compounded by the fact that the jury completed a special

verdict finding that the aggravated assault had been accomplished "with a weapon." Where as here, the information charged use of a weapon, the jury was instructed on use of a deadly weapon and then returned a verdict of aggravated assault and a special verdict of "weapon," no less than in Moore, "[e]ither the information and the verdict do not correlate with the jury instructions; or, the information does not correlate with the jury instructions and the verdict." Moore v. State, 496 So.2d 255, 356 (Fla. 5th DCA 1986)(the result is reversed and remanded where a defendant was charged with unlawful sale of cocaine, the jury was instructed regarding unlawful delivery of cocaine, and the jury returned a verdict of guilty "as charged).

The conviction handed to the Petitioner by the jury for aggravated assault not only had not been charged, but also might well have been based upon a nonexistent crime. See Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984)(an assault is aggravated either by possession of a *deadly weapon* or when accompanied by the intent to commit a felony). [Emphasis added.] Conviction of a nonexistent crime is also fundamental error. Mundell v. State, 739 So.2d 1201 (Fla. 5th DCA 1999); Jordan v. State; 801 So.2d 1032 (Fla. 5th DCA 2001); Mills v. State; 714 So.2d 1198 (Fla. 4th DCA 1998).

The rule attributed to Ray and claiming to be followed by the Nesbitt Court

is that the fundamental due process error of convicting a defendant of an uncharged crime, in the case of an improper permissive lesser-included offense, can be waived by the failure of counsel to make specific objection. Yet the spirit as opposed to the letter of the Ray opinion, as amplified by more recent decisions, addresses the issue on the policy grounds of invited error and estoppel. See State v. Espinoza, 686 So.2d 1345, (Fla. 1996); Nesbitt, 819 at 995-995 (Harris, J., specially concurring). Closer scrutiny of the Ray decision will support the conclusion that the Ray Court's remarks on the subject of inapt, permissive lesser-included jury instructions were *dicta*, given that the subject of Ray concerned second-degree felony lewd assault being wrongfully given as a permissive lesser-included offense of second-degree felony sexual battery. See Torrence v. State, 440 So.2d 392, 398-399 (Fla. 5th DCA 1983)(Cowart, J., dissenting).

Silence alone is not sufficient to demonstrate a waiver of the fundamental, constitutional right not to be convicted of a crime for which one is not charged or tried. U. S. Const., Amend. V, and XIV; Fla. Const., Art. I §9 and 16; Ray. Unless counsel has requested the improper instruction or affirmatively relied on such charge by argument to the jury or some other affirmative action, a conviction for an uncharged crime is not considered waived. Ray, 403 at 961.

To sustain a conviction of a category two lesser-included offense such as

aggravated assault, the information charging attempted second-degree murder must have alleged each of the elements of the lesser, namely, that the alleged crime was committed using a deadly weapon. Lawrence v. State, 685 So.2d 1356 (Fla. 2d DCA 1996); Persaud v. State, 821 So.2d 411 (Fla. 2d DCA 2002). Absent waiver, affirmative conduct or other exceptional circumstances, a defendant may not be convicted of a permissive lesser-included offense where the charging document is silent as to an essential element. Tolbert v. State, 679 So.2d 816 (Fla. 4th DCA 1996).

A verdict which finds a person guilty of an uncharged crime is a nullity. Moore. A defendant is entitled to have the charge against him proved substantially as alleged in the indictment or information, and cannot be prosecuted for one offense and convicted and sentenced for another. U.S. Const., Amend. V and XIV; Fla. Const., Art. I, § 9 and 16; Zwick v. State, 730 So.2d 759 (Fla. 5th DCA 1999).

The information charged that the Petitioner attempted second-degree murder with a "weapon" described as a stun gun and a pillow, as count one, and aggravated battery with a deadly weapon as count two. The jury was instructed on aggravated assault with a deadly weapon as a lesser-included-offense on count one. The jury returned verdicts of aggravated assault and a special verdict with a finding

that a weapon had been used on count one, and simple battery on count two. The Petitioner was not charged with the use of a deadly weapon in count one of the information. The jury verdict of aggravated assault, with a deadly weapon as aggravator, exceeded the *allegata* of the charging document, and is a nullity. Abbate v. State, 745 So.2d 409 (Fla. 4th DCA 1999). The verdict must be vacated. Mateo; Levesque; Gray; Dixon; O'Bryan; Abbate.

Although acknowledging authority that holds that the proper remedy in such a case is remand for trial on the next level lesser-included offense, the next, last lesser in this instance would be simple assault. State v. Wiley, 682 So.2d 1097 (Fla. 1996). This court is asked to remand for reduction of the conviction to simple assault. Torrence v. State (Sharp J., dissenting), 440 at 395(where the information charging the attempted robbery did not allege all of the elements of aggravated assault as a lesser, and the record did not show that defendant's attorney had requested or affirmatively relied on the instruction reversal and reduction of the conviction to simple assault was mandated). Where as here, the conviction was for the nonexistent crime of aggravated assault with a weapon, the proper remedy is to remand for resentencing on simple assault. See Mundell v. State, 739 at 1202. Since the maximum sentence for the second degree misdemeanor of simple assault is 60 days in jail, this court is asked to direct that the Petitioner be immediately

released. Fla. Stat., Section 784.011 (2000) and Section 775.082 (4)(b) (2000).

In the alternative, the Petitioner argues that his trial counsel's failure to specifically object to the jury instruction after having made clear her objection to the expansion of the definition of weapon from that charged in the information is very far afield from the affirmative action required to constitute a waiver according to the controlling case law. Ray; Tolbert. Finally, even if a waiver can conceivably be construed on these facts then judicial economy and legal efficiency both dictate that the matter be addressed as ineffective assistance of counsel on the face of the record on this direct appeal "to avoid the legal churning which would be required if we made the parties and the lower court do the long way what we ourselves should do the short." Mizell v. State, 716 So.2d 829 (Fla. 3d DCA 1998).

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the Petitioner requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal, vacate the judgment and sentence for aggravated assault, remand for entry of judgment for simple assault as the next and last lesser-included offense, and direct that the Petitioner be immediately released.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to Ronald Nesbitt, this 7th day of October, 2002.

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman.

ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

RONALD NESBITT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC02-1723
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_____	)	

APPENDIX