IN THE SUPREME COURT OF FLORIDA

ROBERT L. BATTLE, JR., Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC03-443

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Petitioner was initially charged by information with one count of second degree murder (Count One) and one count of attempted robbery (Count Two). (V.I:R8-9). The information was later amended to include one count of attempted felony murder with a firearm (Count Three). (V.I:R14-5).

The case was tried before a jury on March 27 and March 28, 2001. The jury found Petitioner guilty as charged. (V.I:R22-4). Petitioner was adjudicated and sentenced to 30 years on Count One, 15 years on Count Two, and life on Count Three, with a life term imposed on each of the three counts pursuant to the 10/20/life statute and a minimum mandatory 30 years on Count One, a mandatory 15 years on Count Two, and a mandatory life sentence on Count Three, all pursuant to the Prison Releasee Reoffender statute. (V.I:R30-5).

Petitioner filed a timely notice of appeal on April 24, 2001. On January 17, 2003, the Second District Court of Appeal affirmed Petitioner's conviction holding that the failure to instruct on an essential element of attempted felony murder in this case was not fundamental error when the defense was mistaken identification. The court certified conflict with the Fourth District's decision in Thompson v. State, 814 So.2d 1103 (Fla. 4th DCA 2002) (which held that an attempted felony murder instruction which failed to instruct the jury that it was re-

quired to find that the defendant committed an intentional act that is not an "essential element of the felony constituted fundamental error where the defense was mistaken identity).

The Second District opinion also remarked in a footnote that although the Petitioner had failed to raise the issue on appeal, the Fifth District in Mitchell v. State, 830 So.2d 944 (Fla. 5th DCA 2002) had held that dual convictions for attempted second degree murder and attempted felony murder under 782.051, Fla. Stat., both arising from a single act, constituted a double jeopardy violation.

Petitioner filed a motion for rehearing in which he raised the double jeopardy issue for the first time. The Second District denied the motion for rehearing. The Petitioner then filed a Notice to Invoke the discretionary jurisdiction of this Court based upon the certified conflict. In its order dated May 1, 2003, this Court indicated that it had postponed its decision on jurisdiction, but issued a briefing schedule. Petitioner's Initial Brief on the merits was filed on May 21, 2003. Respondent's Answer Brief follows.

STATEMENT OF THE FACTS

On the morning of January 24, 2000, the victim, David Golly was attempting to buy drugs in an alley behind a motel located on 34th Street in St. Petersburg, Florida. (V.I:T148). Mr. Golly saw a couple of boys who waived him down and tried to sell him drugs. The victim described the two as Hispanic boys around 11 or 12 years old. (V.I:T149-50). When he discovered that all the boys had was fake cocaine, the boys called the Petitioner over. Petitioner approached Mr. Golly and then stepped away telling him he would be just a second.

When Petitioner stepped back to Mr. Golly, Mr. Golly noticed Petitioner had a pistol. (V.I:T151). Petitioner then demanded Mr. Golly's money. (V.I:T153). Mr. Golly attempted to flee by hitting the gas on his truck. He then heard a loud bang and a cloud came over his vision, (V.I:T154). He recalled driving down the alley and running into a dumpster. He managed to park his truck and walk into a pawn shop where he told an employee to call 911 because he had been shot. (V.I:T153-4). Mr. Golly identified Petitioner from a photopack a few days later. (V.I:T159).

Kevin Valentine, one of the two boys who waived the victim down, testified that Appellant held the gun to the truck window and Appellant shot the victim when he tried to drive off. (Add. Vol. II:T196). Kevin identified Appellant from a photopack af-

ter the shooting. (Add. Vol. II:T198). Peter Valentine, Kevin's brother, testified that he saw Appellant holding the gun on the victim and heard a gunshot. (Vol.II:T24). Peter heard his brother say "he shot him, he shot him."(Vol.II:T22). Peter also identified Appellant from a photopack. (Vol.II:T27).

Dr. Vieux, a trauma surgeon at Bayfront Medical Center, testified that the Mr. Golly sustained a life threatening gun-shot wound to his right temple. (Add.V.II:T212-3).

Following closing arguments, the jury was instructed. The jury instruction on attempted felony murder was as follows:

> In order to find the Defendant attempted to commit the crime of attempted felony murder, the State must prove two elements beyond a reasonable doubt:
>
> The first is that the Defendant attempted to perpetrate the crime of robbery, as I have previously explained the crime to you.
>
> And the second element is that during the course thereof, the Defendant committed an intentional action that could have but did not cause the death of David Gollay.

(Suppl.:R296-7).

Appellant did not object to the instruction at the charge conference or after the instructions were read to the jury. (Suppl.:R228,308).

SUMMARY OF THE ARGUMENT

Appellant failed to object to the jury instructions and did not preserve the issue for review. The omission of statutory language concerning attempted felony murder from the jury instruction did not constitute fundamental reversible error where the omitted element in the jury instruction was not a disputed issue. State v. Delva, 575 So. 2d 643 (Fla. 1991).

Taken as a whole, the information clearly alleges attempted felony murder. The defendant's failure to object to the information waived any defect as long as the information did not wholly fail to state the crime. State v. Duarte, 681 So.2d 1187 (Fla. 2d DCA 1996).

The State submits that Mitchell v. State, 830 So.2d 944 (Fla. 5th DCA) was wrongly decided. Convictions for both attempted felony murder and attempted second degree murder do not violate double jeopardy. The Legislature has clearly shown its intent that both of these two offenses be available to punish a defendant who commits acts meeting the statutory requirements, each of these offenses has separate elements, and these offenses address different evils and are not aggravated forms of the same core offense.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT OF THE CRIME OF ATTEMPTED FELONY MURDER.

The jury was instructed on attempted felony murder as follows:

> In order to find the Defendant attempted to commit the crime of attempted felony murder, the State must prove two elements beyond a reasonable doubt:
>
> The first is that the Defendant attempted to perpetrate the crime of robbery, as I have previously explained the crime to you.
>
> And the second element is that during the course thereof, the Defendant committed an intentional action that could have but did not cause the death of David Gollay.

(R296-7).

Appellant did not object to the instruction at the charge conference or after the instructions were read to the jury. (R228,308)and did not preserve the issue for review. Jury instructions are subject to the contemporaneous objection rule. Absent an objection at trial the issue can only be raised on appeal if the error is fundamental. State v. Delva, 575 So.2d 643 (Fla. 1991).

Fundamental error is 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." McDonald v. State, 743 So.2d 501 (Fla. 1999). Appellant claims that the jury instruction on

attempted felony murder was fundamentally erroneous because the instruction did not specifically state that the intentional act which could have caused death must be an act that is “not an essential element” of the felony (robbery).

Under the facts of the instant case, the error in the instruction was not fundamental. Clearly, firing a bullet into the head of the robbery victim is not an essential element of the crime of robbery. Appellant’s intentional acts of pointing a pistol at the victim’s head and demanding money satisfied the elements of attempted robbery. (V.I:T153). When read together the instructions on attempted felony murder and attempted robbery as a whole fairly state the applicable law. Furthermore, the information specifically indicated the intentional act (shooting David Golly) which was not an essential element of robbery. (R15). The jury found the defendant guilty of attempted felony murder “as charged.” (R24). Accordingly, it follows that the jury specifically found that Appellant committed an intentional act (shooting David Golly) which was not an essential element of robbery.

As the Second District correctly concluded in its opinion:

> The failure to instruct the jury on this essential element is fundamental error if the error pertains "to an element of the crime that is a disputed issue in the case." King, 800 So. 2d at 737; see State v. Delva, 575 So. 2d 643 (Fla. 1991); Pena v. State, 829 So. 2d 289 (Fla. 2d DCA 2002). In Delva, the Florida Supreme Court

> cited Morton v. State, 459 So. 2d 322 (Fla. 3d DCA 1984), for an example of an issue that was not disputed. In Morton, the trial court failed to instruct on the essential elements of robbery, but the court noted that the facts of the robberies were conceded and mistaken identity was the only issue.
>
> Here, the State contends that the omitted element in the jury instruction was not a disputed issue because Battle did not contend that the crime did not occur, but rather that he was misidentified as the perpetrator. It was undisputed that Golly was shot in the head, an act that was not an essential element of the attempted robbery. We note that in Thompson, the Fourth District held that the same omitted element in the attempted felony murder jury instruction was a disputed issue when the defense was mistaken identity, stating that the "defense of mistaken identity required the state to prove every element charged." Thompson, 814 So. 2d at 1104. However, based on the supreme court's reliance on Morton in Delva, we hold that the failure to instruct on an essential element of attempted felony murder in this case was not fundamental error when the defense was mistaken identification. In doing so, we certify conflict with the Fourth District's decision in Thompson v. State, 814 So. 2d 1103 (Fla. 4th DCA 2002). Accordingly, because the erroneous jury instruction was not fundamental error and Battle did not object to the instruction, we affirm Battle's judgment and sentence. See Delva, 575 So. 2d at 644.

Battle v State, 837 So.2d 1063,1065 (Fla. 2d DCA 2003).

Although the instruction in the instant case failed to

include the specific language that the intentional act required for attempted felony murder be one that is "not an essential element" of the crime of robbery, the error was not fundamental because the issue was not disputed. Failing to instruct on an element of a crime over which there is no dispute is not fundamental error. Stat v. Delva, 575 So. 2d 643, 645 (Fla. 1991).

In King v. State, 800 So.2d 734, 737 (Fla. 5th DCA 2001), the court determined that an instruction on attempted felony murder that failure to include the words "an intentional act that is not an essential element of the felony" constituted fundamental error. Id. at 739. However, King is distinguishable from the instant case as the defendant's defense was not one of misidentification. King also involved a drug deal turned robbery/attempted felony murder. King admitted that he had gone to the house where the shootings occurred in order to sell drugs but denied that he knew that a robbery was going to occur or that a gun was present. Id. at 736. The victims were shot by a co-defendant. Id.

Appellant's theory of defense in the instant case was misidentification by the victim and the two witnesses. Appellant did not dispute that an attempted felony murder had occurred when the victim was shot in the head during the

attempted robbery. Shooting a victim in the head is not in fact an essential element of attempted robbery with a firearm.

Under the circumstances, the error was harmless. There is no reasonable possibility that such an instruction would have changed the outcome of the trial. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The error in the instruction was not one which reached 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. See McDonald, supra. Accordingly, as the error was not fundamental, no reversal is required.

> **ISSUE II**: WHETHER THE INFORMATION CHARGING PETITIONER WITH AN ATTEMPTED FELONY MURDER WAS FUNDAMENTALLY DEFECTIVE IN THAT IT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF THE OFFENSE.

This issue was not preserved for Appellate review either by pretrial motion to dismiss or by objection. "'Where the charging allegations are merely incomplete or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defense, and it cannot be raised for the first time on appeal.'" Hart v. State, 761 So.2d 334 (Fla 4th DCA 1998) quoting Carver v. State 560 So.2d 258,260 (Fla. 1st DCA 1990).

The amended information charged that Robert L. Battle

> ...did, while perpetrating or attempting to perpetrate the crime of Robbery, commit an intentional act, to wit: shooting David Golly with a deadly weapon, to wit: a fire-arm, that could have but did not cause the death of David Golly; contrary to Chapter 782.051(1)/775.087, Florida Statutes....

(R15).

The information was not fundamentally defective as Appellant alleges.

> The test to determine if an information is fatally defective is whether there is a total omission of an essential element of the crime, or whether the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to the substantial danger of a

> new prosecution. If the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted words, it cannot be said that the imperfection of the information prejudiced the defendant in his defense.

Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982)(citations omitted)(emphasis added).

Appellant alleges that the information failed to charge Appellant with attempted felony murder. Appellant arrives at this conclusion because the body of the information does not include the statutory language "an intentional act that is not an essential element of the felony." While it is true that these words do not appear in the information, the information does specifically allege the qualifying intentional act "shooting David Golly with a deadly weapon, to wit: a firearm." Furthermore, information cites to Florida Statute 782.051 which contains the language "an intentional act that is not an essential element of the crime." §782.051 Fla. Stat.

Taken as a whole, the information clearly alleges attempted felony murder. "'Any defect in an information is waived if an objection is not made timely as long as the information does not wholly fail to state a crime.'" State v. Duarte, 681 So.2d 1187 (Fla. 2d DCA 1996), citing Williams v. State, 547 So.2d 710, 711 (Fla. 2d DCA 1989). Accordingly, the information in the instant case was not fundamentally de-

fective.

The Appellant was clearly aware that the state aimed to prove that Appellant committed attempted felony murder when he shot Mr. Golly while attempting to rob him at gunpoint. Examination of the record reveals that the wording of the information did not mislead or embarrass Appellant in the preparation of his defense. This is especially true in light of the fact that Appellant's defense to the charges was intentional misidentification by the victim and witnesses.

ISSUE III: WHETHER APPELLANT'S CONVICTION FOR BOTH ATTEMPTED SECOND DEGREE MURDER AND ATTEMPTED FELONY MURDER CONSTITUTED A DOUBLE JEOPARDY VIOLATION.

Questions of law such as whether convictions violate double jeopardy principles are reviewed de novo. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000). The burden to prove a double jeopardy violation is on the Defendant. See Collie v. State, 710 So. 2d 1000, 1012 (Fla. 2d DCA 1998), rev. denied, 722 So. 2d 192 (Fla.) cert. denied, 525 U.S. 1058 (1998); U.S. v. Rodriguez-Aguirre, 73 F.3d 1023 (10th Cir. 1996).

The State submits that Mitchell v. State, 830 So.2d 944 (Fla. 5th DCA 2002), review denied by State v. Mitchell, 2003 Fla. LEXIS 732 (Fla. Apr. 16, 2003), was wrongly decided and that the convictions for both attempted felony murder and attempted second degree murder do not violate double jeopardy. First, the Legislature has clearly shown its intent that both of these two offenses be available to punish a defendant who commits acts meeting the statutory requirements. Second, each of these offenses has separate elements and, without dispute, satisfy the same-elements test. Third, these offenses address different evils and are not aggravated forms of the same core offense.

As this Court has repeatedly recognized, the standard for

determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature "intended to authorize separate punishments for the two crimes." M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996); Boler v. State, 678 So. 2d 319, 321 (Fla. 1996). In fact, in the case Cruller v. State, 808 So. 2d 201 (Fla. 2002), this Court recently reiterated that if the Legislature's intent is clear no additional review is necessary. This Court wrote

> In concluding that double jeopardy precludes punishments for both carjacking and robbery, the dissent relies on the Blockburger[1] test. However, courts only employ the Blockburger test if there is no clear statement of legislative intent to authorize separate punishments for the two crimes in question. See Gordon v. State, 780 So. 2d 17, 20 (Fla. 2001). As stated above, we find that the language, structure, and legislative history of the carjacking statute represent a clear statement from the Legislature that it intended to authorize separate punishments for carjacking and robbery; hence, there is no need to employ the Blockburger test in the instant case.

Id. at 210, n. 3.

It is the State's position that the Legislature's intent is clear from the language, structure and history of the statute at issue. After this Court questioned its earlier ruling

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[1]Blockburger v. U.S., 284 U.S. 299 (1932).

of Amlotte v. State, 454 So. 2d 448 (Fla. 1984), and concluded that attempted felony murder was a nonexistent crime in the case State v. Gray, 654 So. 2d 552 (Fla. 1995), the Legislature responded and enacted section 782.051, Fla. Stat. (1997).[2] Initially, the statute punished bodily injuries during the course of a felony. However, the statute was amended in 1998 and entitled "attempted felony murder." See, section 782.051, Fla. Stat. (1999). The Legislature provided that "(a)ny person who perpetrates or attempts to perpetrate any felony enumerated in s. 782.04(3) and who commits, aids, or abets an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another commits a felony of the first degree."

Additionally, the Legislature specifically provided that this new offense would be a level 9 offense and that victim injury points "shall" be assessed under the statute. See section 782.051, Fla. Stat. (1999). Attempted first degree murder and attempted second degree murder already existed at the time this statute was adopted by the Legislature. By its creation

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[2]This point was expressly discussed in the case Brown v. State, 761 So. 2d 1135, 1137 (Fla. 1st DCA 2000); aff'd, Brown v. State, 781 So. 2d 1083 (Fla. 2001). In Brown, this Court found no double jeopardy violation for convictions of attempted first degree murder and felony causing bodily injury relying upon the recent decision in Gordon which will be discussed in more detail later in this brief.

in response to Gray, the Legislature's intent for a separate conviction would seem to be clear.

Further, even if the offenses are scrutinized under the same-elements tests, Blockburger is clearly satisfied. The two offenses at issue are attempted second degree murder and attempted felony murder, and each has a separate element. See also United States v. Galvan, 949 F.2d 777 (5th Cir. 1991) (A defendant can be convicted of attempting to kill a person to prevent attendance at an official proceeding and attempting to kill a person to prevent his communication of information relating to commission of federal offense since each contained separate elements.)

Attempted second degree murder is a general intent crime, and the State must prove that a defendant committed an act imminently dangerous to another which could have killed that person and that such act evinced a depraved mind. For attempted felony murder there is no intent to kill necessary for a conviction. Instead, the State must prove a separate felony and also during that felony that the defendant committed an unrelated and intentional act which could cause death.

That these offenses have separate elements was expressly found by the Fifth District Court of Appeal in Mitchell when it wrote in its opinion:

> The crimes constitute separate offenses under Blockburger because each crime contains an element that the other does not. Attempted second degree murder requires that the perpetrator's act was imminently dangerous to another and demonstrated a depraved mind without regard for human life. Attempted felony murder requires that the act be committed during the course of committing a felony and that it could have resulted in the unlawful death of another.

Mitchell, 830 So. 2d at 946. However, the Fifth District Court of Appeal continued and found that these two offenses were degree variants of the core offense of homicide. Id.

The Florida Legislature set out in section 775.021, Fla. Stat. (2002):

> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.[3]

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[3]This point has repeatedly been followed by the courts. See Gabor v. State, 684 So. 2d 189 (Fla. 1996) (no double jeopardy violation for convictions of armed burglary and grand theft of a firearm); M.P. v. State, 682 So. 2d 79 (Fla. 1996) (double jeopardy does not bar convictions for carrying concealed firearm

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

The Fifth District Court of Appeal in Mitchell, supra, utilized this statute as well as language from this Court's case of Gordon and determined that the two offenses in the instant case address the same primary "evil." However, the problem with this analysis is that this Court in Gordon found no double jeopardy violation when reviewing offenses very similar to the instant offenses. The offenses were attempted first degree murder with a firearm, felony causing bodily injury, aggravated battery causing great bodily harm with a firearm, and robbery with a firearm. Gordon, 780 So. 2d at 18.

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and possession of a firearm by a minor); Billiot v. State, 711 So. 2d 1277 (Fla. 1st DCA 1998) (upheld convictions for first degree burglary with a battery and aggravated battery).

In Gordon, the defense submitted that the offenses were barred by the cases of Carawan v. State, 515 So. 2d 161 (Fla. 1987), and State v. Boivin, 487 So. 2d 1037 (Fla. 1986), given they are from the "same evil." Rejecting this argument, this Court wrote

> Subsequently, the Legislature amended section 775.021, explicitly enunciating its intent that crimes be separately punished without regard to the rule of lenity. We have noted repeatedly that the Legislature effectively overruled Carawan. See State v. Smith, 547 So. 2d 613, 615-617 (Fla. 1989).

Gordon, 780 So. 2d at 24.

The opinion of the Fifth District Court of Appeal in further reasoned that murder in the second degree and attempted felony murder are both under Chapter 782. Mitchell, 830 So. 2d at 947. However, Chapter 782 was the same exact chapter involved in the Gordon and the Brown cases already cited from this Court, and both of these cases found no double jeopardy violation.

Lastly, the Fifth District Court of Appeal wrote that its decision was greatly influenced by the language in Gordon recognizing the continued validity of the line of cases that hold that a defendant cannot be convicted of two crimes of homicide for the killing of a single person. Id. This principle was

specifically addressed in Gordon and found to have no application. As this Court noted at the end of the discussion as to his argument: "No death occurred in this case." Gordon, 780 So. 2d at 25.

Despite being shot in the head at close range, the victim in this case also did not die. There was not a homicide. Instead, just like in Gordon, this case involves an attempted intentional murder (first degree in Gordon with a premeditated intent; second degree murder in the instant case with a depraved mind and general intent) and an attempted felony murder.

By deciding to rob someone and during this attempted robbery committing a separate, intentional act which easily could have killed (shooting the victim as the victim attempted to flee), the Defendant met the requirements for attempted felony murder. By perpetrating an act imminently dangerous to the victim which evinced a depraved mind, the Defendant satisfied the offense of attempted second degree murder. The Legislature has clearly shown its intent that both of these two offenses be available to punish a defendant who commits acts meeting the statutory requirements. Each of these offenses has separate elements and, without dispute, satisfy the same-elements test. These offenses address different evils and are

not aggravated forms of the same core offense. Accordingly, Petitioner's dual convictions for attempted felony murder and attempted second degree murder do not violate double jeopardy.

Furthermore, Appellant's prison sentence is not effected by the dual convictions. Appellant received life sentences on each of three counts.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the district court below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Allyn Giambalvo, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33831-9000, this _____ day of June, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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