IN THE SUPREME COURT OF FLORIDA

ROBERT L. BATTLE, :

Petitioner, :

vs. : Case No.SC03-443

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE

The State Attorney for the Sixth Judicial Circuit, Pinellas County, Florida, filed an information charging petitioner Robert L. Battle, Jr. with attempted second degree murder and attempted robbery. (V.I/R8-9) Subsequently, an amended information was filed charging petitioner with attempted second degree murder, attempted robbery and attempted felony murder with a firearm. (V.I/R14-15)

Trial was held on March 27 through March 28, 2001, before the Honorable Brandt Downey. The jury heard the testimony of the witnesses, saw the evidence and heard the arguments of counsel and the instructions of the court. The jury deliberated and found petitioner guilty as charged. (V.I/R22-24) Petitioner was adjudicated and sentenced to 30 years on count I, 15 years on count II, and life on count III, 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 I, a mandatory 15 years on count II and a mandatory life sentence on count III, all pursuant to the Prison Releasee Reoffender statute. (V.I/R30-35)

Petitioner filed a timely Notice of Appeal on April 24, 2001. In its opinion of January 17, 2003, the District Court of Appeal, Second District, affirmed petitioner's convictions, but certified conflict with the Fourth District's decision in Thompson v. State, 814 So.2d 1103(Fla.4th DCA 2002). In a footnote, the Second District also noted that although it was not raised as an issue in petitioner's 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 and had certified the question to this court.[1] Petitioner raised the double jeopardy issue in a timely motion for re-hearing, arguing that because the opinion on which he based his claim had not been issued at the time he filed his initial brief, and because the subsequent opinion clearly identified the error, and the error was fundamental, it was a more effective use of judicial resources to correct the error in the current appeal rather than affirm and require petitioner to file a post-conviction motion. The Second District denied petitioner's re-hearing motion.

Thereafter petitioner filed a Notice of Discretionary Review with this court based upon the Second District's certification of conflict with the Fourth District. In its order of May 1, 2003, this court indicated it had postponed its decision on jurisdiction, but ordered that petitioner's initial brief on the merits be filed on or before May 27, 2003. That brief follows.

[1] The decision in the Mitchell case was issued approximately 8 months after the briefs had been filed in petitioner's district court case.

STATEMENT OF THE FACTS

On the morning of January 24, 2000, David Golly had been in his blue and white pickup truck trying to buy drugs in the alley behind the Inn on the Hill Motel which was located on 34th Street in St. Petersburg, FL. (T148) Mr. Golly indicated he hadn't been totally honest about this fact with either the police or in his deposition because of his probationary status at the time.

According to Mr. Golly, he had been working at day labor, but because it was raining, he couldn't get a job ticket. A couple of other laborers had asked him to drop them off at the Sprint Store a couple of blocks away. After dropping them off, Golly saw a couple of people who waved him down and tried to sell him drugs. Golly described the two as Hispanic boys around eleven or twelve years old. (T149-150) When Golly complained that what the boys were trying to sell him was fake cocaine, the two had called petitioner over. He told Golly to pull his truck into the alley. Petitioner approached the truck, said he would be a second, stepped away and when he returned a few minutes later, Golly saw that he had a gun. Golly maintained that he couldn't have confused petitioner with either of the two boys because petitioner was black, a lot bigger and appeared to be twenty or twenty-one years old. (T150-151) He had also identified petitioner from a photopack a few days afterwards. (T159) However, on cross-examination, Mr. Golly was forced to conceded that he only saw the face of the perpetrator for a few seconds. Furthermore, he hadn't seen his attacker's hair because it was covered with

a knit hat or cap, nor had he seen any outstanding features such as scars, earrings, unusual teeth, etc.. (Add.V.II/T180)

Golly said he was by himself in the truck, wasn't armed and had money. (T152) Petitioner told Golly to give him his money. Golly responded by stepping on the gas pedal of his truck. Golly then heard a loud bang and his vision started to cloud. Golly recalled running into some trees and hitting a trash can. He drove down the alley until he couldn't drive any more. Somehow Golly managed to park his truck and walk into a pawn shop where he told an employee to call 911 because he had been shot. (T153-154)

Golly denied telling anyone he didn't know who had shot him or that he wanted money from petitioner and his family to drop the charges. (Add.V.II/T187) To the contrary, he claimed that two of his cellmates at the county jail had badgered him and tried to persuade him not to testify. (T189)

Mr. Golly also testified during the defense's case that he had estimated that the person who shot the gun would have had to have been at least 5'10" to 6' tall, because he was at Golly's eye level while he was sitting in his truck. (T131) Petitioner was only 5'7" while a possible suspect, Tim Watson was 6'. (T89)

SUMMARY OF THE ARGUMENT

The trial court committed fundamental error in its instructions to the jury concerning the offense of attempted felony murder. The instructions the court read omitted an essential element of the offense.

The information supposedly charging petitioner with attempted felony murder was defective, in that it failed to allege an essential element of the offense, that is petitioner committed, aided or abetted an intentional act that was not an essential element of the underlying felony, that could have, but did not cause the death of another. Failure to allege an essential element of the offense in the information constitutes fundamental error.

Petitioner's convictions for both attempted second-degree murder and attempted felony murder, both arising from a single act, constituted double jeopardy.

ARGUMENT

ISSUE I

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

Petitioner Robert Battle, Jr. contends that the trial court committed fundamental error when it gave an incomplete jury instruction on the charge of attempted felony murder. The facts which lead to the charges, according to the State, were that David Golly was shot in the head by petitioner during a robbery attempt. Petitioner was arrested and charged with attempted second degree murder, attempted robbery and attempted felony murder.

Petitioner didn't object to the instruction given to the jury relating to the charge of attempted felony murder. The instruction read went as follows:

> The third crime for which Mr. Battle is charged is attempted felony murder with a firearm. 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 that 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 Golly. supp. (R297)

The statute under which petitioner was charged, 782.051(1) Fla.Stat. provides that:

> Any person who perpetrates or attempts to perpetrate any felony enumerated in 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, punishable by imprisonment for a term of years not exceeding life,.....

Clearly, the instruction given failed to mention that the jury was required to find that petitioner committed "an intentional act that is not an essential element of the felony." Petitioner maintains the instruction given was incomplete and inaccurate because it failed to track the language of the statute. The question is whether the omission of this essential element of the offense constitutes fundamental error, in as much as defense counsel made no objection to the instruction read.

While a contemporaneous objection is usually required in order to argue an erroneous jury instruction on appeal, fundamental error has been held to occur when the trial court errs and doesn't instruct the jury on this specific element of the crime. Neal v. State, 783 So.2d 1102 (Fla. 5th DCA 2001); King v. State, 800 So.2d 734 (Fla. 5th DCA 2001); and Thompson v. State, 814 So.2d 1103(Fla. 4th DCA 2002). Thompson, id. with which the Second District has certified conflict, parallels petitioner's case in the following respects. A man walked into an office in Dania Beach,Florida, displayed a gun and ordered Ms. Rumph to tie up Mr. West and then herself. The man demanded to know where the money was kept and while searching for it, placed his gun on Mr. West's desk. Mr. West made some sort of movement or gesture towards the man which resulted in him firing two shots at West, one of which hit him in the head. The man then took both Mr. West's and Ms. Rumph's money and jewelry and left in West's

vehicle. Subsequently, Mr. West and Ms. Rumph identified Thompson as the robber. There was no other evidence against him other than their identification. As in petitioner's case, Thompson maintained that he had been misidentified. In addition, the court instructed the jury, leaving out the essential element that Thompson had committed, aided or abetted an intentional act **that was not an essential element of the felony.**" As in petitioner's case, defense counsel didn't object to the instruction as given.

On appeal, the Fourth District while recognizing that,"failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal," still held that the "trial court failed to instruct the jury on an essential and disputed element of attempted felony murder, inasmuch as Thompson's defense of mistaken identity required the state to prove every element charged." The error being fundamental, a reversal was required. Thompson, id.

Granted, petitioner's defense was that this was a case of intentional misidentification by the victim in order to extort money and by the witnesses to shield the person who had actually committed the offense. However, the fact remains that the offense of attempted felony murder requires that the jury find not just that petitioner attempted the robbery, but also that petitioner committed(or aided and abetted) an intentional act, apart from one which was an essential element of the attempted robbery, and which could have, but did not cause the victim to die. The Second District's opinion held that while the jury instruction given did omit this essential element

of the offense, the error was not fundamental because it didn't pertain to an element of the offense that was a **disputed** issue in the case. According the Second District's logic, because petitioner had argued that someone else committed the crime, there was no disputed issue as to this or presumably any other element of the offense. Since the error wasn't fundamental and petitioner hadn't objected to the erroneous instruction at trial, he wasn't entitled to a reversal.

It is axiomatic that the State is required to prove every element of the offense charged beyond and to the exclusion of a reasonable doubt and it is the jury's function to determine whether the State has done so. Unlike civil proceedings, where the plaintiff may be entitled to summary judgment or a directed verdict on some or all of the allegations in his complaint, there is no comparable provision in criminal law that grants the prosecution a directed verdict as to any of the elements of the offense it has alleged in the information.

The Second District's opinion, as well as, the decisions in Morton v. State, 459 So.2d 322 (Fla. 3d DCA 1984) and State v. Delva, 575 So.2d 643 (Fla. 1991) which were cited in the opinion, seem to imply that it is not always necessary for the jury to find all elements of the offense were proven beyond a reasonable doubt and that in certain instances the appellate court may, after the fact, make the determination that an element of the offense was not in dispute. As Judge Blue noted in his concurring opinion, "That would make it appear that the defendant has a burden to offer some evidence beyond his not guilty plea in order to place elements of a crime in

dispute." It would also seem to discount any possibility that the jury, if given the question, might have reached a different conclusion than the appellate court, as to the incontrovertibility of the State's proof. Under very similar factual circumstances in Thompson, supra., that the appellate court reached a contrary conclusion, that there was indeed a disputed issue over whether Thompson had committed, or aided or abetted an intentional act apart from the robbery, which could have caused Mr. West's death. This was despite the fact Thompson, like petitioner, had presented a misidentification defense.

Justice Kogan in Delva, supra. and Judge Ferguson in Morton, supra. pointed out in their dissenting opinions some dangerous implications present in the majority's opinions. First, that the majority had created a rule of law which departed from the constitutional due process principle that in a jury trial the existence of every element of the offense must be proved to the satisfaction of the jurors, not the satisfaction of the court and that it shouldn't be summarily rejected under the guise of harmless error. Judge Ferguson noted that the case which had originally created the undisputed element exception, Williams v. State, 400 So.2d 542 (Fla. 3d DCA 1981), came about because the standard instruction for robbery at that time failed to include an intent element. In order to prevent the whole-sale re-trial of every person convicted of robbery based upon this erroneous instruction, the appellate court created the exception as to the intent element. Judge Ferguson went on to point out that as defendant Morton had claimed he wasn't the robber, then it naturally followed that he wasn't present at the scene and had no

way to effectively refute or rebut the State's allegation that a robbery had occurred. Furthermore, if one took the majority's opinion to its logical extreme, where an identification defense was presented, then no element of the offense was disputed and the State would be released from its burden to prove anything other than identification. Judge Ferguson concluded by saying:

> The clear holding here is that the court's failure to instruct the jury on what the State must prove in order to convict may be excused where the defense is misidentification, so long as the court is satisfied that each element has been proved. It seems to me that dispensing with the jury altogether in such cases is, easily, the next logical step.

In his dissenting opinion in Delva supra, Justice Kogan maintained that the majority had confused the term "defense" with the term "element" and that the two were not the same.

> An element of the crime is one of the facts the state **must** prove beyond a reasonable doubt. A defense is merely the rebuttal the defense is privileged to offer--if it so chooses--to negate whatever evidence the state has presented. The failure to mount a defense **never** concedes any element of the crime.

He went on to add that the majority's holding in essence obligated defendant Delva to present evidence that he didn't know the substance in the package was cocaine and his failure to do so conceded the essential knowledge element. Clearly this would violate a defendant's constitutional right to remain silent.

Justice Kogan noted that the vast majority of jurisdictions had found a "not guilty" plea to constitute a blanket denial of every element of the offense charged and that under our legal system a

defendant could enter a not guilty plea, present no evidence in his defense, and be acquitted because the State was unable to prove his guilt beyond a reasonable doubt. In other words, there is no "free ride" for the State, unless the defendant chooses to enter a guilty plea.

By approving the Second District's opinion and overruling the Fourth District's holding in Thompson, supra., this court will be in essence shifting the burden of proof to the defendant as to an essential element of the offense, as well as, removing from the issue from the jury's consideration, both of which are violations of due process.

ISSUE II

THE INFORMATION CHARGING PETITIONER WITH ATTEMPTED FELONY MURDER WAS FUNDAMENTALLY DEFECTIVE IN THAT IT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF THE OFFENSE.

The information filed in this case which ostensibly charged petitioner with attempted felony murder alleged:

> **COUNT THREE**
> And the State Attorney aforesaid, under oath as aforesaid, further information makes that ROBERT L. BATTLE, JR., in the County of Pinellas, State of Florida, on the 24th day of January, in year of our Lord, two thousand, in the County and State aforesaid, 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 firearm, that could have but did not cause the death of David Golly; contrary to Chapter 782.051(1)/775.087, Florida Statutes, and against the peace and dignity of the State of Florida. (V.I/R15)

As has been previously pointed out in Issues I, the statutory language, "an intentional act that is not an essential element of the felony," has been held to be an essential element of the crime of attempted felony murder. Clearly, the allegation contained in the information does not allege this essential element of the offense.

It is constitutionally essential and therefore a fundamental requirement, for the information or other charging document in a criminal case to allege **all** the essential elements of the offense being charged. Essential element means an ultimate fact essential to the allegation of a criminal offense. **When a charging document completely omits an essential element, it fails totally to charge a**

criminal offense. Such failure constitutes fundamental error and can be addressed on appeal without the necessity of the matter having been presented to the trial court. Moreover, where the information completely fails to charge an offense against the defendant, it is void and his conviction pursuant to it must be reversed and the sentence vacated. Gray v. State, 404 So.2d 388 (Fla. 1981); Fulcher v. State, 766 So.2d 243 (Fla. 4th DCA 2000); Jaramillo v. State, 659 So.2d 1238 (Fla. 2d DCA 1995); Looney v. State, 756 So.2d 239 (Fla.2d DCA 2000); Mateo v. State, 757 So.2d 1229 (Fla. 2d DCA 2000).

ISSUE III

APPELLANT'S CONVICTIONS FOR BOTH ATTEMPTED SECOND DEGREE MURDER AND ATTEMPTED FELONY MURDER CONSTITUTED A DOUBLE JEOPARDY VIOLATION.

Petitioner filed a motion at the trial level asserting that to convict him of both attempted second degree murder and attempted felony murder under 782.051(1)Fla.Stat., constituted a double jeopardy violation. In its opinion, the Second District noted in a footnote that the Fifth District in Mitchell v. State, 830 So.2d 944 (Fla. 5th DCA 2002) had recently held that convictions for both these offenses, when they arose from a single incident, amounted to double jeopardy and had certified the question.[2] Because the issue had not been raised in the briefs, the district court did not specifically address the issue in its opinion. Petitioner raised the issue in a motion for rehearing. He argued that since the issue was considered to be fundamental, and that the Mitchell opinion had not been issued at the time his brief was filed,and since the error was clearly identified in the opinion and required no factual determination, it would be a more efficient use of judicial resources to make a determination now rather than require petitioner to file a post-conviction motion. The district court denied the motion for rehearing.

Respondent will most likely argue that petitioner has waived or missed his chance to argue this issue in this court by not arguing it

[2] This court subsequently denied review in State v. Mitchell, Fla. April 16, 2003, Table # SC02-2622

in his initial brief in the district court. Petitioner disputes this contention. First, petitioner would point out that double jeopardy rights are fundamental error and violations of them may be raised at any time. Plowman v. State, 586 So.2d 454 (Fla.2d DCA 1991); Young v. State, 827 So.2d 1075 (Fla. 5th DCA 2002) and Holliday v. State, 781 So.2d 496 (Fla.5th DCA 2001). Secondly, their are no factual determinations to be made that would necessitate a hearing at the trial court level. See Trushin v. State, 425 So.2d 1126 (Fla.1982). Third, once an appellate court has jurisdiction,(in this case certified conflict with another district court) it may consider any issue that may necessarily affect the case. Cantor v. Davis,489 So.2d 18 (Fla.1986); Westerheide v. State, 831 So.2d 93 (Fla.2002) and Trushin, supra..

In Mitchell, supra., the facts were that Mitchell shot a woman in the head and then demanded her companion's wallet. When the companion refused to hand it over, Mitchell ran away. Mitchell argued that his convictions for both attempted second degree murder and attempted felony murder were prohibited by double jeopardy protections. The appellate court agreed and vacated his attempted second degree murder conviction. The Fifth District's reasoning was as follows. In order to determine whether two convictions constitute a double jeopardy violation, one must go further than merely applying the Blockburger test. Certain offenses could pass that test, yet would be impermissible because they were "degree variants of the same core offense." The court explained that "degree variants" were certain core offenses which were distinguishable only by degree and

that they consisted of the offenses of theft, battery, possession of contraband or homicide. The term "degree" didn't refer to statutory degrees of an offense, for example, first and second degree murder, rather they were variants of these particular "core" offenses for which it was concluded the legislature couldn't have intended a defendant to be convicted of two offenses for a single act.

Although attempted second degree murder and attempted felony murder each contained elements the other did not,thereby passing the Blockburger test, the court still found they were degree variants of the same core offense, homicide. Both offenses were included within Chapter 782 of the Florida Statutes entitled "homicide" and were meant to rectify the same evil, to punish acts that could result in death. Since both offenses were included in the core offense of homicide, both dealt with remedying the same evil and both were committed during a single criminal episode, convictions for both amounted to a double jeopardy violation.

In the dissenting opinion to Gordon v. State, 780 So.2d 17 (Fla. 2001), Justice Quince observed that despite the legislative intent stated in 775.021 Fla. Stat., the Florida Supreme Court had still held that multiple convictions for single homicides were impermissible. She maintained that this precept was also applicable to attempted homicides as well.

> In the present case, a single gunshot was the basis for the attempted premeditated murder and felony causing bodily injury convictions. In effect, felony causing bodily injury is essentially the former crime of attempted felony murder[which the court had previously held to be a non-existent crime]. Although the Legisla-

> ture evinced an intent to punish all crimes committed in the course of one criminal episode, we must also be cognizant of the corollary principle that alternative theories for homicides cannot be use to convict defendants of multiple crimes. The same principle is applicable to alternative theories of attempted homicides. For the foregoing reasons, Gordon's convictions for felony causing bodily injury and attempted premeditated murder constitute double jeopardy.

The same rationales would necessarily apply in petitioner's case.

CONCLUSION

In light of the arguments made and the authorities cited petitioner asks this Honorable Court to find a double jeopardy violation and vacate his attempted second degree murder conviction, and/or find the incomplete jury instruction constitutes fundamental error and order a new trial for attempted felony murder and/or find the information for attempted felony murder to be fundamentally defective and vacate his conviction for that offense.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Katherine Coombs Cline, Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this _____ day of May, 2003.

CERTIFICATION OF FONT SIZE

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APPENDIX

1. SECOND DISTRICT COURT OPINION 2D01-1839 FILED JANUARY 17, 2003.