IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	Case No.SC06-0258
GREGORY WEAVER,	:	
Respondent.	:	
	:	

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Statement of Case and Facts in the State's Initial Brief is substantially correct.

SUMMARY OF THE ARGUMENT

The jury instructions given on battery on a law enforcement officer constitute fundamental error because the jury was instructed on an uncharged version of that offense. Respondent was charged with battery on a law enforcement officer based solely on "intentionally touching or striking," but the jury was instructed on both forms of the offense, "intentionally touching or striking" and "causing bodily harm." A conviction of an uncharged offense violates due process. A verdict resulting from a jury instruction on an uncharged crime is a nullity. The facts at trial established a battery that was not a mere touching. Jurors may have deduced bodily harm resulted from the battery and they were instructed to consider that form of battery on a law enforcement officer. The erroneous instruction constitutes fundamental error because it is impossible to tell from the general verdict whether the jury unanimously convicted on the basis of the charged form of the offense.

ARGUMENT
ISSUE I

DOES A TRIAL COURT COMMIT FUNDAMENTAL ERROR WHEN IT INSTRUCTS A JURY REGARDING BOTH "BODILY HARM" BATTERY ON A LAW ENFORCEMENT OFFICER AND "INTENTIONAL TOUCHING" BATTERY ON A LAW ENFORCEMENT OFFICER WHEN THE INFORMATION CHARGED ONLY ONE FORM OF THE CRIME AND NO EVIDENCE WAS PRESENTED NOR ARGUMENT MADE REGARDING THE ALTERNATE FORM? (Restated/question certified by lower court).

A defendant has a constitutional right under the Sixth and Fourteenth Amendments of the U.S. Constitution to a unanimous jury verdict when charged with a non-petty criminal offense. *Burch v. Louisiana*, 441 U.S. 130 (1979). A conviction under a general verdict is improper when it rests on multiple bases, one of which is legally inadequate. *Yates v. United States*, 354 U.S. 298 (1957); *Griffin v. United States*, 502 U.S. 46 (1991) (a general guilty verdict must be set aside where the conviction may have rested on a legally inadequate theory). "[A] conviction on a charge not made by the indictment or information is a denial of due process of law. *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); *De Jonge v. Oregon,* 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937)." *State v. Gray,* 435 So. 2d 816 (Fla. 1983).

Gregory Weaver's conviction is fundamentally flawed and violates due process because there was a general verdict and the jury had been instructed it could convict him of battery

on a law enforcement officer jury by causing bodily harm or by intentional touching, but the information alleged only an intentional touching. Gregory and Thomas Weaver were charged with: obstructing or opposing an officer with violence in (Thomas Weaver only); battery on a law enforcement officer by knowingly, unlawfully, and intentionally touching or striking a deputy (Thomas Weaver only); and battery on a law enforcement officer by knowingly, unlawfully, and intentionally touching or striking a deputy (Gregory Weaver only) (v1/R9-11). On December 16, 2003, the Weaver brothers were tried together before a jury (v2-3/T1-215). The evidence at trial established deputies responded to a reported disturbance at an apartment building and attempted to disperse a crowd (v2/T94-95; 107-109, 138-140, 150). When Deputy Bennett attempted to grab Thomas Weaver, Thomas Weaver threw or accidentally spilled hot coffee that probably scalded the deputy's face or the coffee was cold, then Thomas Weaver resisted being handcuffed or did not do so (v2/T95-96, 102, 112-116, 139, 175-178, 191-193; v3/T227-228, 240-243). Deputy Feenaughty ordered Gregory Weaver to cease inciting the crowd, Gregory Weaver refused, Deputy Feenaughty twice pushed Mr. Weaver away from the crowd, and each time Gregory Weaver struck the deputy's torso with both hands and "with a good amount of force" (v2/T141-144, 150, 194-195; v2/T230-231). The trial court instructed the jury, without defense objection, to convict if the State proved Gregory Weaver, "intentionally

touched or stuck David Feenaughty against his will or caused bodily harm to David Feenaughty. (v1/R26; v3/T279). The jury returned a general verdict of guilty of "battery on a law enforcement officer, as charged." (v1/R37; v3/T293).

> 42 C.J.S. Indictments and Informations § 261 states: "... Where a statute penalizes certain acts in the disjunctive, proof of any one of such acts under an indictment charging all of the acts conjunctively is . . . sufficient; but if the indictment alleges only one state of facts proof of the existence of another state of facts will not sustain a conviction."
> See also 17 Fla. Jur. Indictments and Information §§ 94 and 95.
> *Jimenez v. State*, 231 So. 2d 26, 27 (Fla. 3d DCA 1970). *See Warren v. State*, 635 So. 2d 122 (Fla. 1st DCA 1994). "The [Florida] constitution ... guarantees to every accused person ... the right to know 'the nature and cause of the accusation against him,' and it necessarily follows that the accused cannot be indicted for one offense and convicted and sentenced for another, even though the offenses are closely related and of the same general nature or character and punishable by the same grade of punishment." Penny v. State, 140 Fla. 155, 161, 191 So. 190, 193 (1939).

Atwell v. State, 739 So. 2d 1166, 1168 (Fla. 1st DCA 1999).

> Battery on a law enforcement officer can be committed either by "actually or intentionally touching or striking the officer against the officer's will, or by intentionally causing bodily harm to the officer." *Hendricks v. State,* 744 So. 2d 542, 542 (Fla. 1st DCA 1999); *see* §§ 784.03(1)(a), .07(2)(b), Fla. Stat. (2001). A defendant is entitled to have the jury instructed on the offense with which he is charged. *Dixon v. State,* 823 So. 2d 792, 794 (Fla. 2d DCA 2001) (citing *Zwick v. State,* 730 So. 2d 759 (Fla. 5th DCA 1999)), *review dismissed,* 819 So. 2d 134 (Fla. 2002).

Vega v. State, 900 So. 2d 572, 573 (Fla. 2d DCA 2004).

A trial court's decision on the giving or

> withholding of a proposed jury instruction is reviewed under the abuse of discretion standard of review. *See Bozeman v. State*, 714 So. 2d 570, 572 (Fla. 1st DCA 1998). A trial court "should not give instructions which are confusing, contradictory, or misleading." *Mogavero v. State*, 744 So. 2d 1048, 1049 (Fla. 4th DCA 1999) (quoting *Butler v. State,* 493 So. 2d 451, 452 (Fla. 1986). Reversible error occurs when an instruction is not only an erroneous or incomplete statement of the law, but is also confusing or misleading. *See id* at 1050. (citing *Gross v. Lyons*, 721 So. 2d 304, 306 (Fla. 4th DCA 1998), *approved,* 763 So. 2d 276 (Fla. 2000). The test is not whether a particular jury was actually misled, but instead the inquiry is whether the jury might reasonably have been misled. *See id.* When a court erroneously charges a jury on the elements of a crime, the harmless error doctrine should be invoked with great caution. *See id.*

McKenzie v. State, 830 So.2d 234, 236-237 (Fla. 4th DCA 2002).

> Jury instructions are subject to the contemporaneous objection rule, and absent such an objection at the trial, errors in instructions cannot be raised on appeal unless fundamental error occurred. *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991); *Castor v. State*, 365 So. 2d 701 (Fla. 1978). A defendant has a fundamental right to have a court correctly and intelligently instruct the jury on the essential, material elements of the crime charged and required to be proven by competent evidence. *Delva*, 575 So. 2d at 644; *Gerds v. State*, 64 So. 2d 915 (Fla. 1953). A defendant cannot be convicted of a crime that was not charged. *Dixon*, 823 So. 2d [792] at 794 [Fla. 2d DCA 2001]; *O'Bryan v. State*, 692 So. 2d 290 (Fla. 1st DCA 1997). Fundamental error occurs when the court fails to instruct on an element of the crime that was disputed at trial. *Reed* [*v. State*], 837 So. 2d [366] at 369 (Fla. 2002); Delva, 575 So. 2d at 644-645; *Simmons v. State*, 780 So. 2d 263, 266 (Fla. 4th DCA 2001). Likewise, **expanding the definition of a crime beyond that which is charged in the information, resulting in a conviction of a crime not charged, is fundamental error.** *Dixon*, 823 So. 2d at 794; *Zwick v. State*, 730 So. 2d 759 (Fla. 5th DCA 1999).

Griffis v. State, 848 So. 2d 422, 427 (Fla. 1st DCA 2003)

(emphasis added). "Where instructions for a different crime from that with which a defendant is charged and convicted are read to the jury, the verdict as to that crime is a nullity." *Gaines v. State*, 652 So. 2d 458 (Fla. 4th DCA 1995).

Instructing a jury on a crime that was not charged in the information is fundamental error. *Vega v. State*, 900 So. 2d 572, 573 (Fla. 2d DCA 2004) ("Because Vega was not charged with committing battery on a law enforcement officer by intentionally causing bodily harm, it was error for the trial court to instruct the jury on this alternative. As the State rightly concedes, this error is fundamental because the jury returned a general verdict of guilt without specifying the basis for the conviction, making it impossible to know whether Vega was convicted of the form of battery with which he was charged rather than the form with which he was not charged."); *Dixon v. State*, 823 So. 2d 792, 794 (Fla. 2d DCA 2001) ("Here, the jury was improperly instructed on the bodily harm form of battery although Dixon was not charged with that form of battery. *See Hendricks v. State,* 744 So. 2d 542 (Fla. 1st DCA 1999). This error is fundamental because the jury's general verdict makes it impossible to know whether Dixon was convicted of the offense with which he was charged, i.e., intentional touching battery, or an offense with which he was not charged, i.e., bodily harm battery."); *Zwick v. State*, 730 So. 2d 759 (Fla. 5th DCA 1999) ("Because the general verdict

in the instant case makes it impossible to determine whether the jury found Zwick guilty of uncharged acts, we must reverse the convictions for counts two through five of the information."); *O'Bryan v. State*, 692 So. 2d 290, 291 (Fla. 1st DCA 1997) ("Although one of the crimes on which the court instructed conformed to the information, the court failed to instruct on the information's alternative offense and instead instructed on an uncharged offense. The jury's general verdict makes it impossible to determine of which offense appellant was found guilty.").

The jury was instructed to find each brother guilty of battery on a law enforcement officer based on bodily harm, and it is unwarranted to suppose no juror deduced that bodily harm resulted from scalding hot coffee thrown in a deputy's face (v1/113, 178) or from repeatedly and forcefully striking a deputy's torso with both hands (v1/142). It is likely that in most battery cases the facts would support the jury deducing that there was some bodily harm, and that is certainly so in the instant case.

"Because the court instructed the jury on a crime not charged, the resulting verdict is a nullity. *Gaines v. State,* 652 So. 2d 458 (Fla. 4th DCA 1995); *Moore v. State,* 496 So. 2d 255, 256 (Fla. 5th DCA 1986) ('A verdict which finds a person guilty of a crime with which the accused was not charged is a nullity.')." *O'Bryan v. State*, 692 So. 2d 290, 291 (Fla. 1st

DCA 1997). The cause should be affirmed.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellee asks this Honorable Court to affirm the ruling of the lower court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Charles J. Crist, Jr., Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of October, 2006.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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