IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v. Fla. Supreme Court Case No. SC06-258
Lower Tribunal Case No. 2D04-1006

GREGORY CARNELL WEAVER,
Respondent.

_____/

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

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent and his brother, Thomas Weaver, were both charged with battery on a law enforcement officer arising from an altercation between police and the brothers at Respondent's apartment complex. The Information charged both brothers with "knowingly, unlawfully, and intentionally touch[ing] or strik[ing]" a law enforcement officer. (R. at 9-10). The brothers were charged, tried and convicted together. (R. at 9-13, 37).

The brothers were involved in moving Respondent's belongings out of his apartment, at the Villa Palms apartment, when the altercation occurred. (Trial Tr., p. 92). According to a defense witness, Respondent had a fight with his girlfriend earlier in the evening and was moving out his belongings. (Trial Tr., p. 173-174). This witness testified that Respondent's girlfriend and sister got into a shouting match and that the crowd formed in response to the arrival of police. (Trial Tr., p. 173-174). Respondent's mother also testified that the family was helping Respondent move from the home he shared with his girlfriend. (Trial Tr., p. 189). State witnesses testified that a loud, raucous crowd gathered and apartment security, unable to control the crowd, contacted

police. (Trial Tr., p. 92). The time was approximately 10:30 p.m. (R. 8).

Officer Bennett was the first officer to respond to the call from apartment security. When he arrived at the apartment complex he encountered a large group of people yelling and behaving in a hostile manner. (Trial Tr., p. 107-108). He attempted to disperse the group, directing individuals to either return to their homes or leave the premises. (Trial Tr., p. 109). In this capacity, Officer Bennett encountered Thomas Weaver, Respondent's brother. (Trial Tr., p. 109). Upon determining that Thomas was not a resident, the officer directed Thomas to wait by the patrol car, a command Thomas disregarded. (Trial Tr., p. 109-113). When the officer attempted to restrain Thomas, Thomas threw hot coffee in the officer's face. (Trial Tr., p. 113). A scuffle then followed with Officer Bennett attempting to restrain Thomas and advising him not to resist arrest. (Trial Tr., p. 113-116). Throughout the encounter, Thomas continued to struggle with Officer Bennett. (Trial Tr., p. 119).

Ultimately, back up officers arrived and Officer Bennett was able to subdue Thomas. (Trial Tr., p. 119). Officer Bennett was not injured and did not suffer any bodily harm as a result of the altercation. (Trial Tr., p. 110-115; 133-134).

Officer Feenaughty was among the back up officers who arrived at the scene. (Trial Tr., p. 138). He also testified as to the large and hostile nature of the crowd. (Trial Tr., p. 138). As he attempted to control the crowd, Officer Feenaughty's attention was drawn to Respondent who was acting in a loud and belligerent manner. (Trial Tr., p. 140). Believing that Respondent was instigating the crowd's behavior, Officer Feenaughty approached Respondent to get him to cease. (Trial Tr., p. 140). When Respondent refused to obey the officer's command, the officer grabbed him and tried to separate Respondent from the group. (Trial Tr., p. 141-142). Respondent pushed back against the officer, then used his hand to strike the officer. (Trial Tr., p. 143).

Having removed Respondent to the edge of the crowd, Feenaughty waded back into the crowd to aid Officer Bennett. (Trial Tr., p. 143). Respondent again became loud and returned to the group. (Trial Tr., p. 143). For a second time Feenaughty removed Respondent from the group and was met by Respondent's blow. (Trial Tr., p. 143-144). Thereupon, Respondent was placed under arrest. (Trial Tr., p. 144).

Both of the brothers' parents testified at trial, stating that the family arrived at Respondent's apartment around 10:30 at night to help him move. (Trial Tr., p. 223). The father

confirmed that a altercation arose between Respondent's girlfriend and sister. (Trial Tr., p. 225). Finally, Thomas testified that he was rushed by Officer Bennett and the coffee he was carrying spilled. (Trial Tr., p. 241). He denied throwing the coffee and resisting arrest. (Trial Tr., p. 243). He was unable to testify regarding his brother's actions. (Trial Tr., p. 244). Respondent did not testify. (Trial Tr., p. 221).

In closing argument, the State advised the jury of the elements of battery, focusing on its evidence of intentional touching. The State made no argument or suggestion that either officer suffered bodily injury. (Trial Tr., p. 269-272).

The court instructed the jury on the battery charge against that Respondent, that he:

> intentionally touched or struck David Feenaughty against his will or caused bodily harm to David Feenaughty.

(Trial Tr., p. 279).

The court instructed the jury on the battery charge against Thomas Weaver, that he:

> intentionally touched or struck Kevin Bennett against his will or caused bodily harm to Kevin Bennett.

(Trial Tr., p. 278).

The defense did not object to the jury instructions. (Trial Tr., p. 288). The jury returned a verdict against both brothers of guilty of "battery on a law enforcement officer as charged." (Trial Tr., p. 293). Respondent and Thomas Weaver were sentenced on February 5, 2004. Based on his criminal history, Respondent received 35.55 months incarceration. (R. 53; Sentencing Hearing, p. 98). Thomas Weaver, who had no criminal past, received 24 months probation. (Sentencing Hearing, p. 81).

SUMMARY OF THE ARGUMENT

Appellate review of an error alleged to have occurred at trial must, generally, have been preserved by contemporaneous objection. Reed v. State, 837 So. 2d 366 (Fla. 2002). Absent such objection, review is available only if the error is fundamental. Id. at 370.

"[N]ot all harmful error is fundamental." Id. Fundamental error is a class of error that "reach[es] 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." Reed, 837 So. 2d at 369-370. Hence, by its very nature all fundamental error must be harmful error. Error which does not satisfy the fundamental standard "is subject to review in accord with State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)." Id.

The narrow applicability of the fundamental error standard has led to rejection of the claim where a jury was erroneously instructed as to the elements of an offense. Reed, 837 So. 2d at 369-370. Rejection of a fundamental error claim in these circumstances results when the erroneous instruction did not pertain to an issue in dispute. State v. Delva, 575 So. 2d 643, 645 (Fla. 1991); Reed, 837 So. 2d at 369-370. It follows, then, that a jury

instruction which contains alternative methods of committing a crime does not constitute fundamental error when the evidence "deal[s] exclusively with a single alternative." Roberson v. State, 841 So. 2d 490 (Fla. 4th DCA 2003) (en banc), *review denied*, 848 So. 2d 1155 (Fla. 2003).

Florida Statutes provides that battery on a law enforcement officer can be accomplished either by intentional touching or by inflicting bodily harm. § 784.03, Fla. Stat. (2003). Weaver addresses the circumstance where the jury is instructed on both alternatives. Fundamental error does not arise from this error when no evidence was presented in support of the alternate instruction. When the Information charging the crime and the evidence supporting the crime pertain exclusively to a single manner of committing the battery, it is not reasonable to conclude that a jury convicted a defendant on the alternative method. Roberson, 841 So. 2d at 493. Absent evidence of such a conviction, an alternative battery instruction does not result in prejudice to a defendant.

Under Reed, absent prejudice, no claim of fundamental error can lie. The Second District erred in foregoing application of this precedent and reversing Respondent's conviction based on the authority of Vega v. State, 900 So. 2d

572 (Fla. 2d DCA 2004) and Dixon v. State, 823 So. 2d 792 (Fla. 2d DCA 2001).

ARGUMENT

INSTRUCTING A JURY ON ALTERNATE FORMS OF COMMITTING BATTERY ON A LAW ENFORCEMENT OFFICER WHEN THE INFORMATION AND THE EVIDENCE PERTAIN EXCLUSIVELY TO A SINGLE FORM OF THE CRIME DOES NOT CONSTITUTE FUNDAMENTAL ERROR.

At issue in this case is whether, in light of this Court's decision in Reed v. State, 837 So. 2d 366 (Fla. 2002), it is fundamental error to instruct the jury on alternate forms of committing a battery on a law enforcement officer, when only one form was charged in the Information. The opinion below, Weaver v. State, 916 So. 2d 895 (Fla. 2d DCA 2005)(Weaver I), as well as the Second District's identical holding in Weaver v. State, 31 Fla. Law Weekly D 336 (Fla. 2d DCA February 1, 2006)(Weaver II)(pertaining to the conviction of Respondent's brother) (the opinions for both hereinafter referred to collectively as "Weaver"), makes clear that the district courts are in need of guidance as to the continued viability of the fundamental error doctrine in such circumstances.

Respondent was arrested and charged with battery on a law enforcement officer following an altercation at Respondent's home. On appeal, Respondent argued "that the trial court committed fundamental error by instructing the jury that it could convict him of battery by causing bodily harm or by

intentional touching, when the Information alleged only an intentional touching."

The Second District began its analysis by recalling its previous decisions in Vega and Dixon[1]. Judge Altenbernd, writing for the district court, found Dixon and Vega, on which the court relied, were grounded in the principal that it is fundamental error to convict a defendant of a crime with which he has not been charged. Despite this context, the court noted that "the evidence at trial [in this case] was directed solely to the 'intentional touching' form of battery." Weaver, 916 So. 2d at 897. Thus, "[i]t [was] improbable, to say the least, that the jury convicted Gregory Weaver based solely upon the alternative provided in the jury instruction without any evidence to support that alternative." Id. at 897.

While its own analysis suggested that no fundamental error occurred, the Second District, perceiving itself "constrained, [] by [its] precedents in Dixon and Vega," reversed Respondent's conviction for battery on a law enforcement officer. However, based on its reservations and its belief that the Criminal Appeal Reform Act, and this Court's interpretation of that Act in Reed "call[ed] into

[1] This Court's Weaver cases were premised on Vega v. State, 900 So. 2d 572 (Fla. 2d DCA 2004) and Dixon v. State, 823 So. 2d 792 (Fla. 2d DCA 2001).

question the rule of law that [was] followed in this case," the Second District certified the following question:

> 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?

Weaver, 916 So. 2d at 898-899. Based on Reed, this question must be answered in the negative.

The crime of battery on a law enforcement officer occurs when a defendant actually or intentionally touches an officer or intentionally causes an officer bodily harm. § 784.03, Fla. Stat. (2003). Prior to Weaver, the Second District addressed the issue raised by the alternative instruction for battery on a law enforcement officer in Vega and Dixon. Dixon, which was written before Reed, concluded that the error in instructing on both battery alternatives was fundamental "because the jury's general verdict makes it impossible to know whether Dixon was convicted of the offense with which he was charged." Dixon, 823 So. 2d at 794. Vega, written after this Court's Reed decision, nevertheless reversed the conviction based on the authority of Dixon. In this case, the Second District elected to side with its own precedent and eschew application

of Reed to the fundamental error analysis before it.

The Second District erroneously concludes that this Court's Reed decision does not compel affirmance of Respondent's conviction. A review of that decision demonstrates that Reed was intended to limit the applicability of the fundamental error doctrine and to promote the Legislature's intention to stringently apply the contemporaneous objection rule. Absent objection, failure to instruct the jury on an essential element is fundamental error "only when the omission is pertinent or material to what the jury must consider in order to convict"; such as when an element of the offense is in dispute. (Internal citation omitted)." Reed, 837 So. 2d at 366, 369.

The Reed Court's analysis was firmly based on this Court's decision in State v. Delva, 575 So. 2d 643, 645 (Fla. 1991). The Court acknowledged the conclusion that fundamental error does not occur if the failed instruction does not pertain to an issue in dispute:

> [was] required by and follows [this Court's] decision in State v. Delva, 575 So. 2d 643, 645 (Fla. 1991). [In which] [w]e expressly recognized a distinction regarding fundamental error between a disputed element of a crime and an element of a crime about which there is no dispute in the case.

Reed, 837 So. 2d at 369-370.

This Court then:

> "[took] this occasion to clarify that fundamental error is not subject to harmless error review. By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being fundamental. Again, we refer to what we said in Delva. . ..

Reed, 837 So. 2d at 369-370. Accordingly, this Court "recede[d] from State v. Clark, 614 So. 2d 453 (Fla. 1992), to the extent that it holds that fundamental error can be harmless error.

Delva was recently cited again for this same proposition in Battle, where an element of the felony murder charge was omitted from the jury instructions. Battle v. State, 911 So. 2d 85 (Fla. 2005); see also Glover v. State, 863 So. 2d 236 (Fla. 2003)(in reliance on Reed, finding that any error in failing to instruct the jury that the defendant's age was an element of the offense was harmless, and therefore, did not constitute fundamental error).

The Second District's own precedent reflects its cognizance of this Court's Delva and Reed decisions and the Second District's analytical conflict in rejecting Reed in favor of its own precedent.

In Vega[2] and Ayala[3], as well as the two Weaver decisions, the Second District questioned whether Reed had nullified the court's own opinions on the issue of fundamental error as it relates to jury instructions. Despite its express reservations, the Second District was unwilling to so interpret Reed without direct guidance from this Court. In Vega, Judge Altenbernd, concurring, concluded that a fundamental error analysis is inappropriate in a case where the appeal is premised upon an erroneous, but harmless, jury instruction. As occurred in this case, the Vega jury was instructed on guilt based on intentional touching or intentionally causing bodily harm. Given, however, that the evidence was merely of intentional touching, without any

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[2] 900 So. 2d at 573-574(Alternbernd, J., concurring and "question[ing] . . . whether Dixon contains a description of fundamental error that is still accurate. . . .If I had the option, I would be willing to rule that the giving of this jury instruction was harmless beyond a reasonable doubt in the context of this case.")

[3] 28 F.L.W. D2283 (Fla. 2d DCA 2003)(Alternbernd, J., concurring and expressing his uncertainty that Reed had effectively overruled the precedent on which the court was intending to rely and stating "I would dissent if I could convince myself that Reed had effectively overruled Looney. Although I believe that Looney is inconsistent with Reed, I conclude that this court must follow Looney or recede from Looney in an en banc opinion). Concluding that an alternate analysis existed, the Second District withdrew its opinion discussing Reed and substituted the opinion reported at 879 So. 2d 1(Fla. 2d DCA 2004).

suggestion of bodily harm, the concurring opinion concluded that a fundamental error analysis was inappropriate.

Judge Altenbernd then, in reliance on Glover and Reed, went on to state that, "[i]n light of recent cases, [he was] inclined to believe that most, if not all, errors that are harmless beyond a reasonable doubt in their context should not be treated as fundamental errors." Vega, 900 So. 2d at 573-74. He concluded that "[i]f all fundamental error must be harmful and this error was harmless beyond a reasonable doubt, then it seems []that this error was not fundamental and we should affirm all judgments and sentences in this case." Id. at 574. Nevertheless, constrained by Dixon, Judge Alternbernd concurred in the majority's reversal of Vega's conviction.

The need for guidance on the certified question is further illustrated by the uneven manner in which Delva and Reed are being applied within the Second District. Williams v. State, 614 So. 2d 640 (Fla. 2d DCA 1993), which preceded Dixon, Vega and Reed, found the Second District applying Delva to deny reversal of a conviction for battery on a law enforcement officer. The Second District, relying on Delva, affirmed the conviction, reasoning that the erroneous instruction, which related to an undisputed element of the pending charge, did not constitute fundamental error.

Williams, 614 So. 2d at 641.

Recent decisions in both Pena v. State, 829 So. 2d 289 (Fla. 2d DCA 2002), approved, 901 So. 2d 781 (Fla. 2005) and Battle v. State, 837 So. 2d 1063 (Fla. 2d DCA 2003), approved, 911 So. 2d 85 (Fla. 2005), also demonstrate the Second District's willingness to apply the fundamental error analysis established by this Court in Reed. In Pena, the court held it was not fundamental error to omit the instructions on excusable and justifiable homicide where the defendant was charged and convicted of first degree murder and the factual circumstances did not support any jury argument relying upon excusable or justifiable homicide jury instructions. See also, Guardiola v. State, 884 So. 2d 140 (Fla. 2d DCA 2004). In Battle, the court found there was no fundamental error in an attempted felony murder jury instruction, despite the failure to give a complete jury instruction on an essential element of the crime, where that element was not in dispute.

Despite its holdings in these decisions, the Second District has concluded in Weaver, Dixon and Vega that Reed does not overrule the Second District's precedent pertaining to erroneous battery jury instructions. This decision is not only erroneous. It also creates a per-se reversible error analysis which is elevated above this Court's own fundamental

error analysis. As Judge Altenbernd has repeatedly noted, clarification on this issue is necessary.

As this Court reasoned in Reed, jury instructions are subject to contemporaneous objection and, absent such, can be raised on appeal only if fundamental error occurred. Reed, 837 So. 2d at 370. The facts must reflect an error that is pertinent or material to what the jury must consider in order to convict before it can be deemed fundamental. Id. Hence, "to justify not imposing the contemporaneous objection rule, 'the error must reach 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.'[internal citations omitted]." Id. The evidence does not support such an error in this case.

This is not a case where Respondent was convicted of an uncharged crime. The evidence against Respondent and Thomas Weaver was consistently related to battery based on intentional touching. Neither officer made a claim of bodily harm. Nor did the State argue that such harmed occurred during its closing remarks. Thus, the surplusage in the jury instruction related to battery by bodily harm was not material to the relevant evidence the jury had to consider in order to convict. This conclusion rebuts any claim that Respondent was

prejudiced by the jury instruction presented in this case.

As explained in Roberson, 841 So. 2d at 493,[4] it is not reasonable to assume alternative instructions would lead a jury to convict a defendant when the evidence dealt exclusively with a single alternative. The Second District's opinion candidly admits this is so. Hence, it is the stumbling block of precedent, which has been implicitly, but not expressly overruled, that drives the outcome in this case and that of Thomas Weaver.

A claim of fundamental error must be evaluated based on the record, and the record must demonstrate the harm before relief can be accorded. "[N]ot all harmful error is fundamental. Error which does not meet the exacting standard so as to be 'fundamental' is subject to review in accord with State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)." Reed, 837 So. 2d at 369-370; see also Vega, 900 So. 2d at 574 (containing the identical conclusion that a traditional harmless error analysis under DiGuilio is appropriate where no actual harm arises from the erroneous instruction). The Weaver court conducted such an analysis and confirmed that under a traditional harmless error analysis, it would conclude

[4] Roberson, 841 So. 2d at 493 (rejecting fundamental error claim involving "remaining in" burglary jury instruction where evidence supported solely one of two alternative manners

beyond a reasonable doubt the error did not affect the verdict.

Weaver, Dixon and Vega reflect that the District Court is in

conflict as to the effect of Reed on jury instructions which are claimed as fundamental error, but which do not result in actual prejudice to a defendant. These decisions effectively create a per-se rule which is expressly contrary to this Court's decisions in Delva and Reed. The State urges this Court to answer the certified question in the negative, to expressly rule that Reed v. State, 837 So. 2d 366 (Fla. 2002), overrules Weaver, Dixon and Vega, and to hold that the jury instruction given in this case did not constitute fundamental error.

CONCLUSION

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of committing burglary).

In conclusion, the State respectfully requests that this Honorable Court find that Reed v. State, 837 So. 2d 366 (Fla. 2002), compels reversal of the Second District Court of Appeal's decision in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been furnished by U.S. mail to Lisa Lott, Assistant Public Defender, P.O. Box 9000, Bartow, FL 33831, this 16th day of May 2006.

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).

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