IN SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JIMMY MOORE, JR.,

Respondent.

Case No. SC13-1236

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Jimmy Moore, Jr., the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of six volumes, which will be referenced by the volume number in roman numerals, followed by any appropriate page number, as well as two supplemental volumes, which will be referenced as "SRI," and "SRII," respectively, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The First District Court of Appeal summarized the underlying facts of Respondent's offense as follows:

> Appellant was charged with first-degree murder and home invasion robbery. The evidence presented at trial demonstrated that the victim's hands were bound, and he was killed by blunt force trauma to the head and neck. Appellant's defense was that he was out of town at the time the incident occurred and that someone else perpetrated the killing.

Moore v. State, 114 So. 3d 486, 488 (Fla. 1st DCA 2013).

After the presentation of the evidence, the trial court discussed the jury instructions with counsel for both the State and defense. The trial court represented that defense counsel had stated he had no objections to the instructions as prepared and emailed by the State. (IV 486-487).

Nevertheless, the trial court went through the individual instructions with counsel. (IV 487). When the discussion reached the manslaughter instruction, the court inquired whether the defense had any objection, to which counsel answered, "None." (IV 489). After changes were discussed to other portions of the instructions, the State represented that they would make those changes, and the trial court instructed that updated copies should be provided to the defense for a second review the following day. (IV 497). Based on the discussions covered below, it appears that the version of the manslaughter instruction discussed at this time contained no reference to justifiable or excusable homicide, as the later version was based on this initial version.

The following day, the trial court raised the issue of a possible error involving the intent element of manslaughter, in addition to the name of the defendant contained in the manslaughter instruction being the wrong name. (V 505). As the defense considered their position, the trial court moved on to another issue involving the instruction. (V 505-506). Returning to the manslaughter instruction, the defense ultimately agreed to the definition of intent for manslaughter that was given to the jury. (V 508).

Subsequent to this agreement, the trial court noted the wording for intent on the record, and then inquired of counsel regarding their position as to further alterations to the manslaughter instruction in the following exchange:

> THE COURT: Very well. And so that's what we need to include, 2(a), which would be Jimmy Moore, Jr., intentionally caused the death of Jaguar Gee.

So then those would the only changes, correct?

MR. JACOBSEN:[1] Right.

THE COURT: And then was the verdict form changed after our conference yesterday evening?

MR. JACOBSEN: Yes, it was. I've handed you two copies of it.

THE COURT: All right. And has defense counsel had an opportunity to review the verdict form?

MR. D. COLLINS: Is this the copy?

MR. JACOBSEN: Yes.

(Whereupon there was a brief pause in the proceedings.)

MR. D. COLLINS: That's fine with us, Judge.

THE COURT: All right. Very well. So is there anything else we need to address before we begin closing arguments?

MR. D. COLLINS: Not that I can think, no, ma'am.

THE COURT: All right.

(V 508-509). Later, the manslaughter instruction was reviewed again by the trial court to ensure the changes were as discussed. (V 512-513). To this end, the State read aloud the manslaughter instruction that would be given to the jury. (V 513, 611). Nowhere in the instruction on manslaughter was justifiable or excusable homicide mentioned. Despite the erroneous absence of these terms, the defense affirmed twice after the State read the instruction that they agreed with it. The trial court inquired as follows:

THE COURT: Correct. Is the defense in agreement with that?

MR. D. COLLINS: Yes.

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[1] Jacobson is one of the prosecuting attorneys.

THE COURT: Not requesting anything else regarding that?

MR. D. COLLINS: No.

(V 513). The trial court then once again reviewed other changes in the instructions to ensure they were consistent with the parties' desires. (V 513-514). After reviewing the other changes, the trial court again inquired of the parties as to any other changes they desired:

THE COURT: Okay. So we will make that change. Other than that, anything else that you all see that we need to --

MR. JACOBSEN: No.

THE COURT: All right. . .

(V 514-515). Subsequent to closing arguments and the actual instruction of the jury, the instructions were raised once again in the following exchange:

THE COURT: Are there any objections to the instructions as given by the Court from the defense?

MR. D. COLLINS: No, ma'am.

THE COURT: And any objections by the State?

MR. JACOBSEN: No, Your Honor.

(V 624).

The jury convicted Respondent of the lesser-included offense of second-degree murder as to Count I, and the charged offense of Home Invasion Robbery as to Count II. (VI 676). On appeal to the First District, Respondent claimed that fundamental error occurred in the jury instruction for manslaughter because both the intent element was incorrectly defined and the instruction lacked the required definition of justifiable and excusable homicide. Moore, 114 So.3d 486 at 488-489. The First District held that any fundamental error regarding the intent element was waived by Respondent

affirmatively agreeing to the manslaughter instruction after the trial court brought the error to the attention of the defense. Id. at 489.

The First District found that the absence of language defining justifiable and excusable homicide in the manslaughter instruction presented a closer question regarding waiver. Id. at 490. While the court felt there was a lack of clarity on the issue, the court nonetheless concluded that no waiver occurred despite Respondent's affirmative agreement to the language of the manslaughter instruction, which did not contain a definition of justifiable or excusable homicide. Id. at 493. The First District reached this conclusion because it believed waiver required not merely an affirmative agreement to an instruction, but a specific affirmative agreement to omit required language or evidence that the defense was aware of the erroneous omission. Id.

As to the merits of the omission, the First District acknowledged binding authority from this Court in State v. Lucas, 645 So.2d 425 (Fla. 1994), that an omission of the definition of justifiable and excusable homicide from an instruction on the one-step-removed lesser-included offense of manslaughter was fundamental error. The holding of Lucas was without regard to whether the element of justifiable or excusable homicide was disputed at trial. Moore, 114 So.3d 486 at 493. Noting that this holding was contrary to the well-established rule that jury instructions do not constitute fundamental error unless they pertain to an element that is disputed at trial, the First District requested this Court reconsider its decision in Lucas. Id.

To that end, and to clarify the correct test for determining waiver of fundamental error in jury instructions, the First District certified the

following two questions of great public importance to this Court:

> IN ORDER FOR COUNSEL TO WAIVE AN ERROR IN A JURY INSTRUCTION THAT WOULD OTHERWISE BE FUNDAMENTAL, IS IT ONLY NECESSARY THAT COUNSEL AFFIRMATIVELY AGREE TO THE INSTRUCTION, OR IS IT ALSO NECESSARY FOR COUNSEL TO AFFIRMATIVELY AGREE TO THE PORTION OF THE INSTRUCTION THAT IS ERROR AND/OR TO BE AWARE THAT THE INSTRUCTION IS ERRONEOUS?
>
> WHEN A DEFENDANT IS CONVICTED OF EITHER MANSLAUGHTER OR A GREATER OFFENSE NOT MORE THAN ONE STEP REMOVED, DOES THE FAILURE TO INSTRUCT THE JURY ON JUSTIFIABLE OR EXCUSABLE HOMICIDE CONSTITUTE FUNDAMENTAL ERROR NOT SUBJECT TO A HARMLESS ERROR ANALYSIS EVEN WHERE THE RECORD REFLECTS THERE WAS NO DISPUTE AS TO THIS ISSUE AND THERE WAS NO EVIDENCE PRESENTED FROM WHICH THE JURY COULD FIND JUSTIFIABLE OR EXCUSABLE HOMICIDE?

Id. at 493-494.

The First District affirmed the conviction for home invasion robbery and reversed that for second-degree murder. The State now petitions this Court for review of the First District's decision in the instant case.

SUMMARY OF ARGUMENT

Issue I: This Court has clearly stated the test for determining waiver of fundamental error in a jury instruction. Pursuant to that test, waiver occurs where 1) a party requests an instruction, or 2) a party affirmatively agrees to this instruction. This simple test insures that litigants will not seek to represent one position in the trial regarding an erroneous instruction, then change their position on appeal to take advantage of the error.

The First District's expansion of the requirements for waiver to include evidence that a party was aware of the error in an instruction and/or affirmatively agreed to allow the specific error to occur, is not only alien to this Court's analysis, but unwise. Requiring proof of such will allow a party to freely represent that they affirmatively agree with an instruction at trial, and then upon receiving an adverse verdict, claim error in the very instruction with which they previously agreed. The only exception to this would be where a trial court realizes it cannot rely on counsel's representations as to their position and specifically presents possible errors to the litigants. This result eviscerates the invited error doctrine upon which the waiver of a fundamental error is based, and runs afoul of the axiomatic truth that a trial court must be able to rely on the representations of counsel and the parties.

The certified question regarding waiver must therefore be answered by reaffirming the above-mentioned test this Court has previously established. No evidence of knowledge or intent on the part of counsel is necessary to establish the procedural bar of waiver. Similarly, the First District's

decision in the instant case is incorrect. Defense counsel specifically and affirmatively agreed on several occasions to the wording of the manslaughter instruction, which contained no reference to justifiable and excusable homicide. In doing so, the defense communicated to the trial court that the instruction was correct, and cannot now take the opposite position on appeal. Such is the precise situation that the invited error doctrine seeks to avoid.

Issue II: This Court has repeatedly held that an error in a jury instruction is not fundamental when the error relates to an element that is not in dispute. State v. Lucas, 645 So.2d 425 (Fla. 1994), however, is irreconcilably in conflict with the above principle. Lucas stands for the opposite proposition, that where an instruction on the one-step-removed lesser-included offense of manslaughter omits a definition of justifiable and excusable homicide, that error is fundamental without regard to whether a justifiable or excusable homicide was disputed.

In the instant case, Respondent's defense was that he was not the person who committed the crimes, and therefore the issue of justifiable and excusable homicide was not disputed. Under this Court's established test, the error in the manslaughter instruction was not fundamental because of this lack of dispute. Lucas stands alone in leading to a contrary result. Lucas should be receded from, as it does not conform to this Court's definition of fundamental error, and the certified question should be answered in the negative.

ARGUMENT

ISSUE I: IN ORDER FOR COUNSEL TO WAIVE AN ERROR IN A JURY INSTRUCTION THAT WOULD OTHERWISE BE FUNDAMENTAL, IS IT ONLY NECESSARY THAT COUNSEL AFFIRMATIVELY AGREE TO THE INSTRUCTION, OR IS IT ALSO NECESSARY FOR COUNSEL TO AFFIRMATIVELY AGREE TO THE PORTION OF THE INSTRUCTION THAT IS ERROR AND/OR TO BE AWARE THAT THE INSTRUCTION IS ERRONEOUS?

Standard of Review

In the context of the instant case, the certified question is necessarily reviewed de novo, as the issue was never presented to the trial court.

The Certified Question

The First District certified the following as a question of great public importance in the instant case:

> In order for counsel to waive an error in a jury instruction that would otherwise be fundamental, is it only necessary that counsel affirmatively agree to the instruction, or is it also necessary for counsel to affirmatively agree to the portion of the instruction that is error and/or to be aware that the instruction is erroneous?

Moore v. State, 114 So. 3d 486, 493 (Fla. 1st DCA 2013). Pursuant to this Court's precedent, the answer to this question is that only an affirmative agreement to an instruction is necessary to waive fundamental error.

In Universal Ins. Co. of North America v. Warfel, 82 So.3d 47, 65 (Fla. 2012), this Court restated the law of waiver as it relates to fundamental errors in jury instructions. The concept of waiver as it relates to a claim of fundamental error is rooted in the invited error doctrine. Id. Under this doctrine, a party which invites error into a proceeding cannot claim that error on appeal, thereby using it to their advantage in gaining relief. Id.

This Court has recognized two instances where waiver of a fundamental error occurs in the context of an erroneous jury instruction. Id. The first is where a party requests the instruction, and the second is where the party affirmatively agrees to the instruction. Id.[2] In making this restatement, this Court expressly relied on its prior decisions in Ray v. State, 403 So.2d 956 (Fla. 1981), State v. Lucas, 645 So.2d 425 (Fla. 1994), and Armstrong v. State, 579 So.2d 734 (Fla. 1991). This Court also cited favorably the district court decisions in Tindall v. State, 997 So.2d 1260 (Fla. 5th DCA 2009), Jimenez v. State, 994 So.2d 1141 (Fla. 3d DCA 2008), York v. State, 932 So.2d 413 (Fla. 2d DCA 2006), and Sheffield v. Superior Ins. Co., 800 So.2d 197 (Fla. 2001).

In Tindall, 997 So.2d 1260 at 1261, the defendant was charged with burglary of a structure. Subsequent to charging the jury on the law, the

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[2] The rule that waiver is established under either of these scenarios is similar to the general principles of estoppel, as quoted in McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971):

> "[T]he general rule is that a party cannot occupy inconsistent positions in the course of a litigation. It may be also laid down as a general proposition that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it is to the prejudice of the party who has acquiesced in the position taken by him."

McPhee v. State, 254 So.2d 406, 409-10 (Fla. 1st DCA 1971) (quoting Fla. Jur. Estoppel and Waiver § 51).

trial court received a question from the jury to clarify an instruction. Id. The trial court responded to the question by simply reaffirming the instruction, an act with which the defendant affirmatively agreed. Id. at 1261-1262. The appellate court held that this method of advising the trial court as to its response, affirmative agreement with the court's action, constituted a waiver of fundamental error. Id.

In Jimenez, 994 So.2d 1141 at 1142, the defendant was charged with second-degree murder. With regard to the jury instruction, the defendant requested that the trial court not give an instruction on the lesser-included offense of manslaughter. Id. Because the State objected to omitting the instruction, the trial court instructed the jury as to manslaughter. Id. However, the instruction erroneously omitted a definition of justifiable and excusable homicide. Id. The court held that the defendant's request to not include the instruction on manslaughter did not constitute a waiver of the error in failing to instruct as to justifiable and excusable homicide as part of the instruction. Id. at 1143.

In York v. State, 932 So.2d 413, 414 (Fla. 2d DCA 2006), the defendant was convicted of aggravated battery and shooting in a vehicle. At issue in the case was whether the defendant's use of force was justifiable. Id. at 415. However, the jury instruction on that issue was flawed in such a manner that it deprived him of this defense. Id. The defendant remained silent regarding this instruction during trial, neither objecting to nor specifically agreeing to or requesting the instruction. Id.

Sheffield v. Superior Ins. Co., 800 So.2d 197, 199 (Fla. 2001), involved a

personal injury claim resulting from a traffic accident. The plaintiff sought to exclude certain pieces of evidence prior to trial that related to insurance and benefits she received from her employer, but the trial court admitted the evidence over the plaintiff's standing objection. Id. In order to minimize the damage of this evidence, the plaintiff subsequently introduced it herself. Id. The jury's ultimate verdict was in the plaintiff's favor, but with adverse findings as to the extent of her injury and damages. Id. The plaintiff appealed, arguing that the trial court erred in admitting the evidence regarding her insurance and benefits. Id. The First District held that her action in admitting the very evidence she sought to exclude invited the error and therefore waived any complaint. Id. This Court reversed, holding that it was a legitimate trial strategy to minimize the effect of inadmissible, adverse evidence after having failed to exclude such evidence. Id. at 203. Waiver, therefore, did not occur simply because the plaintiff accepted the trial court's ruling and adapted to it.

In the varying scenarios of Tindall, Jiminez, York, and Sheffield, the common determinant of waiver is what the actions of a party reasonably communicated to the trial court and opposing counsel. In Tindall, the defendant represented to the trial court that they agreed with the trial court's reaffirmation of the instruction, thereby waiving the contrary position that the court's action was incorrect. In Jiminez, while the defendant requested the trial court not give a manslaughter instruction, they never communicated that they did not want the jury instructed correctly on manslaughter. Therefore, a request not to give an instruction does not waive

a complaint that an instruction was incorrectly given. In York, the defendant made no representation at all regarding the instruction at issue. While the defendant's lack of an affirmative objection prevented any review except that for fundamental error, the defendant also did not mislead the court into thinking its action was correct by agreeing to it. Therefore, no waiver occurred in York. In Sheffield, the plaintiff represented to the trial court that its admission of evidence was incorrect and made a standing objection to that evidence. These actions left the trial court with no doubt as to her position, thereby allowing her to raise the same contention on appeal.

These decisions are consistent with the axiom that a trial court must be able to rely on the representations of counsel and litigants, and it is similarly true that a litigant must be able to rely on the stipulations of an opposing party as to their position. The invited error doctrine, as well as the related general principles of estoppel, provide a bar to any who misinform a court as to the correct course of action by preventing them from later changing their position and complaining that error resulted from actions they had previously endorsed.

The First District's holding in the instant case that no waiver occurred originates in a misapprehension of the above principles. In Black v. State, 695 So.2d 459, 460 (Fla. 1st DCA 1997), the manslaughter instruction erroneously omitted a definition of justifiable and excusable homicide. The State argued that a stipulation by the defense that the instructions given to the jury were the same as that reviewed during the charge conference constituted an agreement that the instructions were correct. Id. The First

District rejected this argument, holding that a simple acknowledgement that the instructions were the same as that which had been previously reviewed did not constitute waiver. Id. at 461. The First District reasoned that not only must a defendant affirmatively agree to or request an instruction, they must also be specifically aware that the incorrect instruction is being given to the jury. Id.

While the First District was correct in its conclusion, its reasoning departed from that of this Court regarding waiver of fundamental error in jury instructions. The defendant did not waive a claim of error as to the erroneous instruction because agreeing that the instruction is what was reviewed cannot reasonably be understood as a representation that the defendant agreed with the instruction. Had the trial court's inquiry of defense counsel regarding the instructions differed in that it asked whether the instructions were as **agreed** upon at the charge conference, as opposed to merely reviewed, the trial court could reasonably understand defense counsel's answer of, "Yes, sir, they were," as a representation that the instructions were correct. Such an affirmative agreement with the trial court's action would constitute a waiver, regardless of whether evidence existed that defense counsel was specifically aware that one of the instructions he had affirmatively agreed to was erroneous.

In Beckham v. State, 884 So.2d 969 (Fla. 1st DCA 2004), the First District followed its precedent in Black to reach a conclusion that a waiver did not occur when a manslaughter instruction erroneously omitted the definition of justifiable and excusable homicide. With regard to the jury instructions,

defense counsel represented to the trial court that the State and defense had reviewed and agreed on the instructions which were about to be delivered to the courtroom. Id. at 971. Nevertheless, the trial court requested that defense counsel review them again once they arrived to ensure they were as agreed upon. Id. The prosecutor later gave the defense a copy of the instructions and informed the trial court of this, and defense counsel represented that they were ready to proceed. Id. The First District held that because the above did not indicate that defense counsel was aware of the specific error in the jury instruction on manslaughter, his repeated representations of agreement to the entirety of the instructions did not constitute a waiver of the claim under Black and this Court's precedent in Armstrong.

While Black utilized the wrong rationale, but reached the correct result, Beckham's usage of that rationale resulted in a result contrary to this Court's precedent. The repeated, affirmative representations of defense counsel that they were in agreement with the jury instructions is all this Court has required to constitute waiver. Such affirmative agreement with the instructions represented both to the trial court and the State that the entirety of the instructions were correct. The defendant was therefore bound to that position and prohibited from asserting the contrary.

This result is without regard to whether record reveals the extent of the defendant's knowledge of a specific instruction. Indeed, this Court has not required such a showing before a waiver is found. Rather, in restating the law of waiver based on Ray, Armstrong, and Lucas, this Court outlined a

simple, straightforward test. Waiver of a fundamental error in jury instructions is found where 1) a party requests an instruction, or where 2) a party affirmatively agrees to an instruction. Universal Ins. Co. of North America, 82 So.3d 47 at 65. This test satisfies the goal of the invited error doctrine in that it prohibits a party from taking advantage of an error which they had a part in introducing.

An additional requirement that there must be evidence a party is specifically aware of an erroneous instruction is not only outside the above test, but would contravene the goal of the invited error doctrine. This is particularly true in the instant case, where the error at issue is an omission, rather than an inclusion, of language. In such a scenario, it would be rare that a record could reveal whether a party was aware that the language's absence was error, in that it would be akin to proving a negative. Moreover, it is generally true that an appellate record will not necessarily reveal the personal knowledge of a party or counsel. Indeed, it is precisely those parties that would intentionally inject error who are most likely to obscure any awareness they possess of a specific erroneous instruction. Consistent with the goal of discouraging such action, this Court's test does not require evidence of a party's specific knowledge or intent in the record before a waiver is found. It is in this manner that the principle of fairness towards both the tribunal and the opposing party binds a litigant to their word and prevents them from receiving the benefit of changing their position on appeal.

The certified question of the First District must therefore be answered by

restating this Court's rule that a waiver requires only an affirmative representation as to the party's position, whether by affirmative agreement or by a request for the instruction. As to the scope of the waiver, it is precisely the same as the scope of the affirmative representation. Therefore, the question is not whether counsel must agree to a specific portion of an instruction or be aware the instruction is erroneous, the question is whether the trial court and the opposing party could reasonably understand the representation to constitute a position contrary to what is urged on appeal.

As applied to the instant case, this analysis reveals that Respondent waived any claim of fundamental error regarding the omission of justifiable and excusable homicide from the manslaughter instruction. At the beginning of the charge conference, the trial court represented that defense counsel had stated there were no objections to the instructions as prepared and emailed by the State. (IV 486-487). Nevertheless, the trial court went through the individual instructions with counsel. (IV 487). When the discussion reached the manslaughter instruction, the court inquired whether the defense had any objection, to which defense counsel answered, "None." (IV 489). After changes were discussed to other portions of the instructions, the State represented that they would make those changes, and the trial court instructed that updated copies should be provided to the defense for a second review the following day. (IV 497). Based on the discussions covered below, it appears that the version of the manslaughter instruction discussed at this time contained no reference to justifiable or excusable homicide, as the later version was based on this initial version.

The following day, the trial court raised the issue of a possible error involving the intent element of manslaughter, in addition to the name of the defendant contained in the instruction being incorrect. (V 505). As the defense considered their position, the trial court moved on to another issue involving the instruction. (V 505-506). Returning to the manslaughter instruction, the defense ultimately agreed to the definition of intent for manslaughter that was given to the jury. (V 508).

Subsequent to this agreement, the trial court noted the wording for intent on the record, and then inquired of counsel regarding their position as to further alterations to the manslaughter instruction in the following exchange:

> THE COURT: Very well. And so that's what we need to include, 2(a), which would be Jimmy Moore, Jr., intentionally caused the death of Jaguar Gee.
>
> So then those would the only changes, correct?
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> MR. JACOBSEN: Right.
>
> THE COURT: And then was the verdict form changed after our conference yesterday evening?
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> MR. JACOBSEN: Yes, it was. I've handed you two copies of it.
>
> THE COURT: All right. And has defense counsel had an opportunity to review the verdict form?
>
> MR. D. COLLINS: Is this the copy?
>
> MR. JACOBSEN: Yes.
>
> (Whereupon there was a brief pause in the proceedings.)
>
> MR. D. COLLINS: That's fine with us, Judge.
>
> THE COURT: All right. Very well. So is there anything else we need to address before we begin closing arguments?
>
> MR. D. COLLINS: Not that I can think, no, ma'am.
>
> THE COURT: All right.

(V 508-509). Later, the manslaughter instruction was reviewed again by the trial court to ensure the changes were as discussed. (V 512-513). To this end, the State read aloud the manslaughter instruction that would be given to the jury. (V 513, 611). Nowhere in the instruction on manslaughter was justifiable or excusable homicide mentioned. Despite the erroneous absence of these terms, the defense affirmed twice after the State read the instruction that they agreed with it. The trial court inquired as follows:

> **THE COURT: Correct. Is the defense in agreement with that?**
>
> **MR. D. COLLINS: Yes.**
>
> **THE COURT: Not requesting anything else regarding that?**
>
> **MR. D. COLLINS: No.**

(V 513)(emphasis added). The trial court then once again reviewed other changes in the instructions to ensure they were consistent with the parties' desires. (V 513-514). After reviewing the other changes, the trial court again inquired of the parties as to any other changes they desired:

> THE COURT: Okay. So we will make that change. Other than that, anything else that you all see that we need to --
>
> MR. JACOBSEN: No.
>
> THE COURT: All right. . .

(V 514-515). Although the trial court addressed its question to "you all", only the State responded, as indicated above. Subsequent to closing arguments and the actual instruction of the jury, the instructions were raised once again in the following exchange:

> THE COURT: Are there any objections to the instructions as given by the Court from the defense?
>
> MR. D. COLLINS: No, ma'am.

THE COURT: And any objections by the State?

MR. JACOBSEN: No, Your Honor.

(V 624).

The defense in the instant case did not merely fail to object to the absence of a definition for justifiable and excusable homicide as part of the manslaughter instruction. Rather, they affirmatively agreed with the absence of this definition after extensive discussion regarding not only the manslaughter instruction, but the instructions as a whole. On the first day of discussions, the definitions were absent, yet the defense represented to the trial court that they had no objection to them. Perhaps most importantly, after changes to the manslaughter instruction were agreed upon and made, the final instruction was read aloud, and the defense affirmatively stated they agreed with it, and that they requested nothing else regarding it.

These affirmative representations by the defense reasonably communicate that the defense position at trial was that no error existed in the manslaughter instruction. Indeed, this is the only reasonable understanding the trial court and the State could have taken from the representations of the defense. This is especially true in the instant case, where the trial court was particularly thorough in continuously raising the issue of the instructions and inquiring as to the position of the parties. Having represented to the trial court that he affirmatively agreed with the content of the manslaughter instruction, Respondent cannot change his position on appeal and argue that the instruction was lacking.

To allow Respondent to change his position, as he has attempted to do,

contravenes the purpose of the invited error doctrine by allowing him to inject error into the proceedings and take advantage of it on appeal by altering his position. As this Court has stated,

> Any other holding would allow a defendant to intentionally inject error into the trial and then await the outcome with the expectation that if he is found guilty the conviction will be automatically reversed.

Armstrong, 579 So.2d 734 at 735. The test utilized by the First District for determining waiver, which requires proof of knowledge that the defense was aware an instruction was erroneous and/or an affirmative agreement to the specific error in the instruction, departs from this Court's established test. Under that test, waiver of a fundamental error in a jury instruction is established when a party either affirmatively agrees to an instruction, or requests the instruction be given. The First District's certified question should be answered accordingly, and the decision below quashed.

ISSUE II: WHEN A DEFENDANT IS CONVICTED OF EITHER MANSLAUGHTER OR A GREATER OFFENSE NOT MORE THAN ONE STEP REMOVED, DOES THE FAILURE TO INSTRUCT THE JURY ON JUSTIFIABLE OR EXCUSABLE HOMICIDE CONSTITUTE FUNDAMENTAL ERROR NOT SUBJECT TO A HARMLESS ERROR ANALYSIS EVEN WHERE THE RECORD REFLECTS THERE WAS NO DISPUTE AS TO THIS ISSUE AND THERE WAS NO EVIDENCE PRESENTED FROM WHICH THE JURY COULD FIND JUSTIFIABLE OR EXCUSABLE HOMICIDE?

Standard of Review

The decision of a trial court regarding a jury instruction is reviewed for an abuse of the trial court's discretion. Sheppard v. State, 659 So.2d 457, 459 (Fla. 5th DCA 1995). However, if a defendant fails to preserve an issue, the review for fundamental error is de novo. Elliot v. State, 49 So.3d 269 (Fla. 1st DCA 2010).

Consequently, a claim of unpreserved fundamental error concerning jury instructions typically submits to the more favorable *de novo* standard of appellate review a claim that is entitled to significant deference if Petitioner properly preserves the error. As a result, this Court should strictly apply its fundamental error analysis in order to discourage possible "sandbagging" and "gamesmanship" in the future.[3] See Thompson v. State, 949 So.2d 1169, 1179 n.7 (Fla. 1st DCA 2007), citing Black's Law Dictionary 1342 (7th ed. 1999) ("Sandbagging is defined as '[a] trial lawyer's remaining

[3] The State does not suggest that the Respondent in the case *sub judice* engaged in "sandbagging" or "gamesmanship". Rather, the State simply notes that a failure to strictly apply fundamental error analysis in the case at bar might encourage such behavior in future cases.

cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem.'"); see also J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998), citing Davis v. State, 661 So.2d 1193, 1197 (Fla. 1995) ("[The contemporaneous objection rule] prohibits counsel from attempting to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client.").

Preservation

Respondent did not request that the jury be instructed regarding justifiable and excusable homicide as part of the manslaughter instruction, nor did he raise a specific objection to their absence. Therefore, the issue of whether the trial court erred by failing to instruct as to justifiable and excusable homicide is not preserved for appellate review. Weaver v. State, 894 So.2d 178, 196 (Fla. 2004).[4] If the claim is to be considered on appeal, any alleged error would have to reach "down into the validity of the trial itself to the extent that the verdict of guilty could not have been obtained without the assistance of the alleged error." Martinez v. State, 69 So.3d 1062, 1063 (Fla. 3d DCA 2011), quoting State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991). As discussed below, no such error occurred.

[4] Respondent's waiver of any error in not instructing the jury as to justifiable and excusable homicide is discussed in Issue I.

The Certified Question

The First District certified the following as a question of great public importance in the instant case:

> When a defendant is convicted of either manslaughter or a greater offense not more than one step removed, does the failure to instruct the jury on justifiable or excusable homicide constitute fundamental error not subject to a harmless error analysis even where the record reflects there was no dispute as to this issue and there was no evidence presented from which the jury could find justifiable or excusable homicide?

Moore v. State, 114 So.3d 486 (Fla. 1st DCA 2013).[5] This question should be answered in the negative, and the contrary holding of State v. Lucas, 645 So.2d 425 (Fla. 1994), should be receded from. Lucas is in irreconcilable conflict with this Court's analysis of fundamental error, which requires an element to be disputed at trial before an error regarding an instruction on that element can be considered fundamental.

A contemporaneous objection is required, as it is in many situations, to preserve an error involving jury instructions. State v. Delva, 575 So.2d 643, 644 (Fla. 1991). The Florida Rules of Criminal Procedure recognize the importance of an objection regarding these instructions in Fla. R. Crim. P. 3.390(d), which provides that,

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[5] This question is worded nearly identically to the question certified by the First District in Lucas v. State, 630 So.2d 597 (Fla. 1st DCA 1993), and answered by this Court in the affirmative in State v. Lucas, 645 So.2d 425 (Fla. 1994). As the First District has acknowledged, this question has been certified to invite this Court to reconsider the holding of Lucas. Moore, 114 So.3d 486 at 493-494.

> **Objections.** No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the presence of the jury.

Absent special circumstances, the failure to request a special jury instruction in writing may preclude appellate review. Gavlick v. State, 740 So.2d 1212 (Fla. 2d DCA 1999). While fundamental error is an exception to this rule, any error in failing to instruct a jury on an element that is not in dispute is not fundamental. Delva, 575 So.2d 643 at 645.

In Delva, 575 So.2d 643, the defendant was convicted of trafficking in cocaine. At trial, however, the jury was never instructed that the defendant's knowledge that the substance he possessed was cocaine was an element of the crime.[6] Id. at 644. The defendant never requested such an instruction, and the standard instruction at the time of the defendant's trial did not include this element. Id. The defendant's knowledge of the illicit nature of the cocaine was not an issue in the trial; rather, as this Court stated,

> There was no suggestion that Delva was arguing that while he knew of the existence of the package he did not know what it contained. Hence, the issue which was raised in *Dominguez* and corrected by the addition to the standard jury instruction was not involved in Delva's case. Because knowledge that the substance in the package was cocaine was not at issue as a defense, the failure to instruct the jury on that element of the

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[6] The events of Delva took place prior the enactment of §893.101, Fla. Stat., which made clear that knowledge of the illicit nature of a substance was not an element for crimes in Chapter 893, Florida Statutes.

> crime could not be fundamental error and could only be preserved for appeal by a proper objection.

Id. at 645. Thus, when an unpreserved error occurs regarding an instruction on an element of an offense, such error cannot be fundamental when the element is not in dispute. Indeed, no error can be fundamental unless it is first shown to prejudice a defendant, for while all harmful error is not necessarily also fundamental, all fundamental errors must necessarily be harmful. Id. at 644-645.

This Court's formulation of fundamental error in Delva formed the core of this Court's later clarification of the fundamental error analysis in Reed v. State, 837 So.2d 366 (Fla. 2002). In Reed, the First District had certified the question of

> Is the giving of a standard jury instruction which inaccurately defines a disputed element of a crime fundamental error in all cases even where the evidence of guilt is overwhelming and the prosecutor has not made the inaccurate instruction a feature of his argument?

Id. at 367. This Court rephrased the question as,

> Is the giving of the standard jury instruction for aggravated child abuse fundamental error when the instruction inaccurately defines the disputed element of malice?

Id. at 367-368. This rephrasing emphasized that whether the evidence was overwhelming or the prosecutor made an erroneous instruction a feature of their argument was irrelevant to the question of fundamental error. Id. at 369. Rather, the relevant test is whether the error relates to a disputed element that is pertinent and material to what the jury must consider to convict. Id. This standard can only be met by errors which prejudice a defendant, for an error cannot be considered fundamental if it is not already

found to be harmful. Id. at 369-370. Because errors are harmful as a precondition to being considered fundamental, fundamental errors cannot be subject to the harmless error test. Id.

In reaching this conclusion, this Court receded from the portion of Clark v. State, 614 So.2d 453 (Fla. 1992), which held that fundamental error is subject to a harmless error analysis. The holding of Clark led to findings that fundamental errors were harmless, as well as the application of the per se error concept, which is applicable only where an error is preserved, to cases of fundamental error. See Berube v. State, 149 So.3d 1165, 1170 (Fla. 2d DCA 2014)[7]; see also Thomas v. State, 730 So. 2d 667, 668 (Fla. 1998)(holding that the per se rule is "prophylactic" and requires a contemporaneous objection). It is this misapplication of the per se error concept which appears in State v. Lucas, 645 So.2d 425 (Fla. 1994), resulting in the holding that has engendered the instant certified question of public importance.

In Lucas, the defendant was convicted of armed robbery, kidnapping, sexual battery, and attempted second-degree murder. Id. His defense had nothing to do with whether the crimes were justifiable or excusable; rather, he claimed he was not the person who committed the crimes. Id. The jury was instructed as to attempted manslaughter, a one-step removed lesser-included offense of attempted second-degree murder. Id. The attempted manslaughter instruction

[7] Berube is currently before this Court in Case No. SC14-2228.

failed to define justifiable and excusable homicide as required, but this error was unobjected to. Id. Based on these facts, the First District certified the following as a question of great public importance:

> When a defendant has been convicted of either manslaughter or a greater offense not more than one step removed, does failure to explain justifiable and excusable homicide as part of the manslaughter instruction always constitute both "fundamental" and per se reversible error, which may be raised for the first time on appeal and may not be subjected to a harmless-error analysis, regardless of whether the evidence could support a finding of either justifiable or excusable homicide?

Id. at 426. This Court answered the question in the affirmative, thereby holding that this particular error was per se reversible and fundamental, regardless of whether the erroneous portion of an instruction was disputed at trial. Id. at 427.

Subsequent to both Reed and Lucas, this Court noted that the factual circumstances of a case can render the justifiable and excusable homicide definitions immaterial to what a jury must consider. In Pena v. State, 901 So.2d 781 (Fla. 2005), the defendant was charged and convicted of first-degree murder by drug distribution, which this Court noted did not require the State to prove a number of usual elements associated with a homicide offense, such as intent and knowledge. Id. at 787. Therefore, this Court reasoned, the factual context of Pena rendered justifiable and excusable homicide immaterial to what the jury had to consider. Although Pena's holding that no fundamental error occurred was based on a separate ground, this Court's recognition that the justifiable and excusable homicide definitions were not material when the facts did not support them is consistent with Delva and Reed's analysis of

fundamental error, where an error is not fundamental unless it is pertinent and material to what a jury must consider. Perhaps more importantly, it is contrary to the analysis of Lucas, in which the factual circumstances are not considered in determining whether the definitions are pertinent and material.

By failing to account for whether an element was disputed at trial, the holding of Lucas is irreconcilably at odds with not only Delva and Reed, but the consistent holdings of this Court in more recent cases. See Daniels v. State, 121 So.3d 409 (Fla. 2013)(where the defendant's intent was disputed, an error in instructing on intent was fundamental); see also Haygood v. State, 109 So.3d 735 (Fla. 2013)(where the elements of the offense were disputed, an error in instructing on intent was fundamental). Given that Lucas flowed from the flawed fundamental error analysis of Clark, the rationale of Lucas could not have remained valid once this Court receded from Clark in Reed. Thus, in a post-Reed setting, an error in failing to instruct as to justifiable and excusable homicide in a manslaughter instruction cannot be fundamental when there is no dispute as to whether the crime was justifiable or excusable.

This analysis, as applied to the instant case, leads to the conclusion that no fundamental error occurred. The jury was instructed as to manslaughter, a one-step removed lesser-included offense of the charge of conviction, second-degree murder. (V 611). Respondent's defense to the charge was as to his identity as the perpetrator, and thus did not dispute whether the crime was justifiable or excusable. (V 542-600). While the jury should have been instructed as to justifiable and excusable homicide as part of the manslaughter instruction, such error could not have been fundamental in

the absence of dispute regarding these elements. Without a dispute, the definitions were not pertinent and material to what the jury had to consider.

As the First District aptly noted, a finding of fundamental error under these facts in accordance with Lucas does not serve the ends of justice. Moore, 114 So.3d 486 at 493. Rather, following Lucas works an injustice by granting a new trial based on an error "which could not have possibly affected the jury's verdict." Id. Given that such a result is anathema to this Court's view that a fundamental error is one which necessarily affects the verdict in a manner harmful to a defendant, the holding of Lucas must be abandoned.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal reported at 114 So.3d 486 should be quashed, the judgment and sentence of the trial court affirmed, and the certified questions answered as discussed above.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail on February 23, 2015: Kathleen Stover, Esq., at kathleen.stover@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. JIMMY MOORE, JR., Respondent.	Case No. SC13-1236

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