IN SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JIMMY MOORE, JR.,

Respondent.

Case No. SC13-1236

PETITIONER'S REPLY 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. The answer brief shall be referenced as "AB", 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 State relies upon the Statement of the Case and Facts as set out in the State's Initial Brief.

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?

The Certified Question

Initially, it is important to note that Respondent has misapprehended which error in the manslaughter instruction this certified question relates to. The district court discussed two errors, one which related to incorrectly defining intent, and another which failed to instruct the jury as to justifiable and excusable homicide. Moore v. State, 114 So.3d 486, 489 (Fla. 1st DCA 2013). The district court expressly stated they were certifying the question as to the justifiable and excusable homicide issue. Id. at 493.

To the extent Respondent raises the issue of whether the intent error was waived, his argument should be disregarded for being improperly raised. The issue of the intent error was separate and apart from the district court's analysis of the justifiable and excusable homicide error, and Respondent is therefore prohibited from raising it as a new issue in answer to the State's argument. In the absence of a cross-appeal, "the arguments in the answer brief must be a response to those made in the initial brief." Philip J. Padovano, Appellate Practice, §16:10 (2013 ed.). Thus, when an answer brief goes beyond the scope of the initial brief and raises arguments that relate to an independent issue, and when no cross-appeal is filed, the answer brief is

in violation of Fla. R. App. P. 9.110(g) and 9.210(c). See A-1 Racing Specialties, Inc. v. K & S Imports of Broward Cnty., Inc., 576 So.2d 421, 422 (Fla. 4th DCA 1991).

This is to be distinguished from cases where a district court has reached a final holding that is appealable to this Court, but that final holding was only reached by first passing upon a preceding question. For example, if the legality of a district court's instruction to a trial court after reversal were before this Court, then the question of whether the trial court should be reversed at all would be a question precedent to considering the district court's instruction. As a question precedent on the issue, discussion would be permissible as a logical **response** because it attacks the underlying holding which was the basis of the ultimate decision.

This is not such a case. The two errors in the manslaughter instruction, as discussed by the district court below, are separate and distinct, and each stand independently of the other. Thus, Respondent's argument that the intent error was not waived cannot be a reasonable response to the State's argument that the justifiable and excusable homicide error was waived. Similarly, Respondent's argument cannot be a reasonable response to the certified question, which the district court expressly related to the justifiable and excusable homicide error alone.

Because Respondent's argument concerning the intent error is not properly in response to the State's argument, and because there is no cross-appeal in the instant case, Respondent's argument is in violation of Fla. R. App. P. 9.110(g) and 9.210(c). Additionally, this is not a jurisdictional question,

but a question of whether new issues may be properly raised in an answer brief, the sole purpose of which is to respond to the arguments of the initial brief. Thus, the general rule that a court that has jurisdiction in a cause may consider any issue affecting the case is not implicated. Indeed, that general rule is limited by whether the manner in which a party has raised and argued an issue is proper. See State v. T.G., 800 So.2d 204, 210 n.4 (Fla. 2001). Thus, Respondent's argument should be disregarded as being improperly raised.

The primary flaw in Respondent's position regarding waiver is that it is internally inconsistent. Respondent asserts that he does not dispute the principle that "[f]undamental error is also waived where defense counsel affirmatively agrees to an improper instruction." (AB 6). At the same time, Respondent argues that such a principle is not supported by this Court's authority, and that affirmative agreement is insufficient to show waiver. (AB 8-13). An argument that contradicts itself, like Respondent's, cannot stand.

This Court's precedent regarding waiver has been simple, consistent, and clear. Moreover, this standard is the same in civil and criminal cases, for the restatement of waiver in the civil case of Universal Ins. Co. of North America v. Warfel relies almost entirely upon criminal cases for its formulation. An affirmative agreement to a jury instruction waives fundamental error in that instruction. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994); see also Universal Ins. Co. of North America v. Warfel, 82 So.3d 47, 65 (Fla. 2012). Specifically, "affirmative" means the following:

> *adj. 1* saying that something stated is true; **answering "yes" [an affirmative reply]** *2* a) bold or confident in asserting [affirmative people] b] optimistic or hopeful; not negative or cynical *3* Logic affirming something about a subject ["all men are mortal" is an affirmative proposition] -adv., interj. yes: so used in radio communications *-n. 1* **a word or expression indicating assent or agreement (Ex.: yes, aye)** *2* an affirmative statement *3* the point of view that upholds the proposition being debated -in the affirmative *1* in assent or agreement with a plan, suggestion, etc. *2* **with an affirmative answer; saying "yes"**

Webster's New World College Dictionary 23 (4th ed. 2010)(bold emphasis supplied, original italics and bold emphasis removed). Similarly, "agree" means the following:

> *vi. . . . 1* **to consent or accede (to); say "yes"** *2* to be in harmony or accord [their versions agree] *3* **to be of the same opinion; concur (with)** *4* to arrive at a satisfactory understanding (on or about prices, terms, etc.) *5* to be suitable, healthful, etc.: followed by with [this climate does not agree with him] *6* Gram. to be inflected so as to correspond in number, person, case, or gender *-vt.* to grant or acknowledge

Id. at 27 (bold emphasis supplied, original italics and bold emphasis removed). Thus, this Court could not have been clearer in that communicating agreement, assent, or consent to a jury instruction waives any fundamental error in that instruction. There is no basis for the First District's additional requirement that the record must show, above and beyond an affirmative agreement, that a party was "aware an instruction was erroneous in order to waive fundamental error." Moore v. State, 114 So.3d 486, 493 (Fla. 1st DCA 2013). Indeed, the additional requirement contravenes this Court's precedent, and therefore should be repudiated, along with the portion of Respondent's argument which disagrees with this principle.

While Respondent claims the State's position would "destroy the concept of fundamental error", his claim belies a misapprehension of fundamental error.

This Court has been very clear that fundamental error must be **rare**.

> In discussing fundamental error the Court in Gibson v. State, 194 So.2d 19 (Fla.App.2d, 1967) said:
>
> 'The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not properly preserved. Instances where the rule has been permitted by the appellate Courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, (2) where the issue reaches down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged, and (3) where a serious question exists as to jurisdiction of the trial Court.' (p. 20)

State v. Smith, 240 So.2d 807, 810 (Fla. 1970). In addition, the First District has echoed this concern:

> Appellants in criminal cases, and their attorneys, might prefer that any error they deem significant be classified as fundamental. An expansive view of fundamental error has tactical advantages for criminal defendants because it allows the defense lawyer to try a case without raising an important objection and then, if unsuccessful, have the appellate court review such objection for the first time. If the defense objects before the trial court, that court can consider the matter and make a ruling, thereby, in many cases obviating the need for any further review. In this case, for instance, had the defense objected, the trial court could have proceeded with the competency hearing and, for all anyone knows, entered an order, perfectly supported by the evidence, finding appellant competent to proceed. Because he has raised no other errors besides the competency matter, such a turn of events would have proven very bad tactically for appellant.
>
> Courts and lawyers well know the meaning of fundamental error–a mistake in a proceeding substantial enough to abrogate the need for contemporaneous objection. "[T]he 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." *Brown v. State,* 124 So.2d 481, 484 (Fla.1960). As the State argues in its brief, fundamental error in Florida is a structural error or an error without which a guilty verdict could not have been obtained. Such an error amounts to a denial of due process.

Thomas v. State, 894 So. 2d 1000, 1002-03 (Fla. 1st DCA 2005). Thus, fundamental error should be found only in those instances where the defense

has remained silent on the issue, neither communicating its agreement to the Court, nor lodging a proper and timely objection. It is precisely the state which Respondent fears that courts have already established as the proper state for application of the fundamental error doctrine.

Respondent also asserts that allowing waiver based on an affirmative agreement alone would not be fair to himself, for it would bind him to an "unwitting" error, without recourse. This assertion is wrong not only because there is no evidence in the instant case that the defense was unaware of the error, just as there is no evidence they were specifically informed of the error, but because no Respondent is bound without recourse to any unwitting error of counsel. Indeed, ineffective assistance of counsel is a primary cause for relief in a post-conviction proceeding. In such a proceeding a defendant has the opportunity to prove whether their counsel's affirmative agreement was unknowing, and whether that agreement probably would have led to a different result. See Strickland v. Washington, 466 U.S. 668, 687 (1984). This is the very nature of "recourse", and so Respondent's fears are baseless.

Moreover, post-conviction resolution of jury instruction errors which have been waived will eliminate the resulting injustice which the First District observed in the instant case. Moore, 114 So.3d 486 at 493. No longer will reversals occur "due to an error that could not have possibly affected the jury's verdict," at least not when the defense has affirmatively agreed to them. Id. Rather, reversals will only occur where both counsel was unaware of the error and the error probably would have affected the verdict. In this manner, a defendant has recourse to correct an unwitting and not insignificant

error, while at the same time preventing unnecessary reversals when they do not "serve the ends of justice." While it may be sensible to find fundamental error in jury instruction due to a trial court's obligation to correctly instruct the jury when counsel has remained silent, it makes no sense to do so when the complaining litigant actually mislead the court in its duty by agreeing to the error. Although previously stated in the State's initial brief, it is worth repeating that courts must be able to rely upon the word of litigants as to their positions if the judicial system is to function.

While Respondent has represented that the authority he relies upon holds that trial counsel has been found ineffective for failing to object to errors in the manslaughter instruction, and any ineffectiveness in the instant case should be addressed on direct appeal, that representation is incorrect. The cited cases, Molina v. State, 150 So.3d 1280 (Fla. 3d DCA 2014), Ivaldi v. State, 88 So.3d 334 (Fla. 3d DCA 2012), and Dawkins v. State, 39 Fla. L. Weekly D1132 (Fla. 3d DCA 2014), all concern failures of appellate counsel to raise meritorious issues on appeal. Trial counsel's performance is not implicated by these cases. As the First District observed in Thomas, not objecting to an error in an instruction can be of tactical benefit. Moreover, not all errors in jury instructions will meet the Strickland standard for prejudice. Consequently, it would be rare that potential ineffectiveness could be determined on direct appeal, without the benefit of an evidentiary hearing; it certainly could not be determined in this case.

Respondent also appears to misapprehend that telling a court that there is no objection is not merely a failure to object, it is an affirmative act of

agreement, consent, and accession. A failure to object is a failure to speak or act, while telling a court there is no objection is synonymous with other expressions of agreement. "No objection", by any other name, communicates agreement just as clearly. In any case, Respondent specifically replied "Yes" when the trial court asked whether the defense was in agreement with the instruction. (V 513). Any possible distinction between "no objection" and "yes" in the instant case is immaterial, as Respondent affirmatively agreed in unquestionable terms.

Respondent has offered little else to explain his opposition, except to accuse the State of joining him in communicating to the trial court a belief that the jury instructions were correct and failing to reconcile this Court's precedent with its argument on waiver. As to the first point, it is not the State who seeks to gain an advantage from the trial court's error; it is Respondent's. Had the State filed an appeal, it would have been just as unfair to allow the State to benefit as it is now to allow Respondent to benefit. Waiver applies to prevent a party from changing positions mid-stream to gain an advantage. As such, it does not operate against the State in the instant case, for the State does not complain of error which we invited.

As to the second point, Respondent has missed that it is this very Court which has explained how fundamental error and waiver are consistent. Waiver by affirmative agreement or request for an erroneous instruction is the only exception to fundamental error in jury instructions. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994). As stated above, this test is simply applied, and its consistency with the fundamental error doctrine is an already settled

question. Moreover, there is no support for the notion that an additional requirement contrary to this Court's precedent exists for waiver to occur. 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? (RESTATED)

The Certified Question

Subsequent to the filing of the State's initial brief, this Court issued Griffin v. State, 160 So.3d 63 (Fla. 2015). Respondent relies primarily upon Griffin to answer the State's position. Respondent's reliance is misplaced, as Griffin's holding renders Lucas even more irreconcilable with this Court's recent precedent, and provides further support for this Court to answer the certified question in the negative.

In Griffin, this Court addressed an error defining intent in the manslaughter instruction where the defense was one of misidentification, and had nothing to do with the element of intent. This Court held that even where a defendant does not contest the element of intent by presenting a defense unrelated to it, an error defining intent in a jury instruction for a crime that is one-step removed from the crime of conviction is still fundamental error. Id. at 69. This Court further held that when a defendant "concedes one or more elements of a crime, those elements can be characterized as no longer in dispute for purposes of a fundamental error analysis." Id.

In the instant case, Respondent conceded from the outset, in his opening statement, that there was no question about what happened to the victim. (I

35). Specifically, Respondent's counsel stated the following to the jury:

> They told you that Jimmy Moore bound him with duct tape. Okay? That there was a big struggle, right? And you saw all the pictures, the result of whatever happens, right? You saw that. There's no question about what happened. Okay? There's a big question about who did it and how it happened. That's why we're on trial.

(I 35). As Judge Benton noted in his concurrence, "there was no contention that, or any issue as to whether, the perpetrator who, in the course of the home invasion robbery, bound 'the victim's hands ... and ... killed [him] by blunt force trauma to the head and neck,' ante p. 3, acted justifiably or with legal excuse." Moore, 114 So.3d 486 at 494. Indeed, by conceding that the victim was bound with duct tape and that there was no question as to what happened, Respondent conceded any element of justification or excuse that could have played into his case. By the holding of Griffin that such a concession defeats a finding of fundamental error, a holding Respondent has represented as correct, there can be no finding of fundamental error here. (AB 17).

Moreover, Griffin's holding that a concession defeats a finding of fundamental error is irreconcilable with the stark rule of Lucas that when justifiable and excusable homicide is not included in the definition of manslaughter, and when manslaughter is one-step removed from the crime of conviction, fundamental error occurs. While Lucas mandates a finding of fundamental error without consideration of whether an element was conceded by the defense, Griffin specifically allows for such concession to defeat a finding of fundamental error. Lucas should be receded from at least to the extent that it is no longer in step with this Court's precedent, as outlined

in Griffin.

While recognizing the authority of Griffin, and advancing the above argument that Griffin's specific exception supports the State's position in the instant case, the State maintains that the holding of Lucas that an error of the type present in the instant case is per se reversible and fundamental, regardless of whether the erroneous portion of an instruction was disputed at trial, is incorrect. Lucas, 645 So.2d 425 at 427. As discussed in the initial brief, Lucas remains inconsistent with State v. Delva, 575 So.2d 643, 644 (Fla. 1991).

Moreover, Griffin is inconsistent with Delva, for Griffin holds that all elements are actually disputed, regardless of whether they are implicated by a chosen defense, and thus an error as to any is fundamental. The only exception recognized by Griffin is that discussed above, when a defendant specifically concedes an element. However, the defendant in Delva not only chose a defense unrelated to the element missing from his jury instructions, he also failed to specifically concede it.

As mentioned in the initial brief, 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.[1] Id. at 644. The

[1] 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.

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

Id. at 645. Thus, Delva did not require a specific concession to an erroneously missing element to consider the element undisputed. Delva merely required that the chosen defense not **relate** to the missing element for the element to be undisputed. Delva therefore defines what "dispute" means rather differently from Griffin, rendering Griffin irreconcilable with a case that has informed fundamental error analysis since its issuance over twenty years ago.

Both Lucas and Griffin should be receded from to maintain uniformity in Florida law. However, even if Griffin is not receded from, Lucas must be receded from to the extent that it fails to allow for Griffin's exception to a finding of fundamental error. Therefore, the certified question should be answered in the negative, and the decision below quashed.

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 May 18, 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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