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IN THE SUPREME COURT OF FLORIDA

MICHAEL JOE MCCOY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-1316
L.T. Case No. 1D14-5914

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Michael Joe McCoy, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, *McCoy v. State*, Case No. 1D14-5914, (Fla. 1st DCA June 21, 2016), attached in slip opinion form and hereinafter referenced as "slip op." It also can be found at 2016 WL 3402432.

SUMMARY OF ARGUMENT

While the First DCA certified conflict with *Thomas v. State*, 91 So. 3d 880 (Fla. 5th DCA 2012) the State respectfully suggests that the two cases are not actually in express and direct conflict. Thus, this Court need not exercise its discretionary jurisdiction.

ARGUMENT

WHETHER THE FIRST DISTRICT'S OPINION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE FIFTH DISTRICT'S DECISION IN *THOMAS V. STATE*, 91 SO. 3D 880 (FLA. 5TH DCA 2012). (RESTATED)

Petitioner contends that this Court has jurisdiction pursuant to Article V, §3(b)(3), Florida Constitution, which provides: "The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986); *accord, Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla. 1986). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. *Reaves; Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." *Jenkins*, 385 So. 2d at 1359.

In *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article [V] embodies throughout its terms the

> idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the First District's decision here reached a result opposite that in *Thomas v. State*, 91 So. 3d 880 (Fla. 5th DCA 2012).

The decision below is not in "express and direct" conflict with *Thomas*. The decision here, was based on *Graham v. State*, 100 So. 3d 755 (Fla. 1st DCA 2012), which itself relied on opinions from this Court:

> On appeal for the first time, Ms. Graham contends that the trial court erred by using a definition of aggravated battery not subsumed in the attempted first-degree murder charge laid against her: The information charged that Ms. Graham "did unlawfully attempt to kill a human being, Natalie Banks, by stabbing her," but did not allege great bodily harm, permanent disability or permanent disfigurement. *See State v. Von Deck*, 607 So. 2d 1388, 1389 (Fla. 1992) ("[A]n instruction cannot be given on a permissive lesser included offense unless both the accusatory pleading and the evidence support the commission of that offense."); *Andrews v. State*, 679 So.2d 859, 859 (Fla. 1st DCA 1996)(concluding that an information charging attempted first-degree murder by stabbing with a knife alleged aggravated battery by using a deadly weapon but "[b]ecause the information did not sufficiently allege commission of aggravated battery by causing great bodily harm, the trial court erred in instructing the jury" on the great bodily harm theory of aggravated battery).
>
> Under controlling authority, however, because aggravated battery is lesser in degree and penalty than attempted first-degree murder, the trial court's error is not fundamental. See *Nesbitt v. State*, 889 So. 2d 801, 803 (Fla. 2004) ("'[I]t is not fundamental error to convict a defendant under an erroneous lesser included charge when he had an opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action.'") (*quoting Ray v. State*, 403 So. 2d

956, 961 (Fla. 1981)). Trial counsel's failure to object to the definition of aggravated battery used in the jury instructions precludes relief on appeal on Andrews grounds.

100 So. 3d at 757.

The holding below in this case is that it is not fundamental error when the descending order of lesser included offenses is incorrect in jury instructions. Slip op. at 2. The issue confronting the Fifth DCA in *Thomas* was whether a similar error was harmless, as opposed to fundamental:

> Both parties agree that the trial court issued a faulty instruction on the lesser included offense of attempted voluntary manslaughter. The State maintains, however, that the issuance of the faulty instruction was **harmless** because aggravated battery is actually a lesser included offense of attempted voluntary manslaughter. We disagree. The **error was not harmless** because, based on the order in which the charges were set forth in the instructions and verdict form, the jury could reasonably have concluded that the offenses were presented in descending order of seriousness and that attempted voluntary manslaughter was less serious than aggravated battery. As such, "it is impossible to determine whether the jury, if given the opportunity, would have 'pardoned' the defendant," *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978), by convicting him of attempted voluntary manslaughter under a proper instruction.

91 So. 3d at 881-882.

In certifying conflict, the First District apparently was confused by the Fifth District's obiter dictum in the first paragraph of the *Thomas* opinion, which reads "the trial court fundamentally erred . . . ." 91 So. 3d at 881. There is no discussion in *Thomas* about fundamental error, only harmless error. There is a vital distinction between harmless error and fundamental error. When an issue is preserved, the burden is on the State to show that the error did not affect the verdict - i.e., harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). When an issue is

not preserved, the burden is on the Appellant to show that the error vitiated the trial, i.e., it must to "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 this Court made crystal clear in *Reed v. State*, 837 So. 2d 366, 369-70 (Fla. 2002):

> [W]e take 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 [*State v.*] *Delva*, 575 So. 2d [643 (Fla. 1991)] at 644-45:
>
> > Instructions . . . are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred. *Castor v. State*, 365 So. 2d 701 (Fla. 1978); *Brown v. State*, 124 So. 2d 481 (Fla. 1960). 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." *Brown*, 124 So. 2d at 484. In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983).
>
> Thus, for error to meet this standard, it must follow that the error prejudiced the defendant. Therefore, all fundamental error is harmful error. However, we likewise caution that not 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) (discussing the harmless error test).

The Fifth District is aware of this distinction - *see, e.g.*, *Crumbley v. State*, 876 So. 2d 599, 602 n.3 (Fla. 5th DCA 2004) - so by analyzing *Thomas* as a harmless error case it must, necessarily, have not been speaking of fundamental error in the first paragraph of that opinion.

To declare conflict here would be to invite a return to a pre-*Reed* time when courts and practitioners confused the concepts of harmless error - which requires an objection and puts the burden on the State to disprove a harmful effect - and fundamental error, which arises only when there has been no objection and puts the burden on the appellant to demonstrate that the error, basically, convicted him.

Thomas and this case are not decided on the same legal basis. Therefore, there is no expressed and direct conflict, and this Court must dismiss this case for lack of jurisdiction. The First District's certification of conflict was misguided.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court decline to exercise jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by e-mail to Assistant Public Defender Danielle Jorden on August 8, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was printed in 12-point Courier New.

Respectfully submitted and certified,
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L16-1-09811

IN THE SUPREME COURT OF FLORIDA

MICHAEL JOE McCOY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-1316

APPENDIX, RESPONDENT'S JURISDICTIONAL BRIEF

1. Michael Joe McCoy v. State, Case No. 1D14-5914 (Fla. 1st DCA June 21, 2016.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MICHAEL JOE MCCOY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D14-5914

Opinion filed June 21, 2016.

An appeal from the Circuit Court for Bay County.
James B. Fensom, Judge.

Nancy A. Daniels, Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Thomas H. Duffy, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant Michael J. McCoy was charged with the second-degree murder of a man with whom he believed his wife was having an affair and of the attempted second-degree murder of the wife. A jury found him guilty of the lesser-included offenses of manslaughter and aggravated battery with a firearm. On appeal, he challenges his judgment and sentence for aggravated battery with a firearm,

alleging that the jury instructions and verdict form were fundamentally erroneous because the aggravated battery was listed *after* the attempted manslaughter option. He avers that lesser offenses must be listed on a verdict form in descending order by degree of offense; because aggravated battery is a second-degree felony (which carries a maximum sentence of fifteen years in prison but was enhanced here by the 10-20-Life statute to a minimum mandatory penalty of twenty-five years in prison), it should have been listed *before* the attempted manslaughter offense, which is a third-degree felony (carrying a maximum of five years in prison).

An error in the trial court's listing of lesser-included offenses on a verdict form and in jury instructions is not fundamental error in this district. See Graham v. State, 100 So. 3d 755 (Fla. 1st DCA 2012). For that reason, McCoy urges this Court to certify conflict between Graham and the Fifth District's decision in Thomas v. State, 91 So. 3d 880 (Fla. 5th DCA 2012). In Thomas, the defendant was convicted of aggravated battery, but the Fifth District reversed the conviction and sentence. It remanded the case for a new trial, holding that "the trial court fundamentally erred" in the way it listed the lesser-included offenses because "the jury could reasonably have concluded that the offenses were presented in descending order of seriousness and that attempted voluntary manslaughter was less serious than aggravated battery. As such, it is impossible to determine whether the jury, if given the opportunity, would have 'pardoned' the defendant by

convicting him of attempted voluntary manslaughter under a proper instruction." Id. at 881-82. Because the jury was accurately instructed and the evidence supports McCoy's convictions obtained, we affirm the judgment and sentence at issue, but certify conflict with Thomas v. State, 91 So. 3d 880 (Fla. 5th DCA 2012).

AFFIRMED.

LEWIS, B.L. THOMAS, and MAKAR, JJ., CONCUR.