IN THE SUPREME COURT OF FLORIDA

MICHAEL J. MCCOY,

Petitioner,

VS. CASE NO. SC16-1316
LT NO. 1D14-49614

STATE OF FLORIDA,

Respondent.

_____/

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner **MICHAEL J. MCCOY** was the appellant in the First District Court of Appeal and the defendant in the trial court and will be referred to in this brief as Petitioner or by his proper name. Respondent, the State of Florida, was the prosecution below, and will be referred to herein as Respondent, prosecutor, or the state.

The record on appeal consists of eleven volumes, which will be referred to by the use of the symbol "V," followed by the appropriate volume and page number. Petitioner's Initial Brief will be referred to by the use of the symbol "IB," while Respondent's Answer Brief will be referred to by the use of the symbol "AB."

ARGUMENT

ISSUE

The jury instructions and the verdict form for Count II were erroneous because the instruction for aggravated battery (a second degree felony) was given after the instruction for attempted manslaughter (a third degree felony) and the verdict form likewise listed aggravated battery after attempted manslaughter.

In its Answer Brief, Respondent asserts that the Fifth District Court of Appeal's clearly stated holding in Thomas v. State, 91 So.3d 880, 881 (Fla. 5th DCA 2012): "Determining that the trial court fundamentally erred by issuing a faulty jury instruction on attempted voluntary manslaughter, we reverse," contains "obiter dictum." (AB-10). Respondent bases its assertion on the Fifth District Court's statement in the opinion that the error was "not harmless." Thomas at 881. What Respondent fails to acknowledge, however, is that the Court's statement was in response to the State's argument on appeal that the error was harmless ("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.") Id. On appeal, the State conceded error regarding the instructions, but asserted that the error was harmless. Id. While it would have been clearer for the Fifth District Court to state that fundamental error is per

se harmful, and that therefore the error in the case could not be harmless (as the State argued), the result is the same; the Court found fundamental error and reversed. The Court did not engage in a harmless error analysis. It simply addressed the State's argument on appeal (that the error was harmless), which does not alter the Court's conclusion that the error was fundamental. As this Honorable Court has stated, "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." Reed v. State, 837 So.2d 366, 370 (Fla. 2002). Thus, Petitioner asserts that Respondent's argument is faulty; the Thomas court found the error to be fundamental (per se harmful) as it clearly stated in its opinion.

In its Answer Brief, Respondent also asserts that Petitioner "invited" or waived the error. (AB-13-14). Petitioner respectfully disagrees. While it is true that defense counsel, upon reviewing the revised jury instructions and verdict form did state, "I was in agreement with the changes this morning and also the ordering, the order in which things are now located in the instructions," counsel was not referring to the order of lesser offenses, but the order of the "further findings." (V7-440). During the charge conference, held earlier in the trial, there was absolutely no discussion about the order of the lesser included offenses either in the jury instructions or on the

verdict form. (V6-270-281). There was, however, discussion and concern about the order and wording of the "further findings" - the findings as to whether Petitioner actually possessed, possessed and discharged, and/or discharged and caused death or great bodily harm for each Count. (V6-278). The prosecutor informed the court that he and defense counsel had a similar case before and had worked out a way to combine the findings regarding firearm possession and discharge so that it was simpler for the jury to comprehend. (V6-278). Defense counsel further stated that if there was no combination of the firearm options, the jury was left with "too many choices." (V6-278). Later, when defense counsel was provided with the revised jury instructions and verdict form, which combined the firearm findings under each Count, rather than under each listed offense, defense counsel expressed that she was in agreement with the order - of those particular firearm options. She did not state that she was in agreement with the order of the lesser included offenses.

Based on the facts of this case, defense counsel did not affirmatively waive or invite the error. She simply failed to object to it. As the First District Court has stated "affirmative agreement to an instruction as a whole, without more, is not affirmative waiver of omissions in that instruction." Wade v. State, 155 So.2d 1257, 1258 (Fla. 1st DCA

2015)(citing Moore v. State, 114 So.3d 486, 489 (Fla. 1st DCA 2013)).

Further, Respondent's admonition that finding fundamental error here would "lead to the gamesmanship this Court warned of in Cannon"[1] is misplaced. (AB-23). The gamesmanship referred to in Cannon was the failure of defense counsel to object to erroneous jury instructions at trial but then argue on appeal that the trial court denied counsel the opportunity to object outside of the presence of the jury. Cannon v. State, 180 So.3d 1023, 1036 (Fla. 2015). This Court noted that "the record demonstrates that nothing prevented Cannon from objecting to the trial court's modification and requesting a sidebar conference outside of the jury's presence." Id. That is not the issue presented here.

In its Answer Brief, Respondent also asserts that "Petitioner wants to engraft into fundamental error analysis the notion that any jury verdict must be reversed if the jury might have applied its "inherent 'pardon' power," as set out in State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978)." (AB-22). Respondent has apparently misapprehended Petitioner's argument. Petitioner asserts that the error in this case is fundamental because the error denied him of due process. See Ray v. State, 403 So.2d 956, 960 (Fla. 1981) ("This Court has indicated that

[1] Cannon v. State, 180 So.3d 1023 (Fla. 2015).

for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process."). As the Thomas court recognized, and as Petitioner argued in his Initial Brief, jurors assume that an offense appearing below other offenses on a verdict form will be a lesser offense, of a lesser degree, and carrying a lesser penalty. See Thomas at 881;(IB-30-31). As part of the standard jury instructions, trial courts instruct juries to return a verdict of guilty for the "highest offense" proven, as the trial court did in this case. Fla. Std. Jury Instr. (Crim.) 3.12;(V1-88)(V8-514). Juries are instructed to deliberate a defendant's guilt in a manner that goes from highest offense to lowest, which assumes an order of decreasing degree. Based on the order of the jury instructions and charges on the verdict form in this case, the instructions and verdict form were erroneous and the jurors were misled. The error was "pertinent or material" to what the jury had to consider in order to convict Petitioner. See Reed at 370. A new trial is warranted.

Petitioner relies on all argument and caselaw previously presented in his Initial Brief on the Merits and does not abandon any argument from his Initial Brief which is not addressed in this Reply Brief.

CONCLUSION

Based on the argument and authority presented in his Initial and Reply Briefs on the Merits, Petitioner respectfully requests that this Court remand for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail, to Trisha Meggs Pate, Office of the Attorney General, at: crimapptlh@myfloridalegal.com, and Thomas H. Duffy, Assistant Attorney General, at: Thomas.duffy@myfloridalegal.com, and a true and correct copy has been sent via US Mail to Michael McCoy, DOC # Q 29802, Northwest Florida Reception Center-Annex, 4455 Sam Mitchell Drive, Chipley, Florida, 32428, on this 27th day of December, 2016.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 Point.

Respectfully submitted,

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