IN THE SUPREME COURT OF FLORIDA

JESSIE CLAIRE ROBERTS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-1320

STATE'S MOTION FOR CLARIFICATION AND REHEARING

Pursuant to Florida Rule of Appellate Procedure 9.330 and 9.331. the Respondent, the State of Florida (hereinafter State), moves this Honorable Court for a rehearing. In support thereof, Respondent states:

The State had charged petitioner by amended information with attempted second degree murder and possession of cannabis. The attempted second degree murder charge alleged that petitioner shot the victim with a firearm causing great bodily harm. (I.19). Petitioner was tried before a jury. After a charge conference and an agreement, the trial court instructed the jury without objection on the offense of attempted murder in the second degree with aggravated battery and aggravated assault as lesser included offenses.

In this case, petitioner had testified on her own behalf. According to petitioner,[1] the petitioner's ex-girlfriend and the victim were best friends.

[1] The State presented evidence that this occurred because there was a dispute over marijuana. The State's evidence did acknowledge that the victim hit the defendant, but she was unarmed. The defendant shot the victim in her

(T.434,436-437). Petitioner had claimed to have had a previous altercation with the victim. (T.437-439). Petitioner and her ex-girlfriend got into an argument at the bus stop and the girlfriend left in the victim's car. (T.445-446). A person named J.D. was also in the victim's car. (T.448). Subsequently, the victim returned, and the girlfriend asked petitioner for some weed. Petitioner went to the car and asked the girlfriend to return her MP3 player. (T.448-449). Petitioner reached in the car, to get the MP3 player and J.D. pushed her. (T.449). Petitioner testified that at that point she pulled out her gun and held it by her side. (T.450). Petitioner stated she was backing up to go back to the bus stop, when the victim got out of the car coming at her like "she was fixin' to pounce." (T.451). She believed the victim would harm her. (T.452). The victim hit her and she shot the gun. (T.453). Petitioner said she just raised her arms and fired. (T.455-456). She also said she actually thought she would get jumped by J.D. (T.456).

In closing, defense counsel argued that petitioner was afraid because she had been jumped earlier and the victim kept coming at her even when she pulled the gun out. Defense counsel states "Ms. Roberts is walking back trying to leave. And she [the victim] hits her [petitioner]. At that point, split second reaction, she fired a shot. She acted in self-defense. Because she thought that she was facing something that was imminent and dangerous to

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neck and hands because her hands were in a defensive position.

her being." (T.581). Again, defense counsel argued "she thought that Ms. Howard was going to do more harm to her. She felt like it was justifiable for her to fire that shot, because she didn't want them to do anymore harm. She didn't want Mr. Marks to come after. She didn't know if he had a gun." (T.585). The jury found petitioner guilty of attempted murder in the second degree and specifically found that the defendant possessed and discharged a firearm causing great bodily harm. (II.205).

For the first time on appeal, petitioner claimed it was fundamental error for the trial court not to give a jury instruction on the necessarily lesser included offense of attempted manslaughter. This Court has stated that "[a]ttempted manslaughter by act is a necessarily lesser included offense of attempted second-degree murder. Walton, 208 So.3d at 64. Therefore, the trial court was required to give an instruction for attempted manslaughter by act when it gave the instruction for attempted second-degree murder." Roberts v. State, No. SC15-1320, 2018 WL 1100825, at *3 (Fla. Mar. 1, 2018). This Court relied on its previous decision in Walton v. State, 208 So.3d 60 (Fla. 2016), in which this Court held that "we have repeatedly held that the failure to correctly instruct the jury on a necessarily lesser included offense constitutes fundamental error. See, e.g., Williams v. State, 123 So.3d 23, 27 (Fla. 2013) (holding that fundamental error occurs when the trial judge gives an incorrect instruction on the necessarily lesser included offense of attempted manslaughter for a defendant convicted of attempted

second-degree murder); Montgomery, 39 So.3d at 259 (same). If giving an incorrect instruction on a necessarily lesser included offense constitutes fundamental error, then a fortiori giving no instruction at all likewise constitutes fundamental error."

However, this Court has overlooked the fact that subsequent to Walton but prior to this case this Court issued Dean v. State, 230 So.3d 420 (Fla. 2017). In Dean, the defendant was convicted of second-degree felony murder, and Dean requested a instruction on manslaughter as a lesser included offense. Dean at 422. The trial court denied the request finding that manslaughter was not a lesser included offense. Id. This Court rejected that conclusion finding that "[t]he elements of manslaughter are always subsumed within the elements of second-degree felony murder because both offenses require some action by the defendant that ultimately causes the victim's death." Id. at 423. However, rather than reversing the conviction, the majority stated that they affirmed the Fourth District "for the reasons expressed in Justice Polston's concurring opinion and Justice Quince's concurring in result only opinion, we approve the result of the Fourth District's decision to affirm Dean's convictions." Id. at 425. While Justice Quince found that manslaughter was not a category one lesser, Justice Polston, joined by Justice Canady and Lawson, found that the error was harmless because the defendant should not be entitled to the pardon power doctrine. Justice Lewis joined the majority opinion, but did not join a

concurrence. Regardless of whether the majority of this Court agrees to advocate the pardon power doctrine, which the State would advocate that they should, a majority of the court found the manslaughter was a necessary lesser included offense and that error of omitting the offense to be harmless.

The facts of the case at bar are far less egregious than Dean. In Dean, the error was brought to the trial court's attention and the trial court did not correct the error, yet the majority of the Court found it be harmless. In the case at bar, the parties had ample time to review the jury instructions. In fact, the prosecutor stated that the proposed jury instructions were provided to the defense on Monday, which was the day of jury selections. (T.527). The defense counsel specially stated that they were asking for aggravated battery. (T.516). On the record the judge stated all right "lessers included crimes or attempts, aggravated battery, and aggravated assault." (T.519). Defense counsel affirmatively responded "That's correct, Your Honor." (T.519). Defense counsel also noted that they had specifically requested aggravated assault, which the State did not believe applied, but the trial court stated that he would allow it." (T.519). Defense counsel also had no objection to the verdicts. (T.523).

These inconsistent decisions have resulted in uncertainty and a bad practice of law. By finding that a rejected requested instruction which is a necessarily lesser included offense can be harmless, but yet the omission of an instruction which is not requested or part of the agreed upon

instructions requires a new trial, this Court has fostered an environment which not only provides an incentive to attorneys to not to preserve issues or attempt to correct errors as the earliest possible time, it makes an attorney practically ineffective if he or she does object. Under current caselaw, when an possible error is objected to and addressed it is reviewed to determine if it is harmless, but if counsel remains silent or even agrees to the jury instructions without mention of the error, a new trial is guaranteed. In fact, a crafty[2] defense attorney would always agree to a jury instruction without specifying potential error to lull the trial court and State into a feeling of safety while guaranteeing a new trial, if the defense was unsuccessful. In this case, there is no indication in the record that the trial court would not have given the attempted manslaughter instruction if counsel had asked for it, as the trial court gave aggravated assault as a lesser despite the argument that it was not a proper lesser included offense.

"[O]bjecting to erroneous instructions is the responsibility of a defendant's attorney, and the attorney's failure to object to such instructions can properly constitute a waiver of any defects." Ray v. State, 403 So.2d 956, 961 (Fla.1981). "There is a good reason for requiring preservation of the issue by requiring it to be raised at trial; the trial court should be given the opportunity to correct the problem." F.B. v.

[2] There is no indication on the record that this attorney was attempting to sandbag the court, but whether counsel's actions are intentional or unintentional the results are the same.

State, 816 So.2d 699, 701 (Fla. 4th DCA 2002). This Court has said that:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The contemporaneous rule also puts an end to "sandbagging" or "gotcha type maneuvers." See State v. Belien, 379 So. 2d 446, 447 (Fla. 3d DCA 1980)("'[G]otcha!' manuevers will not be permitted to succeed in criminal, any more than in civil litigation."); Berkman v. Foley, 709 So. 2d 628, 629 (Fla. 4th DCA 1998)("[T]he courts will not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed."), quoting, Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1339 (Fla. 3d DCA), cert. denied, 378 So. 2d 342 (Fla. 1979); State v. D.C.W., 426 So. 2d 970, 971 (Fla. 4th DCA 1982)(stating that a defendant cannot take advantage of a more charitable method of dispensing justice "and subvert it altogether to escape the consequences of his or her conduct."). Moreover, whether a party is intentionally attempting to sandbag or it is the unintended consequences of his or her action or inaction, the results would be the same, the party has allowed an error to occur during trial which will ensure reversal on appeal if convicted.

The results of this Court's decisions can be seen in the new trend of

conduct in which the trial courts engage in detailed discussions about the jury instructions and defense attorneys affirmatively agree to the instructions in a manner which does not specifically acknowledge the alleged error yet claiming fundamental error on appeal. See Moore v. State, 114 So. 3d 486, 488 (Fla. 1st DCA 2013)(providing that during the charge conference, in light of the State v. Montgomery, 39 So.3d 252 (Fla. 2010), the prosecutor questioned the manslaughter instruction and offered to strike the intent language. Moore's counsel did not respond and then later agreed with the proposed instructions); Facin v. State, 188 So. 3d 859 (Fla. 1st DCA 2015), review denied, No. SC15 1234, 2016 WL 3002446 (Fla. May 25, 2016)(providing that during the charge conference the trial court asked Facin's counsel if he approved of attempted voluntary manslaughter instruction, and counsel gave an affirmative response along with later during during the discussion on the lesser-included offenses the prosecutor and trial court discussed the Montgomery problem. Facin's attorney said nothing."); Knight v. State, 2016 WL 4036091 (Fla. 1st DCA July 28, 2016), petition for review pending, Case SC18-309,(finding that during the charge conference, Knight's attorney "stated that he had read all of the proposed jury instructions and had no objections to them. He then made detailed comments and requests on several instructions and on the verdict form, particularly with respect to adding battery offenses to the verdict form and instructions. He consulted with Defendant during the charge conference and stipulated to adding the battery

offenses without requiring amendment of the information."). This Court cannot allow a new trial because of an omission of a jury instruction which was never requested especially when there was an agreement to give the jury instructions which the trial court read to the jury.

Moreover, this Court has also overlooked that whether an error is of a fundamental nature is a case specific decision. While a decision of this Court finding something to be an error should apply to all cases, whether that error is fundamental, meaning it was a pertinent or material to what the jury must consider in order to convict, must always be applied on a case by case basis. In State v. Dominique, 215 So.3d 1227 (Fla. 2017), this Court, attempted to clarify this very principle. This Court rejected that the Fourth District's conclusion that "a new trial any time the erroneous manslaughter by act instruction is given and the defendant is convicted of an offense not more than one step removed from manslaughter—regardless of whether the evidence could support a finding of manslaughter by culpable negligence." Id. at 1230. This Court recognized that "jury instructions are subject to the contemporaneous objection rule and, without an objection, error in an instruction can only be raised as fundamental error on appeal[,]" and that "not all errors in jury instructions are fundamental." Id. at 1232, citing Daniels v. State, 121 So.3d 409 (Fla. 2013). This Court continued that "[t]o 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.'" Id. citing, State v. Delva, 575 So.2d 643 (Fla. 1991). In Dominique, this Court found that the manslaughter instruction although erroneous did not require reversal or was not of a fundamental nature because "[e]ven though the jury was foreclosed from finding Dominique guilty of manslaughter by act due to the erroneous instruction, the jury still had a viable, nonintentional lesser included homicide offense for which he could have been convicted." Id. at 1236.

In the case at bar, not only did the jury have a viable lesser offense of aggravated battery, which was the same degree crime as attempted manslaughter by act with a firearm, but it also has almost identical elements as attempted manslaughter by act. As attempted manslaughter is unlawful act, shooting the victim, which was likely to cause death but did not result in the death of the victim, and aggravated battery is intentionally causing great bodily harm or bodily harm and in the process using a deadly weapon. Thus, for both offenses, the jury must find unlawful act, the battery, which is likely to cause death in which the defendant used a firearm. Furthermore, petitioner's defense was self defense, which actually was better suited to aggravated battery rather than manslaughter. Petitioner was not claiming she aimed at the ground and did not realize the bullet would richotte, but instead, petitioner claimed that she raised the gun and shot at the victim because the victim was coming at her ready to pounce. Accordingly, the

failure to give the manslaughter instruction did not vitiate her only defense and aggravated battery gave the jury another viable option. Therefore, again, this Court has reached inconsistent results as some cases are per se reversible and some cases this Court looks to the other evidence and the validity of other lesser included offenses and defenses.

While the majority says that the facts in Roberts are nearly identical to Walton, the facts of how the crime occurred are not. While it is true that both were convicted of attempted second degree murder and in neither case the jury was instructed on attempted manslaughter, that is where the comparison stops. In Walton, the victim and her sister were placing their children in a car, when two men approached her and one demanded her purse or he would kill her. They struggled until the gun fell. The man recovered the gun and demanded the sisters belongings. Officers, who were nearby, approached and told the man to lay down the gun. The men started shooting at the detectives. Thus, unlike Roberts, Walton, who was shooting at police officers, was not arguing self-defense. Accordingly, the cases are different and one case should not control the outcome of the other.

Finally, as the dissent suggests, this Court should abolish the pardon power doctrine. As Justice Polston stated in his dissent in Dean, "[w]here the evidence supports the charged offense as well as the requested instruction on a necessarily lesser included offense, any error in failing to give the requested instruction is harmless because the defendant is not

entitled to an opportunity for a jury pardon." Dean v. State, 230 So. 3d 420, 426 (Fla. 2017), reh'g denied, No. SC16-1314, 2017 WL 5247735 (Fla. Nov. 13, 2017)(Polston, J. dissenting). Justice Canady, stated in his dissent in Haygood v. State, 109 So.3d 735 (Fla. 2013):

> In any case where the evidence supports the jury's verdict of guilt on the charged offense and no error was made in the instructions regarding that offense, it is hard to fathom how an error in an instruction regarding a lesser included offense would properly be considered an error without which "a verdict of guilt could not have been obtained." But the departure from our general doctrine of fundamental error is magnified where—as in the majority's decision here—an error in an instruction regarding a lesser included offense is declared fundamental even though there is no evidentiary basis for an instruction on that offense. The "validity of the trial itself" is said to be vitiated because the jury was not correctly instructed on an inapplicable lesser offense and instead was fully afforded the opportunity to act in an irrational and lawless manner. This is a far cry from the cases in which we have held that fundamental error occurred because a defendant was convicted of an offense and the jury was not properly instructed concerning the elements of that offense.

Id. at 749(Canady J, dissenting).

Nevertheless, even if this Court does not abolish the pardon power doctrine all together, this Court should grant rehearing in this case. The principles addressed in this Court's cases on errors in jury instructions are inconsistent and are leading to unfair gamesmanship in trials. Preserved errors are subject to harmless error review, but an agreement to the proposed instructions without mention of omitted instructions result in a new trial. Furthermore, in some cases this Court looks to see if there is another viable lesser included offense which the evidence supports before reversing, yet in

others it is per se reversible. Accordingly, the State would request that this Court rehear this case, reverse its opinion and find that the ommission in the jury instruction was waived and not of a fundamental nature to require a new trial.

WHEREFORE, the State of Florida respectfully requests that this Court grant rehearing and affirm as to the issue.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following to Maria Ines Suber, by email at ines.suber@flpd2.com, on this 14th day of March, 2018.

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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