IN THE SUPREME COURT OF FLORIDA

JARVIS RAMON HAYNES,

Petitioner,

v. Case No. SC07-432

Fifth DCA Case No. 5D05-2741

STATE OF FLORIDA

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The relevant facts are set forth in the opinion of the district court below:

> In this appeal, Jarvis Ramon Haynes [AHaynes@] makes three claims of error. . . .
>
> Finally, Haynes complains of the insertion of the words "or a principal" into the robbery charge, i.e., "Jarvis Haynes or a principal took the electronic equipment . . . . ." (Emphasis added). The standard instruction on "Principal" was also given. The only objection raised below was that this instruction varied from the standard instruction, but counsel for Haynes acknowledged:
>
> > I can't argue it is prejudicial because it is the law and I understand it is the law. I understand why Mr. Green is inserting it in there, but for the record, I would object to anything other than the standard language that is in these jury instructions.
>
> We agree that the amendment to the instruction is redundant, but notwithstanding Haynes's protestations on appeal, in the context of the conduct of the entire trial, [sic] did not deprive Haynes of a fair trial or invalidate his conviction.

Haynes v. State, 946 So.2d 1106, 1107-1108 (Fla. 5th DCA 2006)(footnote omitted).

SUMMARY OF ARGUMENT

This Court should not accept jurisdiction of this case because there is no express and direct conflict. The cases which Petitioner relies upon for conflict present distinct facts and reach distinct legal conclusions based upon those facts.

ARGUMENT

THIS COURT SHOULD NOT ACCEPT JURISDICTION IN THIS CASE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Haynes first contends that the opinion below expressly and directly conflicts with Carpenter v. State, 785 So.2d 1182 (Fla. 2001), regarding the issue of preservation. Haynes argues that the objection lodged to the jury instruction in the instant case was Avirtually identical@ to that in Carpenter, and in Carpenter this Court considered the jury instruction claim to be preserved. Petitioner=s Br. at 4-5. In the decision below, the district court of appeal applied fundamental error. Haynes, 946 So.2d at 1107-1108.

A plain reading of Haynes demonstrates no express and direct conflict with respect to preservation. In Carpenter, this Court addressed the State=s preservation arguments. These arguments

were whether defense counsel was required to renew his objection under Florida Rule of Criminal Procedure 3.390(d) and the ruling of the trial court granting defense counsel=s request to give a special jury instruction on accessory after the fact and independent acts. Carpenter, 785 So.2d at 1199. No such analysis was done in the decision below. The district court instead noted that the facts of this case were that defense counsel objected that the jury instruction given varied from the standard instruction and counsel conceded that the instructions as given comported with the law. Haynes, 946 So.2d at 1107. This Court did not address preservation in that context in Carpenter, and Haynes does not cite to or refer to Carpenter in the context of preservation nor does Haynes contemplate the preservation arguments directly addressed by this Court in Carpenter. See Carpenter, 785 So.2d at 1199 and Haynes, 946 So.2d at 1107-1108 n. 2.

Haynes= attempt to extract a conflict between these two decisions on the issue of preservation goes well beyond the four corners of either of these two decisions. In other words, Haynes= displeasure with the implicit conclusion of the district court that the appellate attack on the jury instructions differed from that raised by defense counsel at trial, which warranted a reversal only upon a showing of a fundamental error,

does not establish an express and direct conflict that would invoke the jurisdiction of this Court.

Haynes also contends that the decision below expressly and directly conflicts with Cardenas v. State, 867 So.2d 384 (Fla. 2004); Reed v. State, 837 So.2d 366 (Fla. 2002); and State v. Delva, 575 So.2d 643 (Fla. 1991), with respect to the proper standard of fundamental error to be applied in jury instruction cases. He claims that the decision below did not apply the correct standard of fundamental error, conflicting with Cardenas, Reed, and Delva.

Again, a plain reading of Haynes demonstrates no express and direct conflict. In Haynes, the district court found that the principal instruction as given, when considered Ain the context of the conduct of the entire trial, did not deprive Haynes of a fair trial or invalidate his conviction.@ Haynes, 946 So.2d at 1108. In reaching that conclusion, the district court of appeal succinctly applied the same standard enunciated in Cardenas, Reed, and Delva that fundamental error in jury instructions is error that Amust 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. . .@, or in other words, the defendant is deprived of a fair trial. See Cardenas, 867 So.2d at 390-391 (quoting Reed, 837 So.2d at 370

(quoting Delva, 575 So.2d at 644-645))(emphasis omitted). In all, Haynes demonstrates its consistency with Cardenas, Reed, and Delva, in terms of the fundamental error standard in jury instructions cases. Accordingly, there can be no express and direct conflict with Haynes and these three cases.

In addition, the decision below addresses the insertion of the word Aor a principal@ to the robbery jury instruction. Cardenas, Reed, and Delva cases address fundamental error in jury instructions given in cases involving entirely different crimes, facts, and legal standards. See Cardenas, 867 So.2d at 390-392 (finding no fundamental error in jury instruction on statutory presumption of impairment given in DUI case); Reed, 837 So.2d at 368-370 (fundamental error to give jury instruction on aggravated child abuse which misdefined disputed element of malice); and Delva, 575 So.2d at 644-645 (no fundamental error in jury instruction for trafficking which failed to include knowledge element). Thus, these three cases are not a basis for this Court to accept jurisdiction based upon an express and direct conflict with the decision below.

Finally, while Haynes makes a concise argument with respect to jurisdiction, he then goes to great lengths to attack the merits of the decision of the district court based upon the specific facts of this case. This legal argument should not

considered by this Court in its assessment of jurisdiction because Haynes makes no argument in support of jurisdiction with respect to the decisions addressing the propriety of the principal jury instruction. The underlying merits of the jury instruction are not before this Court in jurisdictional briefs.

In all, Haynes comes forward with no decision that is in express and direct conflict with Haynes. Each decision he cites addresses different factual and legal issues than those raised below. These decisions cannot serve as a basis to invoke the discretionary jurisdiction of this Court based upon express and direct conflict.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court decline to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on jurisdiction of Respondent has been furnished by United States Mail to Terrence Kehoe, Esq., counsel for Haynes, Tinker Building, 18 West Pine Street, Orlando, Florida 32801, this _____ day of April, 2007.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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