

IN THE SUPREME COURT OF FLORIDA

JARVIS GERRARD GREEN,

:

Petitioner,

:

vs.

:

Case No.

STATE OF FLORIDA,

:

Respondent.

:

:

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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### STATEMENT OF THE CASE AND FACTS

Petitioner, Jarvis Gerrard Green, was convicted by a jury of burglary. Following the verdict, the defense filed a motion seeking a new trial, judgment of acquittal, or arrest of judgment. After determining it had improperly allowed the state to introduce a 911 call containing inadmissible hearsay, the trial court reduced the burglary verdict to the permissive lesser-included offense of trespass. The trial court concluded there was only sufficient evidence to support a conviction for the lesser charge. The State appealed the reduction of the verdict, arguing the trial court should have ordered a new trial instead. In State v. Green, Case No. 2D12-4828 (Fla. 2d DCA June 18, 2014), the Second District Court of Appeal reversed the reduction of the verdict and ordered that Mr. Green be retried for burglary.

Petitioner had argued that the State was not authorized to appeal the case because in Exposito v. State, 891 So. 2d 525 (Fla. 2004), this Court held the State cannot appeal a post-trial order reducing a verdict. However, in a footnote the Second District found the trial court's reduction of verdict was a judgment of acquittal giving the appellate court jurisdiction over the appeal under section 924.07(1)(j), Florida Statutes (2012), and Florida Rule of Appellate Procedure 9.140(c)(1)(E).

The Second District found it was improper for the lower court to reduce the burglary conviction to a trespass because trespass was a permissive lesser-included offense, not a necessarily lesser-included offense, of burglary. The Second District held that a court may only reduce verdicts to necessarily-included lesser offenses. The Second District also found that the trial court had not granted relief under Florida Rule 3.620 and that Rule 3.620 was inapposite to this case. While that rule allows a trial court upon a motion for new trial to adjudicate a defendant guilty of a lesser offense if the evidence is sufficient to convict only on a lesser offense, the Second District held the rule applies only where the lesser offense is a necessarily lesser-included one. The Second District certified the following question as one of great public importance:

DOES FLORIDA RULE OF CRIMINAL PROCEDURE 3.620 APPLY IN CASES WHERE NO OFFENSE DIVIDED INTO DEGREES IS CHARGED AND THE DEFENDANT SEEKS REDUCTION OF HIS CONVICTION TO A PERMISSIVE LESSER-INCLUDED OFFENSE?

A timely notice to invoke the discretionary jurisdiction of this Court was filed on July 1, 2014.

### SUMMARY OF THE ARGUMENT

This Court should exercise its jurisdiction to review this case for three reasons. First, this Court should exercise its jurisdiction because the Second District's opinion expressly and directly conflicts with decisions of this Court and with the Fifth District on whether section 924.07(1)(j) of the Florida Statutes allows the State to appeal a trial court's reduction of verdict to a lesser-included offense. Second, this Court should exercise its jurisdiction because the Second District's opinion expressly and directly conflicts with decisions of this Court and other district courts as to whether double jeopardy prohibits a defendant from being retried following a trial court's post-verdict judgment of acquittal or reduction of verdict to a lesser-included offense. Third, the Second District certified as being of great public importance the question of whether Florida Rule of Criminal Procedure 3.620 does not apply to permissibly included lesser offenses. Discretionary review is warranted. The Second District's ruling in State v. Green expressly and directly conflicts with this Court's rulings in Exposito v. State and Ramos v. State, as well as several District Court rulings. This Court should resolve the conflict on both issues and should answer the certified question of great public importance.

## ARGUMENT

### ISSUE I

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN STATE V. GREEN, Case No. 2D12-4828 (FLA. 2D DCA JUNE 18, 2014), HOLDING THAT THE STATE MAY APPEAL A REDUCTION OF VERDICT, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIFTH DISTRICT COURT OF APPEAL.

The lower court entered a post-trial order adjudicating Mr. Green guilty of a lesser-included offense. In Exposito v. State, 891 So. 2d 525 (Fla. 2004), this Court held that the State is not authorized under section 924.07 of the Florida Statutes to appeal such an order. In a footnote, the Second District found in Green that jurisdiction in the present case existed under section 924.07(1)(j), which allows the State to appeal a ruling granting a motion for judgment of acquittal after a jury verdict. But Mr. Green was not acquitted. His conviction was reduced to trespass. Exposito explicitly prohibits the State from appealing a reduction of verdict.

The Second District found the trial court had acquitted Mr. Green rather than granting him relief under Florida Rule of Criminal Procedure 3.620 when it reduced his verdict. While the trial court did in fact style its order reducing the verdict as a

judgment of acquittal this Court previously addressed this situation in Ramos v. State, 505 So. 2d 418 (Fla. 1987), where a lower court reduced a verdict but mischaracterized what it had done as a motion for judgment of acquittal. This Court explained that "although styled as a judgment of acquittal, the trial court's action is better understood as a judgment of conviction of a lesser included offense pursuant to rule 3.620." Id. at 420.

In Exposito, this Court held that a reduction of a verdict cannot be treated as a judgment of acquittal under section 924.07(1)(j). Exposito, 891 So. 2d at 531. This Court held section 924.07(1) "does not grant the State the right to appeal from an order that 'effectively' dismisses the information or an order that is in 'legal effect' a judgment of acquittal." Id. This Court approved the Fourth District's opinion in State v. Richards, 792 So. 2d 570 (Fla. 4th DCA 2001), that held a trial court's reduction to a lesser-included offense was not tantamount to granting a judgment of acquittal. As a ruling on a rule 3.620 motion does not result in an acquittal, only in a conviction of a lesser offense, the State's right to appeal was not authorized by section 924.07 and the appeal was dismissed for lack of jurisdiction. Id. at 571.

In Green, the Second District characterized the trial court's



order reducing the verdict as an "acquittal down", a phrase that appears in no other appellate court opinion. But using this phrase to describe a reduction of verdict does not change what actually happened. In Exposito, this Court stated that "equating a reduction of charge to a dismissal or judgment of acquittal conflicts with the well-settled principles of statutory construction that courts are not at liberty to add words to statutes and must give statutory language its plain and ordinary meaning." Exposito, 891 So. 2d at 531. In the present case, the lower court reduced Mr. Green's charge, something this Court held in Exposito cannot be equated to a judgment of acquittal. Mr. Green was convicted of the lesser crime of trespass, adjudicated guilty and sentenced to a year behind bars. The trial court did not acquit him. Consequently, because Exposito prohibits appeals of reductions of verdicts, the Second District lacked jurisdiction under section 924.07(1)(j) to hear the State's appeal.

This Court should exercise its authority to review this case because the Second District's ruling that the State could appeal the post-trial order adjudicating Mr. Green guilty of a lesser-included offense pursuant to section 924.07(1) expressly and directly conflicts with this Court's opinions in Exposito and Ramos, and with the Fifth's District's opinion in Richars.

## ISSUE II

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN STATE V. GREEN, Case No. 2D12-4828 (FLA. 2D DCA JUNE 18, 2014), ORDERING A RETRIAL FOLLOWING A REDUCTION OF VERDICT, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT, THE FIRST DISTRICT COURT OF APPEAL, AND THE THIRD DISTRICT COURT OF APPEAL, THAT HOLD A NEW TRIAL WOULD VIOLATE DOUBLE JEOPARDY.

In Green, the Second District ordered that Mr. Green be retried for burglary following the post-verdict reduction of his conviction by the lower court. Yet this Court, the First District, and the Third District have all held that a retrial following a reduction of verdict violates the prohibition against double jeopardy. See Ramos v. State, 505 So. 2d 418 (Fla. 1987); Hudson v. State, 711 So. 2d 244 (Fla. 1st DCA 1988); State v. Rincon, 700 So. 2d 412 (Fla. 3d DCA 1997); and Ramos v. State, 457 So. 2d 492 (Fla. 3d DCA 1984). All of these cases hold that the State may only appeal a post-verdict judgment of acquittal or reduction of verdict if no retrial is necessary.

In Ramos, the Third District held that in a state appeal from a post-verdict judgment of acquittal, double jeopardy is a consideration "only when a retrial of the defendant would be necessitated by a reversal of the trial court's ruling." Ramos,

457 So. 2d at 494. Since a reversal of the trial court's post-verdict ruling would result only in the reinstatement of the jury's verdict, the Third District found no double jeopardy violation existed. In State v. Rincon, 700 So. 2d 412 (Fla. 3d DCA 1997), the Third District reiterated its ruling in Ramos. In Ramos v. State, 505 So. 2d 418 (Fla. 1987), this Court not only approved the Third District's Ramos opinion but also held that double jeopardy would not bar the state's appeal of a post-verdict reduction of judgment to a lesser offense because "[a]ppellate review of a trial court's ruling on a question of law after a trial does not involve the threat of a second prosecution for the same offense." Id. at 421. In the present case, the Second District's ordering of a new trial guarantees Mr. Green will be prosecuted a second time for the same offense contrary to Ramos. Citing to this Court's Ramos opinion, the First District held in Hudson v. State, 711 So. 2d 244, 246 (Fla. 1st DCA 1988), that no question of double jeopardy arises when an appeal is taken from a judgment of acquittal coming after the jury has determined the facts because should the state prevail on appeal the jury's guilty verdict is reinstated and no retrial is necessary.

According to this Court in Ramos, the First District in Hudson, and the Third District in Ramos and Rincon, if a trial

court improperly grants a post-verdict acquittal or improperly reduces a verdict, the granting of a new trial on appeal would violate double jeopardy. The only possible remedy on appeal would be for a reinstatement of the jury verdict. However, in the present case the Second District found the verdict could not simply be reinstated as the trial court found prejudicial evidence had been improperly admitted at the trial. Additionally, Respondent sought only a new trial on appeal not a reinstatement of the verdict.

This Court should exercise its authority to review this case because the Second District's ruling that a defendant can be tried a second time following the reduction of a jury verdict expressly and directly conflicts with this Court's decision in Ramos, with the First District's decision in Hudson, and with the Third District's decisions in Ramos and Rincon.

### ISSUE III

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE  
CERTIFIED QUESTION.

In State v. Green, the Second District held that Florida Rule of Criminal Procedure 3.620 allows courts to reduce verdicts to necessarily included lesser offenses but not to permissive lesser-included offenses. The Second District certified the following question as one of great public importance:

DOES FLORIDA RULE OF CRIMINAL PROCEDURE 3.620  
APPLY IN CASES WHERE NO OFFENSE DIVIDED INTO  
DEGREES IS CHARGED AND THE DEFENDANT SEEKS  
REDUCTION OF HIS CONVICTION TO A PERMISSIVE  
LESSER-INCLUDED OFFENSE?

This Court should grant review to decide the certified question.

### CONCLUSION

Petitioner Jarvis Gerrard Green respectfully requests this Court grant review of this case based on the certified question and on the express and direct conflict of decisions.

APPENDIX

PAGE NO.

1. Opinion of the Second District Court of Appeal in  
State v. Green, 2D12-4828 (Fla. 2d DCA June 18, 2014). 1-7

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Dawn A. Tiffin, Office of the Attorney General, at CrimappTPA@myfloridalegal.com, on July 7<sup>th</sup>, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

/s/Robert D. Rosen

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IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

June 18, 2014

STATE OF FLORIDA,

Appellant,

v.

JARVIS GERRARD GREEN,

Appellee.

Case No. 2D12-4828

BY ORDER OF THE COURT:

Appellee's motion for rehearing and rehearing en banc is denied. On the court's own motion, the prior opinion dated April 11, 2014, is withdrawn, and the attached opinion is issued in its place. No further motions will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A  
TRUE COPY OF THE ORIGINAL COURT ORDER.

  
JAMES BIRK HOLD, CLERK

Received By  
JUN 18 2014  
Appellate Division  
Public Defenders Office

APP 1



IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

STATE OF FLORIDA,  
  
Appellant,  
  
v.  
  
JARVIS GERRARD GREEN,  
  
Appellee.

Case No. 2D12-4828

Opinion filed June 18, 2014.

Appeal from the Circuit Court for  
Hillsborough County; Ronald N. Ficarrotta,  
Judge.

Pamela Jo Bondi, Attorney General,  
Tallahassee, and Dawn A. Tiffin, Assistant  
Attorney General, Tampa, for Appellant.

Howard L. Dimmig, II, Public Defender,  
and Robert D. Rosen, Assistant Public  
Defender, Bartow, for Appellee.

Received By  
JUN 18 2014  
Appellate Division  
Public Defenders Office

CRENSHAW, Judge.

The State of Florida appeals an order granting Jarvis Green's motion for judgment of acquittal after jury trial. Pursuant to the motion, the circuit court reduced Green's conviction from burglary of an unoccupied dwelling to trespass. We have

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jurisdiction.<sup>1</sup> Because the court erred in reducing the charge rather than ordering a new trial, we reverse the judgment and order a new trial. We also certify a question of great public importance.

Green was charged in 2012 with burglary of an unoccupied dwelling and petit theft; he was not charged with trespass. He was acquitted by a jury of the petit theft charge and convicted of the burglary. Before sentencing, Green filed an omnibus posttrial motion seeking a new trial, judgment of acquittal, or arrest of judgment but did not seek relief pursuant to Florida Rule of Criminal Procedure 3.620. The merits of the motion were that a 911 call containing inadmissible hearsay was admitted into evidence and became a feature of the trial. The court agreed that admission of the call was error and prejudiced Green; the State disagreed. Though the court determined that the burglary conviction could not stand without the 911 call, it concluded that there was sufficient evidence to convict Green of trespass. In accordance with that determination the burglary conviction was reduced to a conviction for trespass and the State appealed. We reverse the judgment and explain the remedy the court should have used below.

#### Why a Judgment of Acquittal Could Not Be Granted

While it is appropriate to grant a judgment of acquittal of a greater charge where the evidence only supports a lesser charge, such is not the case here. The court below "acquitted [burglary] down to trespass." After the motion was granted, Green was

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<sup>1</sup>See art. V, § 4(b)(1), Fla. Const. (providing authority of district courts of appeal to hear appeals of right from final judgments or orders); § 924.07(1)(j), Fla. Stat. (2012) (creating the State's substantive right to appeal from a judgment of acquittal after jury trial); Fla. R. App. P. 9.140(c)(1)(E) (effectuating by procedural rule the State's right to appeal a judgment of acquittal after jury trial).

convicted of trespass but not burglary; trespass was not charged in the information. Because trespass was not charged and Green did not stipulate to an amendment of the charging document he could not be convicted of that offense unless trespass were a necessarily lesser-included offense. See Johnson v. State, 981 So. 2d 680, 681 (Fla. 2d DCA 2008) (" [D]ue process prohibits a defendant from being convicted of a crime not charged in the information or indictment." (quoting Crain v. State, 894 So. 2d 59, 69 (Fla. 2004))). However, trespass is not a necessarily lesser-included offense of burglary. See Fla. Std. Jury Instr. (Crim.) 13.1; see also § 810.02, Fla. Stat. (2012) (defining and criminalizing burglary). Rather, it is a category two, or permissive, lesser-included offense of burglary of a dwelling. Fla. Std. Jury Instr. (Crim.) 13.1; see Hannah v. State, 42 So. 3d 951, 953 (Fla. 4th DCA 2010) (" Trespass is a permissive or category 2 lesser-included offense of burglary of a conveyance." (quoting Thomas v. State, 591 So. 2d 259, 260 (Fla. 4th DCA 1991))). Because an "acquittal down" can only be done when the lesser charge is necessarily a lesser-charged offense and burglary does not necessarily include trespass, a judgment of acquittal was improper on this ground. See Hannah, 42 So. 3d at 953; cf. Sellers v. State, 838 So. 2d 661 (Fla. 1st DCA 2003) (holding that trial court erred in denying a motion for judgment of acquittal as to grand theft where there was insufficient evidence of value and ordering reduction to necessarily lesser-included offense of petit theft.)

#### New Trial Was the Appropriate Relief in this Case

This brings us to the question of the proper remedy. Green sought three types of relief—new trial, judgment of acquittal, and arrest of judgment. We have already discussed why a judgment of acquittal was not the appropriate relief in this

case. As to a motion for an arrest of judgment, in this case the motion is inapposite and lacks merit. See Fla. R. Crim. P. 3.610. On the other hand, a criminal court is empowered to grant a new trial, among other circumstances not relevant here, where "[t]he verdict is contrary to law or the weight of the evidence" or "[t]he court erred in the decision of any matter of law arising during the course of the trial," in the latter case so long as prejudice is established. Fla. R. Crim. P. 3.600(a)(2), (b)(6); see Fla. R. Crim. P. 3.580. Thus, upon proper motion, once the trial judge properly determines that prejudicial information was erroneously admitted during trial and where it cannot grant a motion for judgment of acquittal nor arrest the judgment, it must grant a new trial. Accordingly, in this case the court could only issue one form of relief, and that is a new trial.

Florida Rule of Criminal Procedure 3.620 is Inapposite

Green seeks dismissal of this appeal arguing that we do not have jurisdiction over orders granting relief pursuant to Florida Rule of Criminal Procedure 3.620. See Exposito v. State, 891 So. 2d 525, 529-31 (Fla. 2004). The court did not grant relief under the rule. Moreover, rule 3.620 is inapposite to this case.

Rule 3.620 reads in full, with emphasis added:

When the offense is divided into degrees or necessarily includes lesser offenses and the court, on a motion for new trial, is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilt of a lesser degree or of a lesser offense necessarily included in the one charged, the court shall not grant a new trial but shall find or adjudge the defendant guilty of the lesser degree or lesser offense necessarily included in the charge, unless a new trial is granted by reason of some other prejudicial error.

" 'When a rule is clear and unambiguous, courts will not look behind the rule's plain language or resort to rules of construction to ascertain intent.' " Kidder v. State, 117 So. 3d 1166, 1170-71 (Fla. 2d DCA 2013) (quoting Weston TC LLLP v. CNDP Mktg. Inc., 66 So. 3d 370, 375 (Fla. 4th DCA 2011)). Because burglary of an unoccupied dwelling is not an offense that necessarily includes trespass, and Green's charge was not divided into degrees, rule 3.620 is inapplicable.

Green points out that in Exposito the court explicitly approved State v. Richards, 792 So. 2d 570 (Fla. 4th DCA 2001). See Exposito, 891 So. 2d at 531. In Richards, the Fourth District dismissed an appeal from the grant of relief under rule 3.620 as concluding that it lacked jurisdiction. Richards, 792 So. 2d at 571. Richards, like this case, resulted from an "acquittal down" in the context of permissive lesser offenses. Id. Specifically, Richards dealt with robbery and its permissive lesser offense of resisting a merchant. See Fla. Std. Jury Instr. (Crim.) Robbery. Neither the Richards court nor the Exposito court noted the discrepancy between the facts of Richards and rule 3.620's text we discuss above. Although we adhere to the letter of the rule, we certify the following question as one of great public importance:

DOES FLORIDA RULE OF CRIMINAL PROCEDURE 3.620 APPLY IN CASES WHERE NO OFFENSE DIVIDED INTO DEGREES IS CHARGED AND THE DEFENDANT SEEKS REDUCTION OF HIS CONVICTION TO A PERMISSIVE LESSER-INCLUDED OFFENSE?

#### Conclusion

We recognize the court's need to grant relief based on its determination that prejudicial, inadmissible evidence was adduced at trial, but rule 3.620 is inapposite and a motion for judgment of acquittal could not be granted in this case. However, a new trial could have, and should have, been granted.

Reversed and remanded for new trial; question of great public importance  
certified.

CASANUEVA and BLACK, JJ., Concur.