

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-2005

THIRD DCA CASE NO: 3D12-2104

GEAN DANIEL,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Daniel v. State*, 137 So.3d 1181 (Fla. 3rd DCA 2014), on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix, which is the Third District opinion, paginated separately and identified as “A” followed by the page number.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged, in relevant part, with armed burglary of a dwelling. (A. 2). At trial, petitioner requested a jury instruction on the lesser included offense of trespass. (A. 4). The trial court refused to instruct on trespass. *Id.* On direct appeal, “[t]he defendant contend[ed] the trial court erred in failing to instruct the jury on trespass, a permissive lesser-included offense of armed burglary of a dwelling, and that the error constitute[d] per se reversible error.” (A. 2). Before the Third District Court of Appeals, the State filed a confession of error and agreed that the failure to give the requested trespass instruction was reversible error entitling Petitioner to a new trial. *Id.*

However, the Third District refused to accept the State’s confession of reversible error. *Id.* They agreed with the State and the defense that the trial court

did err by refusing to give the requested trespass instruction, as all elements of trespass were charged in the information and as there was evidence at trial to support the lesser-included offense at trial. (A. 4). However, per the Third District, the failure to instruct the jury on trespass was harmless error. (A. 8). This was so because the jury was instructed on the lesser included offenses of unarmed burglary of a dwelling and burglary of a structure. (A. 6). According to the Third District, “[b]ecause the trial court instructed the jury on at least one lesser-included offense that the jury rejected, and trespass is even further removed than the lesser-included offenses for which the trial court gave instructions and the jury rejected, the failure to instruct the jury on trespass is subject to a harmless error analysis.” (A. 6).

Applying this harmless error analysis, the Third District noted that the jury returned a verdict of guilty as charged to armed burglary, and also to the separately charged offense of grand theft, indicating that they did not believe Petitioner committed a trespass and that they did not exercise their pardon power to find Petitioner guilty of a lesser offense than the one they believed he committed. (A. 6). Therefore, the failure to instruct the jury on the requested lesser included offense of trespass was harmless error.

After a successful petition seeking belated discretionary review, a Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court was entered in case SC14-2005 on October 20, 2014.

SUMMARY OF ARGUMENT

The Third District in the instant case found that trespass is not a one step removed lesser included offense of burglary, and therefore that it was not *per se* reversible error to refuse to instruct on trespass, even though all parties and the Third District concede that Petitioner was legally entitled to the instruction. The Third District based their decision on the fact that there were various degrees of burglary addressed in the jury instructions (armed burglary of a dwelling, unarmed burglary of a dwelling, and burglary of a structure or conveyance).

These are all different ways of committing the same offense of burglary and do not constitute separate lesser included offenses in the way that trespass does. The crime of trespass is a one step removed lesser included offense of the crime of burglary.

The Fourth District has, in at least three cases (*McCloud v. State*, 60 So.3d 1094 (Fla. 4th DCA 2011), *Bordes v. State*, 34 So.3d 215 (Fla. 4th DCA 2010), and *Piccioni v. State*, 833 So.2d 247 (Fla. 4th DCA 2002)) found that trespass is a one step removed lesser included offense of burglary of a dwelling (even though there

exists the intervening method of committing burglary of simple burglary¹) and that it is *per se* reversible error to refuse to instruct on trespass when the crime of conviction is burglary of a dwelling, without regard to any harmless error analysis.

This Court should resolve this express and direct conflict between District Courts of Appeal to ensure uniformity in the law as it is applied throughout this State.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH *MCCLLOUD V. STATE*, 60 So.3d 1094 (FLA. 4th DCA 2011), *BORDES V. STATE*, 34 So.3d 215 (FLA. 4th DCA 2010), AND *PICCIONI V. STATE*, 833 So.2d 247 (FLA. 4th DCA 2002).

There is no dispute in this case that the jury should have been instructed on trespass as the defense requested. The information alleged all of the statutory elements of trespass and the evidence at trial established those elements. The only question is whether the failure to give the trespass instruction in these circumstances is reversible error.

There are at least three cases out of the Fourth District which are indistinguishable from the instant case and reach the opposite result. As a

¹ Simple burglary is burglary of a structure or conveyance rather than a dwelling. If there are no complicating factors, the former is a third degree felony and the latter a second degree felony. § 810.02(3)-(4).

representative example, in *Piccioni v. State*, 833 So.2d 247 (Fla. 4th DCA 2002), the defendant was charged with burglary of a dwelling. The defense requested an instruction on the lesser included offense of trespass, but the trial court refused to give it. The defendant was convicted of burglary of a dwelling as charged. The Fourth District found: 1) that the trial court erred in failing to give the requested trespass instruction; and 2) that reversal was required as the error could not be harmless because “[w]here the absent lesser-included offense is only one step removed from the charged offense, however, the failure to give the requested instruction is reversible error per se”, and trespass was indeed one step removed from burglary of a dwelling. *Piccioni* at 248.

The Fourth District in *Piccioni* (and the Third District here) took their cues from this Court’s decision in *State v. Abreau*, 363 So.2d 1063 (Fla. 1978), where this Court established a distinction between failure to instruct on lesser included offenses which are “one step removed from the offense charged” and those which are more than one step removed. This Court said “Only the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible. Where the omitted instruction relates to an offense two or more steps removed, *DeLaine* [*v. State*, 262 So.2d 655 (Fla. 1972)] continues to have vitality, and reviewing courts may properly find such error to be harmless.” *Abreau* at 1064.

The real question, then, is whether trespass is: a) one step removed from burglary; or b) more than one step removed from burglary. If trespass is the next immediate lesser-included offense of burglary (one step removed), then, under *Abreau*, it was *per se* reversible error not to instruct on it when the defense requested it. If trespass is more than one step removed, then, per *Abreau*, failure to instruct on it despite a defense request, though clearly still error, is subject to harmless error analysis.

The Third District proclaims that trespass is not a one step removed lesser included offense of burglary because the burglary in this case was charged as armed burglary of a dwelling. Per the Third District, intermediate lesser included offenses between armed burglary of a dwelling and trespass include unarmed burglary of a dwelling and burglary of a structure. (A. 6). The problem with this logic is that all three of these offenses (armed burglary of a dwelling, unarmed burglary of a dwelling, and burglary of a structure) are versions of the same crime: Burglary. Each is prohibited by Florida Statutes section 810.02. Each requires the same basic action of “entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter.” § 810.02(1)(b)(1), Fla. Stat. (2012). It is *that* which the jury must find the defendant did in order to convict him of burglary. Various subtypes of burglary then have specific jury instructions,

such as those requiring the jury to find whether the offender was armed and whether the property was a dwelling.² But these subtypes only come into play after the jury has determined that the offender has committed a burglary.

In other words, the jury is asked to determine whether the offender committed a burglary (did they enter a place with the intent to commit a crime therein?), and then separately whether they were armed and whether they entered a dwelling. The jury is not instructed as to unarmed burglary, or burglary of a structure, as separate lesser included offenses of armed burglary of a dwelling. All three crimes are subsumed in the same jury instruction, the instruction on burglary.

On the other hand, trespass is a lesser included offense of burglary. If the jury thought that Petitioner had not committed burglary, but had committed some crime, the middle ground was trespass. If the jury wanted to exercise their inherent pardon power, but not acquit him altogether, the middle ground was trespass. Unlike the degrees of burglary, trespass is an entirely separate crime from burglary and the jury is properly charged with it separately as a lesser included offense. See Fla. Std. Jury Instr. (Crim.) 13.3-13.5, § 810.08 *et. seq.*, Fla. Stat. (2013).

² Specifically, the standard jury instructions for burglary include the language “If you find(defendant) guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether, in the course of committing the burglary, (defendant) was armed or armed [himself] [herself] with in the [structure] [conveyance] with [explosives] [a dangerous weapon]” and “”If you find (defendant) guilty of burglary, you must also determine if the State has proved beyond a reasonable doubt whether the [structure] [conveyance] [entered] [remained in] was a dwelling.” Fla. Std. Jury Instr. (Crim.) 13.1.

Contrary to the Third District's decision, the Fourth District has plainly held that trespass is a one step removed lesser included offense of burglary. In *Bordes v. State*, 34 So.3d 215 (Fla. 4th DCA 2010), the defendant was charged and convicted of burglary of a dwelling. The trial court refused to give a jury instruction on trespass. The Fourth District reversed and remanded for a new trial because of the missing lesser included offense instruction, without any harmless error analysis. If the Third District's logic applied, this case would have been subject to a harmless error analysis, because trespass would not be considered to be one step removed from burglary of a dwelling. After all, there is an intervening necessary lesser included offense of simple burglary pursuant to Florida Statutes section 810.02(4) and the Florida Standard Jury Instructions (Criminal) 13.1. Yet, this did not matter to the Fourth District's analysis. Trespass is a one step removed lesser of burglary, without regard to how the burglary is charged.

Even more explicit on this point is *McCloud v. State*, 60 So.3d 1094 (Fla. 4th DCA 2011), where the Fourth District held "the failure to instruct on a necessarily lesser included offense one step removed from the crime for which a defendant was convicted constitutes per se reversible error" and reversed and remanded for a new trial. In *McCloud*, the crime of conviction was burglary of a dwelling, and the trial court refused to give a jury instruction on trespass as a lesser included offense. The only difference between this case and that one is that this case involved a

charge of armed burglary of a dwelling, while that one involved unarmed burglary of a dwelling. This is a distinction without a difference, because, per the Third District's logic, even if the charge of conviction was unarmed burglary of a dwelling, trespass would not be a one step removed lesser because simple burglary (burglary of a structure or conveyance) would intervene. The Fourth District held the opposite—in such a situation trespass **was** a one step removed lesser included offense and it was *per se* reversible error to decline to give the jury instruction when it was requested.³

The First District is on the side of the Third District as to this issue. In *McKiver v. State*, 55 So.3d 646 (Fla. 1st DCA 2011), they found that it was not *per se* error for the trial court to refuse a defense-requested trespass instruction when the crime charged was burglary of a dwelling, because simple burglary is a lesser that comes between burglary of a dwelling and trespass, meaning trespass is not one step removed from burglary of a dwelling. Nevertheless, applying a harmless error analysis, *McKiver* did not find the error harmless as the appellate Court could not say that the error did not affect the verdict.

The bottom line is that the Fourth District and the Third District are in express and direct conflict on this issue. In the Fourth District, a defendant who

³ As already noted, *Piccioni v. State*, 833 So.2d 247 (Fla. 4th DCA 2002) is another Fourth District case that explicitly holds that trespass is one step removed from burglary of a dwelling, and that the failure to instruct on it when requested is *per se* reversible in a burglary of a dwelling case.

asks for a trespass instruction (which all courts agree he is entitled to) and is incorrectly refused it is automatically afforded a new burglary trial. Not so in the Third District, where Petitioner, in that exact situation, has been told that the admitted error was harmless, and that despite his jury having been given no option but to convict him of some version of burglary or find him not guilty, he is entitled to no relief.

For the foregoing reasons, the instant case is in direct and express conflict with *McCloud v. State*, 60 So.3d 1094 (Fla. 4th DCA 2011), *Bordes v. State*, 34 So.3d 215 (Fla. 4th DCA 2010), and *Piccioni v. State*, 833 So.2d 247 (Fla. 4th DCA 2002). Thus, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court should exercise its discretionary jurisdiction.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal in *Daniel v. State*, 137 So.3d 1181 (Fla. 3rd DCA 2014).

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by email to CrimAppMIA@MyFloridaLegal.com, and efiled with the Florida Supreme Court via the Florida Courts e-filing Portal, this 30th day of October, and that this jurisdictional brief was typed in 14 point proportionally spaced Times New Roman.

/s/ Daniel Tibbitt

Daniel Tibbitt