

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-2005

Lower Tribunal No. 3D12-2104

GEAN DANIEL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

PAMELA JO BONDI
Attorney General

RICHARD L. POLIN
Bureau Chief, Criminal Appeals
Florida Bar No. 0230987

BRENT J. KELLEHER
Assistant Attorney General
Florida Bar No.: 0056124
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441 – Voice
Primary E-mail:
CrimAppMIA@myfloridalegal.com
Secondary E-mail:
Brent.Kelleher@myfloridalegal.com

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INTRODUCTION

Petitioner, Gean Daniel, was the Defendant in the trial court and the Appellee in the Third District. Respondent, THE STATE OF FLORIDA, was the Prosecution in the trial court and the Appellant in the Third District. The parties shall be referred to as they stand in this Court. In this brief, all references to the opinion under review will be referred to as they exist in the published opinion, *Daniel v. State*, 137 So. 3d 1181 (Fla. 3d DCA 2014).

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of armed burglary of a dwelling and grand theft at trial. On appeal, Petitioner argued that the trial court committed per se reversible error, when it did not instruct the jury on trespass, a permissive lesser-included offense of armed burglary of a dwelling. The Third District Court of Appeal affirmed the conviction holding that the correct analysis was whether any error was harmless beyond a reasonable doubt. The Third District concluded that it was not. The jury was instructed on armed burglary of a dwelling and the lesser offense of burglary of a dwelling (while unarmed). The Third District Court of Appeal found that the failure to give the instruction was error, however, it was harmless error pursuant to this Honorable Court's holding in *State v. Abreau*, 363 So. 2d 1063, 1064 (Fla. 1978). The Third District found that the offense of trespass was more

than two steps removed from armed burglary of a dwelling and therefore was subject to a harmless error analysis.

Petitioner filed a belated notice of appeal to invoke this Court's discretionary jurisdiction and filed a jurisdictional brief. The Respondent's brief on jurisdiction follows.

SUMMARY OF ARGUMENT

There is no basis upon which discretionary review can be granted in this case because the Third District's opinion does not conflict with any case of this Court or of any other district court in Florida. As such, no conflict exists for this Court to exercise discretionary jurisdiction to review the decision below.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Petitioner contends that this Court should invoke its discretionary review power to review the Third District's opinion on the basis that "THE THIRD DISTRICT COURT'S OPINION EXPRESS AND DIRECTLY CONFLICTS 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)."

This Court held in *Abreau* that an error in giving a lesser included offense instruction is harmless error where that offense is two steps removed from the offense for which the defendant was convicted. In the instant case, Petitioner was convicted of armed burglary of a dwelling. Trespass was a two-steps removed lesser included offense because, in between armed burglary of a dwelling and trespass, the jury was also instructed on burglary of a structure as a lesser included offense. As the cases upon which the petitioner relies do not involve armed burglary as the offense for which there was a conviction, and as those cases did not have any intervening lesser included offense instructions between the one for which there was a conviction and the one that the court erred in failing to give, there is no express and direct conflict between the instant case and the Fourth District cases.

An unarmed burglary of a dwelling is a lesser-included offense of armed burglary of a dwelling and is a second-degree felony. *See Reddick v. State*, 394 So. 2d 417, 417–18 (Fla. 1981) (noting that robbery with a weapon is a lesser-included offense of robbery with a deadly weapon). The jury in the present case was also instructed on and given the option of finding the defendant guilty of burglary to a structure, a third-degree felony and a lesser-included offense of armed burglary of a dwelling. Burglary to a structure is a lesser-included offense that is two degrees removed from the offense of armed burglary of a dwelling. Trespass, a

misdemeanor, is at least three degrees removed from armed burglary of a dwelling.¹ Because 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 was subject to a harmless error analysis.

Petitioner cites three cases out of the Fourth District Court of Appeal, *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), which he states are in conflict with the subject opinion of *Daniels* from the Third District.

In each of the three cases out of the Fourth District, the respective defendants were charged and convicted of burglary of a dwelling. That fact alone distinguishes the subject case and any alleged conflict. In those cases, there were no intervening lesser offense instructions between burglary and trespass.

By contrast, in the present case, the petitioner was charged and convicted of armed burglary of a dwelling, thus enhancing the burglary charge under Fla. Stat. §810.02. After the instruction on armed burglary, the jury was instructed in the

¹ The Third District Court noted, “Arguably simple trespass is even more than three steps removed from armed burglary of a dwelling, but we need not determine how many steps removed it is above and beyond the requisite two steps removed required to perform a harmless error analysis because it is clearly greater than one step removed from armed burglary of a dwelling.” *Daniel v. State*, 137 So. 3d 1181, 1185 (Fla. 3d DCA 2014).

following sequence: armed burglary of a dwelling, burglary of a dwelling and burglary of a structure. Thus, there was an intervening lesser included offense instruction in the instant case, resulting in the trespass instruction being two steps removed from the offense for which the defendant was convicted. As a result, this case is directly controlled by this Court's holding in *Abreau v. State*. Therefore, the Third District's analysis is accurate and the Court was correct to assess the case under the harmless error doctrine. Furthermore, as the instant case presents intervening lesser included offense instructions, with trespass being two steps removed, and the cases cited by the Petitioner did not involve any intervening instructions and therefore did not have a two-steps removed scenario, there is no express and direct conflict between the instant case and the Fourth District decisions. Petitioner's own case of *Piccioni v. State*, 833 So. 2d 247 (Fla. 4th DCA 2002), states that, "The failure to instruct the jury on a permissive lesser-included offense can sometimes be harmless error." This Honorable Court in *Abreau* illustrated the concept:

For example, if a defendant is charged with offense "A" of which "B" is the next immediate lesser-included offense (one step removed) and "C" is the next below "B" (two steps removed), then when the jury is instructed on "B" yet still convicts the accused of "A" it is logical to assume that the panel would not have found him guilty only of "C" (that is, would have passed over "B"), so that the failure to instruct on "C" is harmless. If, however, the jury only receives instructions on "A" and "C" and returns a conviction on "A", the error cannot be harmless because it is impossible to determine whether the

jury, if given the opportunity, would have “pardoned” the defendant to the extent of convicting him on “B” (although it may have been unwilling to make the two-step leap downward to “C”).

Thus, to the extent that the broad language employed in *Lomax* intimates that the harmless error doctrine cannot be invoked whenever there has been a failure to instruct on Any lesser-included offense, it is disapproved. 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* continues to have vitality, and reviewing courts may properly find such error to be harmless.

State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978).

Petitioner claims that if this case was tried within the Fourth District’s jurisdiction, the case would be reversed and automatically afforded a new burglary trial. (Brief at p. 10). This is not so. Petitioner fails to observe the distinguishing fact that the instant case involved an armed burglary of a dwelling, unlike the three cases cited in an alleged perceived conflict. The Third District properly concluded that the permissive lesser-included instruction of trespass was more than two steps removed.

As this Court explained in *Abreau*, the significance of the two-steps-removed requirement is more than merely a matter of number or degree. A jury must be given a fair opportunity to exercise its inherent “pardon” power by returning a verdict of guilty as to the next lower crime. If the jury is not properly instructed on the next lower crime, then it is impossible to determine whether,

having been properly instructed, it would have found the defendant guilty of the next lesser offense. However, when the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis. *Pena v. State*, 901 So. 2d 781, 787 (Fla. 2005).

The test for discretionary review is whether there is an express and direct conflict. *See Department of Health & Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So. 2d 888, 889 (Fla. 1986). As shown above, there is no conflict between the instant case and those cited by Petitioner. Discretionary jurisdiction entails only a judicial power to review a case, and not an obligation to do so. This court should not exercise its power to review the instant case for the reasons mentioned *supra*.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court decline jurisdiction to review this cause.

Respectfully submitted,

PAMELA JO BONDI
Attorney General

/s/ Brent J. Kelleher
BRENT J. KELLEHER
Assistant Attorney General
Florida Bar No.: 0056124
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441 – Voice
(305) 377-5655 – Facsimile
Primary E-mail:
CrimAppMIA@myfloridalegal.com
Secondary E-mail:
Brent.Kelleher@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was e-mailed this 10th day of December, 2014, to Daniel Tibbitt, Esq., Counsel for Petitioner at DTibbitt@rierlaw.com and e-filed with the Florida Supreme Court via the Florida Courts e-filing Portal.

/s/ Brent J. Kelleher
BRENT J. KELLEHER
Assistant Attorney General
Florida Bar No.: 0056124

CERTIFICATE REGARDING FONT SIZE AND TYPE

The foregoing Brief of Respondent on Jurisdiction was typed in Times New Roman, 14-point font, in accordance with the Florida Rules of Appellate Procedure.

/s/ Brent J. Kelleher
BRENT J. KELLEHER
Assistant Attorney General
Florida Bar No.: 0056124