

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

HERIBERTO TOSADO,

Appellant,

v.

Case No. 5D13-1840

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

Opinion filed October 9, 2015

Appeal from the Circuit Court  
for Osceola County,  
Emerson R. Thompson, Jr., Senior Judge.

James S. Purdy, Public Defender,  
and Susan A. Fagan, Assistant Public  
Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General,  
Tallahassee, and Ann M. Phillips,  
Assistant Attorney General, Daytona  
Beach, for Appellee.

WALLIS, J.

Heriberto Tosado ("Appellant") appeals his judgment and sentence for convictions of possession of burglary tools, grand theft, burglary of a structure, criminal mischief,

driving without a valid license, and driving with a suspended license.<sup>1</sup> We find that only one issue on appeal has merit.

Appellant argues, *inter alia*, that double jeopardy prohibits dual convictions for driving with a suspended license in violation of section 322.34(2)(a), Florida Statutes (2013), and driving without a valid license in violation of section 322.03(1), Florida Statutes (2013). Although Appellant did not raise this issue below, a violation of the prohibition against double jeopardy constitutes fundamental error, which can be raised for the first time on appeal. Barfield v. State, 871 So. 2d 929, 930 (Fla. 5th DCA 2004). The State properly concedes that the elements of driving without a valid license are subsumed by the elements of driving with a suspended license. Roedel v. State, 773 So. 2d 1280, 1282 (Fla. 5th DCA 2000) ("In other words, section 322.03(1) is a necessary lesser included offense of section 322.34(2)."). On remand, we instruct the trial court to vacate Appellant's judgment and sentence for driving without a valid license.

AFFIRMED IN PART; REVERSED IN PART, and REMANDED WITH INSTRUCTIONS.

LAWSON, C.J., and TORPY, J., concur.

---

<sup>1</sup> The jury returned verdicts of not guilty on the counts for resisting with violence and resisting without violence.