

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

JULY TERM 2013

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

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

Case Nos. 5D12-178 & 5D12-536

DONALD E. ROBINSON,

Appellee/Cross-Appellant.

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Opinion filed October 18, 2013

Appeal from the Circuit Court  
for Osceola County,  
Jeffords D. Miller, Judge.

Pamela Jo Bondi, Attorney General,  
Tallahassee, Lori N. Hagan and Pamela  
J. Koller, Assistant Attorneys General,  
Daytona Beach, for Appellant/Cross-  
Appellee.

Terrence E. Kehoe of Law Office  
of Terrence E. Kehoe, Orlando,  
for Appellee/Cross-Appellant.

PER CURIAM.

The State challenges the departure sentence after Appellee was convicted of aggravated assault with a firearm. Appellee commendably concedes error on this point but asserts by cross-appeal that the court gave erroneous jury instructions that amounted to fundamental error, necessitating a new trial. We agree with Appellee and reverse and remand for a new trial.

The aggravated assault instruction was fundamentally erroneous because it was based on a theory not charged in the information. *Grau v. State*, 101 So. 3d 922 (Fla. 5th DCA 2012); *Fuentes v. State*, 730 So. 2d 366 (Fla. 4th DCA 1999). Because of our conclusion on this issue, it is not necessary to address the State's argument that Appellee invited error in the self-defense instruction.

REVERSED AND REMANDED.

TORPY, C.J., GRIFFIN and WALLIS, JJ., concur.