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

RANDEL LEE HUMPHREYS,

Appellant,

v. Case No. 5D18-2535

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed July 2, 2020

Appeal from the Circuit Court
for Volusia County,
Raul A. Zambrano, Judge.

James S. Purdy, Public Defender, and Glendon George Gordon, Jr., Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Appellee.

TRAVER, J.

Randel Humphreys appeals his judgment and sentence for aggravated battery against his daughter, Maranda. Only one issue Humphreys raises on appeal merits discussion. Because the trial court fundamentally erred by editing the standard jury

instruction on aggravated battery to omit the element and definition of "deadly weapon," Humphreys is entitled to a new trial on this charge.

Humphreys and his wife were divorcing, and they had an argument in the back yard culminating with him throwing her in the pool and allegedly trying to drown her. Maranda jumped in to separate them and then ran to her room to dial 911. Humphreys grabbed a flare gun, broke into her room, and hit her on the head with it. On direct examination, Maranda said Humphreys "struck" her. The State also introduced a photograph showing a mark on Maranda's forehead. On cross-examination, Maranda described Humphreys's action as a "tap." She was not injured, did not bleed, required no medical treatment, was only "startled," and did not think Humphreys was trying to hurt her.

With the help of a neighbor, Maranda left the house. Humphreys then sat on his front porch, where a deputy approached in response to Maranda's call. Humphreys shot at the deputy with the flare gun, survived the return fire, and was apprehended.

The State charged Humphreys with: (1) attempted second-degree murder of his wife; (2) aggravated battery against his daughter; and (3) attempted second-degree murder of the deputy. Humphreys does not appeal the judgments and sentences on his attempted murder charges, on which the jury returned lesser verdicts of misdemeanor battery and attempted manslaughter. The jury found Humphreys guilty as charged of aggravated battery and concluded he possessed a firearm. *See* § 784.045(1)(a)(2), Fla. Stat. (2018).

Without objection from either party, the trial court edited the standard instruction for aggravated battery. The omissions from the standard instruction are illustrated by strikethroughs, and the additions are underlined:

Count III
AGGRAVATED BATTERY
(Maranda Humphreys)

To prove the crime of Aggravated Battery, the State must prove the following two elements beyond a reasonable doubt. The first element is a definition of Battery.

1. Mr. Humphreys actually and intentionally touched or struck Maranda Humphreys against her will.

2. Mr. Humphreys, in committing the Battery, used a ~~deadly weapon~~ <u>firearm</u>.

~~A "deadly weapon" is any object that will likely cause death or great bodily harm if used or threatened to be used in the ordinary and usual manner contemplated by its design and construction.~~

~~An object not designed to inflict bodily harm may nonetheless be a "deadly weapon" if it was used or threatened to be used in a manner likely to cause death or great bodily harm.~~

<u>A "firearm" means any weapon, including a starter gun, which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive or the frame or receiver of any such weapon.</u>

"In the absence of a contemporaneous objection at trial, a jury instruction error is only subject to relief in the event of fundamental error." *Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019). A fundamental error "must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960). A trial court's failure to instruct the jury on an element of the offense of conviction is fundamental error

only if the defendant disputes the element at trial. *State v. Delva*, 575 So. 2d 643, 644–45 (Fla. 1991). Here, Humphreys unsuccessfully argued for a judgment of acquittal by claiming the flare gun was not a deadly weapon.

"An essential element of the offense of aggravated battery with a deadly weapon . . . is that the object used to commit the offense is a deadly weapon." *Brown v. State*, 86 So. 3d 569, 571 (Fla. 5th DCA 2012). Florida's Criminal Punishment Code does not define "deadly weapon," but we have concluded an object may qualify as a deadly weapon under two circumstances. *Id.* First, if it "will likely cause death or great bodily harm when used in the ordinary and usual manner contemplated by its design." *Id.* (citing *Michaud v. State*, 47 So. 3d 374, 376 (Fla. 5th DCA 2010)). Second, if an object is not designed to inflict bodily harm, it may qualify as deadly if the defendant used or threatened to use the object in a way likely to cause death or great bodily harm. *Id.* Humphreys correctly focused his argument on the second definition because a flare gun is not designed to cause great bodily harm. *See Emmons v. State*, 546 So. 2d 69, 72 (Fla. 2d DCA 1989) (Altenbernd, J., concurring) ("In this case, the flare gun was certainly designed and manufactured to be an instrument of safety."); *see also, State v. Rackle*, 523 P.2d 299, 303 (Haw. 1974) ("A flare gun is an emergency signaling device employed predominantly aboard boats to expedite rescue efforts.").

Whether Humphreys's flare gun was a deadly weapon therefore depended on how he used it, and this was a jury question. *Dale v. State*, 703 So. 2d 1045, 1047 (Fla. 1997) (holding that whether weapons, including BB or pellet guns, are "deadly" under the armed robbery statute is a jury question); *Duba v. State*, 446 So. 2d 1167, 1169 (Fla. 5th DCA 1984) ("[W]hether or not an object is a deadly weapon is a question of fact to be

determined by the jury from the evidence, taking into consideration its size, shape and material and the manner in which it was used or was capable of being used."); *see also, State v. Jeffers*, 490 So. 2d 968, 969 (Fla. 5th DCA 1986).

The issued jury instruction affected the verdict because it was incorrect and incomplete based on the facts of this case. Because the weapon at issue was a flare gun, whether it was a deadly weapon was a jury question, and the jury had no definition of "deadly weapon" to apply.[1] It could have concluded Humphreys used a deadly weapon when he struck Maranda on the head and left a mark. *See, e.g.*, *McCray v. State*, 358 So. 2d 615, 617 n.1 (Fla. 1st DCA 1978). Or it could have decided he did not use a deadly weapon when he tapped her on the head and only startled her. Accordingly, the trial court's alteration of the standard instruction by substituting "firearm" for "deadly weapon" and omitting the definition of "deadly weapon" was fundamentally erroneous.

Accordingly, we reverse and remand for a new trial on the charge of aggravated battery.

REVERSED and REMANDED.

EISNAUGLE and HARRIS, JJ., concur.

[1] The trial court correctly defined "firearm" for the jury to inform their special finding of whether Humphreys actually possessed a firearm for purposes of a potential minimum-mandatory sentence. *See* § 775.087(2), Fla. Stat. (2018).