

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CORNELL ROBERTS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D17-3877

[December 5, 2018]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Jr., Judge; L.T. Case No. 16-003909CF10A.

Carey Haughwout, Public Defender, and J. Woodson Isom, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jonathan P. Picard, Assistant Attorney General, West Palm Beach, for appellee.

CONCESSION OF ERROR

PER CURIAM.

Appellant was charged with attempted first degree murder. Following a jury trial, he was convicted of the lesser included offense of attempted second degree murder. As the state concedes, the trial court's failure to instruct the jury on the necessarily included offense of attempted manslaughter by act amounted to fundamental error because that offense is one step removed from the convicted offense of attempted second degree murder. *See Walton v. State*, 208 So. 3d 60, 64 (Fla. 2016); *Coleman v. State*, 110 So. 3d 971, 972 (Fla. 2d DCA 2013). Nothing in the record suggests that appellant expressly waived the instruction. Defense counsel did not waive the error by failing to request an instruction on attempted manslaughter by act. *See Roberts v. State*, 242 So. 3d 296,299 (Fla. 2018).

Reversed and remanded for a new trial.

GERBER, C.J., WARNER and GROSS, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.