

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STEVEN A. SHELBY)	
)	
Petitioner,)	
)	
v.)	Case No. 2D09-1626
)	
STATE OF FLORIDA)	
)	
Respondent.)	
_____)	

Opinion filed November 25, 2009.

Petition Alleging Ineffective Assistance of
Appellate Counsel. Pinellas County; Nancy
Moate Ley, Judge.

Steven A. Shelby, pro se.

Bill McCollum, Attorney General,
Tallahassee, and Ha Thu Dao, Assistant
Attorney General, Tampa, for Respondent.

VILLANTI, Judge.

Steven Shelby, in his petition filed pursuant to Florida Rule of Appellate
Procedure 9.141(c), alleges that appellate counsel was ineffective in failing to argue that
the definition of the element of malice that was provided to the jury as part of the
instructions for the offense of aggravated child abuse constituted fundamental error.
We conclude that this case is controlled by the supreme court's decision in Reed v.
State, 837 So. 2d 366 (Fla. 2002). We agree with Shelby's contention, and we reverse

his conviction for aggravated child abuse, vacate the sentence imposed, and remand for a new trial.

Shelby was charged by information with aggravated child abuse based on allegations that he had willfully tortured or maliciously punished the victim by choking him with a belt and/or making him kneel on a pile of rice while holding dictionary-sized books. The victim is the son of Shelby's live-in girlfriend, and he was nine years old at the time of the incident. He testified at trial that because he lied to Shelby, Shelby made him kneel on dry rice on a tile floor holding two heavy books in each hand. Shelby then took off his belt, wrapped it around the victim's neck, and tightened it. The victim remembered that he was not able to breathe, and the books fell down. The next thing he remembered was that he was standing up without the belt around his neck. He and Shelby then watched a movie together in the living room. Nothing was said about the incident. The victim testified that before the incident, he and Shelby had gotten along well and that Shelby had never done anything like that to him before. Shelby testified that the event never happened and that he loved the victim.

In Reed, the supreme court quashed the decision of the First District in Reed v. State, 783 So. 2d 1192 (Fla. 1st DCA 2001). 837 So. 2d at 370. Reed was charged with aggravated child abuse for allegedly committing an aggravated battery on the child and/or willfully torturing or maliciously punishing the child. Reed, 783 So. 2d at 1194. The trial court instructed the jury in accordance with the standard jury instruction for aggravated child abuse which at that time defined "maliciously" as "wrongfully, intentionally, without legal justification or excuse." Id. at 1196. The First District concluded that the definition of maliciously that was given to the jury was error. Id. However, the court determined that in the absence of an objection to the instruction, the

error was not fundamental where the evidence was overwhelming and the prosecutor did not misuse the incorrect instruction. Id. at 1198.

In quashing the decision of the First District, the supreme court held that the instruction for aggravated child abuse constituted fundamental error because it contained an incorrect definition of an essential element of the charged offense that reduced the State's burden of proof, the inaccurate definition was material to what the jury had to consider in order to convict Reed, and the essential element of malice was a disputed element at trial. Reed, 837 So. 2d at 369. The supreme court concluded that the overwhelming nature of the evidence and whether the prosecutor has or has not made an inaccurate instruction a feature of the trial are not germane to the issue of whether the erroneous instruction constitutes fundamental error. Id. The supreme court held that " '[m]alice means ill will, hatred, spite, an evil intent.' "¹ Id. at 368-69 (quoting State v. Gaylord, 356 So. 2d 313, 314 (Fla. 1978)).

Subsequent to the First District's decision in Reed, but prior to the supreme court's decision, the supreme court amended the aggravated child abuse jury instruction to state that "maliciously" means "done from ill will, hatred, spite, or an evil intent." Standard Jury Instructions in Criminal Cases, 824 So. 2d 881, 898 (Fla. 2002). The jury trial in the present case took place in 2007, almost five years after the aggravated child abuse instruction was amended. However, the trial court instructed the jurors:

Maliciously means wrongly, intentionally and without legal justification or excuse.

¹The First District in Reed also held, based on its decision in Young v. State, 753 So. 2d 725 (Fla. 1st DCA 2000), that malice means ill will, hatred, spite, or an evil intent. 783 So. 2d at 1196.

Maliciousness may be established by circumstances from which one could conclude that a reasonable parent would not have engaged in the damaging acts toward the child for any valid reason, and that the primary purpose of the acts was to cause the victim unjustifiable pain or injury.

The first sentence contains virtually the exact instruction that the supreme court found to constitute fundamental error in Reed. The second sentence applies a reasonable man standard to the definition of maliciously and is not equivalent to instructing the jury that the motive for the punishment must be based on ill will, hatred, spite, or evil intent. The inaccuracies in the definition were clearly material to the jury's considerations in convicting Shelby. Additionally, the element of malice was a disputed element at trial.² We therefore conclude that appellate counsel was ineffective in failing to argue on direct appeal that the definition of "maliciously" provided to the jury in the aggravated child abuse jury instruction constituted fundamental error.

We reverse Shelby's conviction for aggravated child abuse, vacate the sentence imposed thereon, and remand for a new trial because a new appeal would be redundant in this instance. See Wolfork v. State, 992 So. 2d 907, 910 (Fla. 2d DCA 2008).

Petition granted.

KELLY and WALLACE, JJ., Concur.

²The prosecutor aggravated the error in this case by advising the jury in closing arguments that "maliciousness" means wrongfully, intentionally, and without legal justification or excuse.