IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D15-1249

MITCHELL FINLAY,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Appellant Mitchell Finlay, a young man vacationing on Miami Beach and staying at the Chesterfield Hotel, was charged in an information with several offenses arising out of a single incident of alleged date rape involving a woman with whom he had been socializing in the early morning hours of August 4, 2001, the principal dispute being whether or not sexual contact between them in the defendant's hotel room was consensual or nonconsensual. The charges consisted of kidnapping, in violation of Fla. Stat. § 787.01 (Count I); sexual battery, in violation of Fla. Stat. § 794.011(5) (Counts II and III), and sexual battery with the use of force likely to cause serious personal injury, in violation of Fla. Stat. § 794.011(3) (Count IV). *Id.*

Finlay pled not guilty and was tried by a jury. Among the arguments raised by counsel at trial was the defense that the most serious charge, alleging the use of force likely to cause serious personal injury, was entirely lacking in any evidentiary basis and was fundamentally flawed. Under the statute, if the injury results from less than great force, it is irrelevant to the elemental analysis; further, if force is not fully used, but there is merely a threat or attempt to employ actual great force, then there is no violation of the statute. In this case, the defendant proceeded on the theory that he was innocent, and particularly so as to the claims regarding force.

The State's theory was that the alleged victim suffered injuries that satisfied the

statutory requirement and that any form of choking activity—whether or not breathing was cut off for any duration—categorically qualified as the requisite force. The State sought to show that the totality of the injuries—including scratches sustained by the victim—served to prove serious injury.

The victim, who testified she had a clear memory of the events, alleged that the sexual interactions between herself and the defendant were interrupted by her on one occasion and then resumed, and that in the process the defendant applied pressure to her neck and she believed that she blacked out at least momentarily. She had small reddish scratch marks on her neck and cheek, but no serious injury. As to this last interaction, the State alleged that the defendant had committed a sexual assault by using physical force likely to cause serious personal injury, in violation of the firearm/use of weapon/great-force subsection of the sexual assault statute, § 794.011(3). In closing argument, the State contended those injuries resulted. The State also sought and obtained lesser-included offense instructions on sexual assault without serious bodily injury.

The trial judge instructed the jury that the distinction between the lesser offenses (Counts II and III of the information) and the greater offense (Count IV) was whether or not the victim sustained a serious injury, defined to include great pain. Docket Entry 139. The instructions repeatedly directed the jury that their decision,

if they found the sexual contact to be non-consensual, turned on whether or not the victim sustained serious injury.

The trial judge reiterated this differentiation of the offenses in instructing the jury as to the verdict that they were called upon to render, advising the jurors that their verdicts, if they found the requisite sexual battery conduct had occurred, were to be for the lesser offense if no serious injury occurred and for the greater offense if there was such injury. The verdict rendered by the jury, as to each charge of sexual battery, was directed to a specific determination of whether the battery was with or without serious injury. No reference to the actual force or the degree of force was made to or by the jury in connection with differentiating the counts presented to them. And while the trial judge read to the jury the language of the information, the instructions given focused on injury, with no instruction to the jury as to the meaning or import of the physical-force element, whether the force must be great, whether likelihood is established whenever actual injury occurs, or whether the defendant must intend to use force likely to cause serious bodily injury.

Following deliberations, the jury returned a verdict as follows: as to Count 1, the jury acquitted Finlay of kidnapping and convicted him of a lesser-included offense of false imprisonment, in violation of Fla. Stat. § 787.02; as to Counts II and III, the jury returned guilty verdicts; and as to Count IV, the jury returned a verdict of guilty

with serious injury, exactly as indicated by the trial court. Docket Entry 191 (Judgment of Guilt). Not only was force not addressed by the jury verdict, the issue of whether the force employed was itself likely to cause great bodily injury was not considered at all by the jury and was excluded from the scope of the verdict.

At sentencing, the court imposed a total sentence of life imprisonment, consisting of a life sentence on Count IV, a concurrent five-year sentence on count I, and concurrent 15-year sentences on counts II and III, respectively. Docket Entries 192-94.

Finlay filed post-trial motions, a direct appeal, a motion under Fla. R. Crim. P. 3.850 challenging his conviction, and an appeal from the denial of his Rule 3.850 motion, all of which were denied. Docket Entries 147 (motion for new trial); 167 (denial of motion for new trial); 200 (notice of appeal from conviction); 213 (mandate affirming conviction on direct appeal); 217 (Rule 3.850 motion for post-conviction relief), 254 (order denying rule 3.850 motion for post-conviction relief); 249 (notice of appeal from denial of Rule 3.850 motion); DE:258 (order dismissing appeal from denial of Rule 3.850 motion). With respect to each of those filings, the parties failed to note that the jury verdict did not encompass the elements of the forceful sexual assault statute. Instead, in the trial court and on appeal, counsel contended that the injuries were so slight as to render the verdict on serious injury unsupported by the

evidence. And in the post-conviction motion, counsel for Finlay focused on trial counsel's failure to object to a series of improper arguments made to the jury by the State. At no time was the issue of the wholly deficient jury verdict presented to any court in the post-trial motions, direct appeal, or Rule 3.850 motion.

Mr. Finlay subsequently filed a motion to correct illegal sentence under Fla. R. Crim. P. 3.800 challenging, for the first time, the jury verdict as deficient and the ensuing life sentence imposed by the court on count IV as illegal. Docket Entry 262. Finlay contended that the sentence was rendered illegal because the jury was fundamentally misinstructed as to the offense elements and then directed to render a verdict as to elements that were not those of the charged offense. In an order entered April 2015, Mr. Finlay's Rule 3.800 motion was denied. Docket Entry 328. On May 28, 2015, Mr. Finlay moved for rehearing of the court's order denying his Rule 3.800 motion; the motion for rehearing remains pending. Docket Entry 329.

Mr. Finlay filed a timely notice of appeal from the court's denial of Mr. Finlay's Rule 3.800 motion. Docket Entry 330.

STANDARD OF REVIEW

The court of appeals reviews *de novo* the denial of a Rule 3.800 motion seeking relief from an illegal sentence. *See, e.g., Kittles v. State*, 31 So.3d 283, 284 (Fla. 4th DCA 2010).

SUMMARY OF THE ARGUMENT

There is no dispute that the verdict was defective. The jury returned a verdict for the nonexistent offense of "sexual battery with serious injury" and was neither called upon to, nor did, return a verdict consistent with the essential requirements for a judgment of conviction of the first degree felony of sexual battery with great force under Fla. Stat. § 794.011(3). The State having conceded this defect, relief should be granted. The defect is jurisdictional and hence appropriate for relief under Fla. R. Crim. P. 3.800. A life sentence imposed without a verdict or finding of guilt that adequately supports such a sentence cannot lawfully be sustained. Reference made to the defective jury instructions merely supports the plain deficiency of the verdict itself. That the defendant is serving an illegal life sentence is plain based on the undisputed facts.

ARGUMENT

THE DISTRICT COURT COMMITTED FUNDAMENTAL ERROR IN IMPOSING ON THE DEFENDANT A LIFE SENTENCE PREMISED ON A NONEXISTENT OR LESSER-INCLUDED OFFENSE.

The life sentence imposed on defendant Finlay for a nonexistent offense of sexual battery with serious injury is based on a verdict finding him guilty of that nonexistent offense, where the jury was called upon to make a specific finding of "with" or without "serious bodily injury"—a verdict that was defective on it face and is insufficient to permit imposition of a life sentence for the offense of sexual battery with the use of "actual physical force likely to cause serious bodily injury." Fla. Stat. § 794.011(3).

The verdict in this case was wholly defective in asking the jury to decide, as the critical distinction between the lesser and greater offenses, whether the victim of the offense had sustained a serious bodily injury. The verdict deviated from the essential life-felony sentence enhancement element—the use of great force, the element that governs the legality or illegality of the life sentence—in a case where there was no great force. *See Caylor v. State*, 78 So.3d 482, 493 (2011) (relevant offense is "sexual battery involving great physical force"; Fla. Stat. § 794.011(3)'s "uses actual physical

force likely to cause serious personal injury" element requires proof of the use of great physical force). Application of a lower standard for the conviction in this case—where the jury was directed to the separate, non-elemental question of whether the victim sustained injuries, and where the State wrongly argued that if the defendant had engaged in the use of additional physical force, injury might have resulted—renders the defendant's conviction of Count IV a lesser offense: a violation of Fla. Stat. § 794.011(5), rather than § 794.011(3).

The jury verdict rendered in the present case did not state anything about the use of force—and instead adhered to the trial court's instructional direction regarding the distinction between a sexual assault "with Serious Injury" and a sexual assault "with No Serious Injury." *See* Trial trans. at 647–48, 656–57. The doubly-defective verdict renders the sentence illegal despite the interrogatory form of verdict in wrongly laying out the purported difference between the lesser offense and the greater offense, comparing the commission of the offenses either with or without serious injury.

Not only was the jury called upon to return a verdict for an offense that does not exist (sexual battery with serious injury), but the jury was also called upon to reject the lesser-included offense of sexual battery without a deadly weapon or great force unless there was "No Serious Injury," preventing the defendant from having a verdict

on the lesser offense unless a matter foreign to both the greater and the lesser offenses—serious injury—was found by the jury to be entirely absent. Thus, the verdict not only contains less than all of the findings necessary for the greater offense, it wrongly states that the jury could not return a verdict for the lesser offense if there was serious injury, a notion that is premised on a complete misapprehension of the elements of the lesser offense as well as the greater offense. These verdict defects are not mere trial errors, but fundamental verdict defects.

The Florida Supreme Court, in *Caylor v. State*, 78 So.3d at 493, reiterated the statutory definition of Fla. Stat. § 794.011(3)'s "uses actual physical force likely to cause serious personal injury" element as requiring the use of great physical force. The Supreme Court concluded that requiring anything less would send the statute into the realm of unresolvably ambiguous criminal prohibitions. Thus, to comply with due process limitations, "likely" refers to an objective level of great force that the person knew should have caused serious injury. Under the express terms of the statute, therefore, a mere touching that resulted in injury, even serious injury, simply does not qualify to prove the requisite force element. Nor does the threatened or attempted use of such force qualify, as would be the case with the use of a deadly weapon. The threatened use of such a weapon is a component of the statute, but the threatened use of sufficient force to cause serious injury is insufficient.

In Mr. Finlay's case, the life felony sentence is illegal. The jury was not instructed to return, nor did it return, a verdict on the element of "physical force likely to cause serious injury." Instead, the jury was asked to find only whether injury was suffered by the alleged victim. Trial trans. at 657 (directing the jury to determine if "[t]he defendant is guilty of sexual battery with serious injuries as charged"). Under *Speights v. State*, 102 So.3d 671 (Fla. 2d DCA 2012), *Espinoza-Montes v. State*, 113 So.3d 847 (Fla. 2d DCA 2011), and *Medberry v. State*, 699 So.2d 857 (Fla. 5th DCA 1997), a life felony sanction cannot be applied where the jury has returned a verdict on less than the complete element of the defendant's use of force likely to cause serious injury. A mere verdict of injury—a matter that was not an element of the case and thus its substitution for the statutorily mandated elements fundamentally altered the charge such that the verdict was legally deficient—warranted at most a second degree felony conviction and a maximum sentence of 15 years.

Thus, the court of appeal in *Espinoza-Montes v. State*, addressing a defective verdict form in the context of a life felony charge under Fla. Stat. § 794.011(3), held that the life felony sentence could not be imposed where "the verdict form did not contain a special interrogatory to allow the jury to specify whether it found that Mr. Espinoza–Montes committed the offense by the threatened use of a deadly weapon or by the use of physical force likely to cause serious personal injury." 113 So.3d at 848.

The court explained that “[f]or the purpose of a conviction under section 794.011(3), the physical force element does not require a finding that the defendant caused serious personal injury to the victim, only that the defendant used ‘actual physical force likely to cause serious personal injury.’” 113 at 848 n.1 (quoting § 794.011(3)). Finding that the special interrogatory to the jury did not require a unanimous finding as to the sentence enhancing element, the Court reversed and remanded for resentencing. Even more so than in *Espinoza-Montes*, where, as the trial court here noted, “the jury did not make specific findings of possession of a firearm in the form of an interrogatory on the verdict form,” Docket Entry 328 at 3, the verdict in the present case so deviates from the statutory requirement as to compel vacation of the illegal sentence.

In addition, in *Medberry v. State*, the court of appeal vacated life felony convictions under § 794.011(3) where the verdicts returned by the jury reflected no more than the elements of the lesser second degree felony of sexual assault. Absent a jury finding of the use of physical force in the degree required by the statute, the life felony provision was inapplicable. The issue in *Medberry*, as is true in the present case, turns on whether the jury was led to return a verdict on less than all of the elements of the offense for which the defendant was sentenced. In *Medberry*, the verdict failed to incorporate the elements of Fla. Stat. § 794.011(4); hence, the court held that the first degree felony sentence authorized under that provision of the statute,

relating to threats of the use of great force in a sexual assault, was inapplicable to Medberry's conviction. 699 So.2d at 858 n. 1 ("[F]undamental error is involved where a defendant is adjudicated and sentenced for offenses greater in degree than returned in the verdicts."). As in *Medberry*, the instructions in this case misdirected the jury to return the serious-injury verdict that it returned, as reflected by the jury instructions, and by the crucial explanation of the verdict and verdict forms given by the trial court. *See* Trial trans. at 656–57.

Similarly, in *Speights v. State*, the court of appeal reversed the denial of a motion to correct illegal sentence under Fla. R. Crim. P. 3.800 where the sentencing court had confused the separate factors of injury (a sentence enhancement) and force (an element of the offense): "Although injury is incorporated into the definition of [§ 794.011(3)], the phrasing of the statute requires the prosecution to prove only that a certain level of force was used but not that actual injury occurred; that the force is 'likely' to cause serious personal injury does not necessarily mean that the force caused an actual injury." Recognizing that the limits of sentencing authority—even in guideline calculations—are premised on the content of the verdict actually returned by the jury, the court held: "Here, as reflected in the verdict forms, the jury did not find victim injury but only that Speights was guilty [of] the 'force likely to cause serious personal injury" language of the sexual battery statute." 102 So.3d at 673.

The verdict rendered in *Speights* presents the mirror image of the verdict in this case that contained a finding as to injury, but not as to crucial element of force, reflecting manifest defects as to the material elements of both the greater and lesser offenses. *Speights* is directly on point. A life sentence cannot be authorized for a verdict that fails to incorporate the life-sentence element or life-sentence guideline enhancement factor.

The jury in Mr. Finlay's case was repeatedly advised to focus merely on whether bodily injury occurred, rather than the essential element of the life felony offense. *See* Trial trans. at 469-71, 487-90. The verdict rendered was specific, but was specific as to lesser elements, and was thus wholly insufficient. Neither the great force explanation in *Caylor*, nor the requisite "likelihood" of serious harm based on the actual force used, were ever considered by the jury. The jury returned a verdict on a non-element, leaving at most a default conviction of a second degree felony. Mr. Finlay is, in addition, actually innocent of the Count IV offense under a correct interpretation of the law.

A. The issues presented by Mr. Finlay are cognizable in a Rule 3.800 motion, not procedurally barred, and timely raised.

Contrary to the trial court's determination, the challenge presented by Mr. Finlay is cognizable in the context of a Rule 3.800 motion, as well as timely and not

procedurally barred. The trial court misperceived the claims as challenges to the jury instructions or counsel's ineffectiveness, when instead the core contention established by the record is that the jury did not return a verdict on the aggravated form of sexual battery charged, but rather a verdict properly construed to lack the enhancement element, rendering the defendant's life sentence invalid. In the alternative, the issues raised demonstrate that Mr. Finlay is actually innocent of the count IV offense of conviction, thereby excusing any procedural default and rendering his sentence on that count invalid. *See Schlup v. Delo*, 513 U.S. 298 (1995) (actual innocence exception defeats procedural bars).

B. Appellant's sentence of life imprisonment was illegal where premised on an incomplete or inadequate verdict.

When a defendant proceeds to a jury trial, the Sixth Amendment guarantees that the limit of the sentencing exposure faced by the defendant is set by the jury's verdict. *See, e.g., Morrow v. State*, 972 So.2d 202, 203 (Fla. 1st DCA 2006)(defendant's "maximum sentence is limited to the length 'a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant'")(quoting *Blakely v. Washington*, 124 S.Ct. 2531, 2537 (2004)). The trial court lacks jurisdiction to sentence a defendant to imprisonment for an offense as to which the jury has failed to reach a verdict. *See State v. Johnson*, 122 So.3d 856, 864 (Fla.

2013)(recognizing, under *Blakely*, 124 S.Ct. at 2539, that "'the judge's authority to sentence derives wholly from the jury's verdict'"). An incomplete verdict is inadequate to serve as the basis for the imposition of sentence. *See, e.g., Estevez v. State*, 713 So.2d 1039 (Fla. 3d DCA 1998)(sentence invalid where premised on incomplete jury verdict that failed to specify finding necessary for the sentence imposed).

A defendant may challenge at any time a sentence founded on mistaken notion of the offense of conviction. *See, e.g., Ferguson v. State*, 594 So.2d 864, 865-66 (Fla. 5th DCA 1992)(court having jurisdiction can always act to correct illegal sentence). Thus, where a jury verdict fails to encompass the elements of the charged offense, a sentence exceeding the statutory maximum for any actual offenses of conviction is illegal and must be vacated. *Estevez v. State*, 713 So.2d 1039.

In this case, the jury was fundamentally misadvised as to the elements of the offense and then directed to render a verdict as to elements that did not amount to the elements of the charged offense. Hence, the imposition of a life sentence on such verdict was illegal and must be vacated. *See, e.g.*, *Gonzalez v. State*, 392 So. 2d 334, 336 (Fla. 3d DCA 1981) ("It is indisputable that an error in sentencing that causes a defendant to be incarcerated or restrained for a greater length of time than the law permits is fundamental.").

To place in context the inadequacy of the verdict, two factors are of key importance. First, because the defendant has the right to a jury verdict on each element of the offense, *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also State v. Harbaugh*, 754 So.2d 691, 693-94 (Fla. 2000)(recognizing, pursuant to *Gaudin*, that the Due Process Clause and the Sixth Amendment "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which the defendant is charged"), including mixed questions of fact and law, the trial court may not remove elements from the jury's consideration or direct a verdict on such elements. Here, however, not even the trial court made a finding of the use of force likely to cause serious bodily injury. Instead, the effect of the proceedings was the same as if the jury in a burglary with a firearm case were to return a verdict form setting forth alternatives (a) burglary, and (b) burglary with a loss of more than $1,000. In such a case, the jury's return of a verdict to (b), stating that in the course of the burglary special harm was suffered, could not be deemed to properly encompass the finding of the use of a firearm in the commission of the burglary. Sentencing such a defendant for the offense of burglary by use of a firearm would be illegal.

So also here, the jury's verdict, focusing on harm to the victim rather than the means employed and whether those means, in and of themselves, were not merely the

cause of injury but were necessarily likely to have caused serious injury, is so incomplete and misdirected from the actual elements as to preclude the imposition of a life sentence under Fla. Stat. § 794.011(3), as punishable by § 775.082.

The law simply does not permit enhanced penalties based on an inadequate verdict and the illegality of the life sentence mandates vacation of the sentence.

C. The sentence of life imprisonment was illegal where it was based on a nonexistent or lesser included offense under Fla. Stat. § 794.011(3).

To the extent that the inadequate verdict rendered as to Count IV in Mr. Finlay's case may be deemed to default to a lesser included offense of sexual assault, the sentence must nevertheless be vacated and reduced to no more than 15 years imprisonment, the same concurrently imposed sentences as Mr. Finlay received on Counts II and III. *See* Fla. Stat. § 794.011(5)(sexual battery without force or violence likely to cause serious personal injury, a second degree felony subject to a 15-year maximum sentence under § 775.082). Where a verdict does not encompass all elements of an offense, but instead encompasses only a lesser offense, albeit with surplusage, then the Court may convert the previously imposed sentence to a sentence that comports with the lesser included offense. In this case, while Mr. Finlay asserts that the verdict rendered is so fundamentally flawed as require vacation in its entirety,

if deemed to be a conviction for the lesser offense of sexual assault, and if such offense is not deemed barred by double jeopardy due to Mr. Finlay's convictions on Counts II and III, then the Court must still vacate the enhanced offense for which Mr. Finlay was illegally sentenced and should convert the term to a term of 15 years.

The courts of appeal and the Florida Supreme Court have repeatedly held that where a conviction will not stand as to an enhanced offense, the court may, as a remedy, convert the conviction to one of a lesser degree of offense, with the sentence limited to the applicable penalties for the lesser offense. *See Hearns v. State*, 117 So.3d 454, 456 (Fla. 3d DCA 2013)(vacating conviction and directing conviction of lesser included offense, where element essential to enhanced sentence not established); *Mordica v. State*, 618 So.2d 301, 305 (Fla. 1st DCA 1993)(same); *Shaara v. State*, 581 So.2d 1339, 1344-45 (Fla. 1st DCA 1991)(vacating erroneous conviction under § 794.011(3) and directing conviction for lesser included offense of § 794.011(4)(b)). *See also* Fla. Stat. § 924.34 ("When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense."); *Sigler v. State*, 967 So.2d 835, 844 (Fla.

2007) (clarifying constitutional boundaries of § 924.34: "[W]hen all of the elements of a lesser offense have been determined by the jury, section 924.34 is a valid exercise of the legislative prerogative allowing appellate courts to direct a judgment for such an offense."). When a conviction may encompass an array of conduct, only some of which corresponds to the relevant offense, the conviction is deemed to have "rested upon … the least of these acts." *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010). Where a statute provides for multiple means of commission, absent a jury finding as to the enhanced method of commission of the offense, a court may not presuppose that the enhanced penalty provision applies. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1687-88 (2013) (rejecting premise that a statute may be read to require the most severe penalty in the absence of express language shifting to the defendant the burden of proof; where "text makes neither provision the default[,] each is drafted to be exclusive of the other," rendering only the least severe sanction applicable).

D. A court may not substitute its own verdict for that rendered by the jury.

The verdict in this case was rendered without a jury determination of guilt as to the two essential components of the element of means of commission: (1) use of force; and (2) likelihood that the force actually used would cause serious bodily injury. *See* Fla. Stat. § 794.011(3) (setting forth elements of offense of forceful sexual

assault); In re Standard Jury Instructions in Criminal Cases-Report No. 2008-04, 995 So.2d 476, 478 (Fla. 2008). Rule 3.800(a) "ensur[es] that criminal defendants do not serve sentences imposed contrary to the requirements of law." *Carter v. State*, 786 So.2d 1173, 1176 (Fla. 2001) (where life felony statute did not apply to enhancement imposed by trial court, Rule 3.800 compelled relief); *see also Lamont v. State*, 610 So.2d 435, 438 (Fla. 1992) (same, with discussion of verdict form). A sentence is illegal if it imposes "a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." *Carter*, 786 So.2d at 1178 (quoting and approving definition in *Blakley v. State*, 746 So.2d 1182, 1186-87 (Fla. 4th DCA 1999)).

In *Maddox v. State*, 760 So.2d 89, 101 (Fla. 2000), the Florida Supreme Court explained: "The extraordinary provision made for remedying illegal sentences evidences the utmost importance of correcting such errors, even at the expense of legal principles that might preclude relief from trial court errors of less consequence." The *Maddox* Court recognized that the State "has no interest in any defendant serving a sentence that is longer than the sentence authorized by law." *Id.* at 99. Indeed, the entire justice system certainly has an interest in ensuring that the defendant is not incarcerated longer than is authorized by law, or under illegal terms. The courts have an obligation to correct any such error whenever it is brought to their attention. *Id.*

Such a defective verdict may not be "corrected" or expanded by subsequent judicial action to encompass the charged offense. Instead, the Court is bound by the jury's verdict and may impose sentence only as to the verdict returned. The sentence in this case exceeded any potential statutory limit for the offense found by the jury, even assuming such an offense were deemed sufficient to qualify as a verdict of guilty as to Fla. Stat. § 794.011(3).

The facts established at trial did not show the use of great force. Mr. Finlay is actually innocent under the choking-force concept as used by the prosecution at trial. The State made no effort to prove that any person would have been likely to suffer severe injury as a result of the force—and most importantly, the duration of the force—that was actually employed (or proved to be employed) in this case. What the State's theory amounted to was that grabbing the neck or choking can lead to serious injury. *Cf. T.W. ex rel. Wilson v. School Bd. of Seminole County, Fla.*, 610 F.3d 588, 601 (11th Cir. 2010) ("This Court concluded that choking a student until he lost his breath and sustained blue and red bruises and a scratch on his neck was not obviously excessive because 'the extent of the student's bodily injury was not serious.")(citing *Peterson v. Baker*, 504 F.3d 1331, 1334-35, 1337 (11th Cir. 2007); *Mederos v. State*, 102 So.3d 7, 11 (Fla. 1st DCA 2012) (rejecting argument that use of deadly force in response to instance of choking where attacker released choke hold before serious

injury could result was warranted under Stand Your Ground law). The statute of conviction as to Count IV does not turn on whether a type of conduct can lead to serious injury, but whether the extent of actual use of that type of force was likely to cause serious injury. Thus, what the State really sought to prove was at most the use of force that, if it had actually continued, would have been likely to cause serious injury, but because it did not continue, did not and was not likely to cause serious injury.

A relevant analogy is to stabbing. If someone uses very light force to scratch someone with sharp object, that force does not become sufficient to be likely to cause serious injury. If the use of the sharp object had continued and become more severe, then serious injury could have likely occurred. The failure of proof of actual force that would cause serious injury is seen in the State's reliance on the faulty jury instruction and faulty verdicts. Ultimately, even if the jury had been directed to consider the element, they would have been misled to believe that if someone engages in choking behavior, such a form or type of conduct automatically qualifies as physical force likely to cause serious injury even though one must engage in the choking behavior for a substantially longer period of time than the State was able to allege or prove in this case.

To the extent that the inadequate verdict rendered as to Count IV in Mr.

Finlay's case may be deemed to default to a lesser included offense of sexual assault, the sentence must nevertheless be vacated and reduced to no more than 15 years imprisonment, the same concurrently imposed sentences as Mr. Finlay received on Counts II and III. *See* Fla. Stat. § 794.011(5)(sexual battery without force or violence likely to cause serious personal injury, a second degree felony subject to a 15-year maximum sentence under § 775.082). Where a verdict does not encompass all elements of an offense, but instead encompasses only a lesser offense, albeit with surplusage, then the court may convert the previously imposed sentence to a sentence that comports with the lesser included offense. In this case, while Mr. Finlay asserts that the verdict rendered is so fundamentally flawed as require vacation in its entirety, if deemed to be a conviction for the lesser offense of sexual assault, and if such offense is not deemed barred by double jeopardy due to Mr. Finlay's convictions on Counts II and III, then the court must still vacate the enhanced offense for which Mr. Finlay was illegally sentenced and should convert the term to a term of 15 years.

For all these reasons, the denial of Finlay's motion for post-conviction relief under Fla. R. Crim. P. 3.800 was erroneous, and his sentence on Count IV of the information should be vacated, with his life sentence converted to a sentence of 15 years, representing the statutory maximum for a violation of lesser included offense under Fla. Stat. § 794.011(5).

CONCLUSION

Based on the foregoing, Appellant Mitchell Finlay submits that this Court should vacate his sentence of life imprisonment on Count IV and remand with directions that his sentence be converted to a sentence of 15 years.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this document was generated by computer using WordPerfect with Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

s/ Richard C. Klugh
RICHARD C. KLUGH, ESQ.

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing was sent by email on November 13, 2015 to the Office of the Attorney General at crimappmia@myfloridalegal.com.

s/ Richard C. Klugh
Richard C. Klugh