IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL):AC
CASE NO.: 502017AP000118AXXXMB
L.T. NO.: 502017MM003851AXXXMB

TERRENCE NARINESINGH,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: APR 2 2 2019

Appeal from the County Court in and for Palm Beach County,
Judge Debra Moses Stephens.

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PER CURIAM.

Appellant Terrence Narinesingh appeals his conviction for one count of "Battery (Domestic)" following a jury trial. Appellant claims that the trial court reversibly erred by (1) allowing improper testimony of a lay witness, (2) failing to provide a defense-of-property jury instruction, and (3) convicting Appellant of a nonexistent crime. We find Appellant's first

argument is without merit and decline to address it further. We agree with Appellant's second two arguments, however, and find reversal is required.

Appellant was charged by Information with "Battery (Domestic)" in violation of sections 784.03(1) and 741.283, Florida Statutes, following an altercation with his husband. The evidence presented at trial showed that Appellant came home one evening to find that his husband had packed up all of his property and was preparing to leave, spurring an argument between the two that ultimately became physical. Appellant's husband testified at trial that Appellant grabbed him, shoved him, and caused him to fall backward over a chair. Appellant argued that the only physical altercation that occurred involved a dispute over Appellant's dog. Appellant argued that his husband was trying to leave with his dog, and that he grabbed the husband's shirt in an attempt to keep his husband from taking the dog.

At trial, there was extensive discussion about the justifiable-use-of-non-deadly-force jury instruction, and the propriety of giving the defense-of-property or the defense-of-person portion of the jury instruction. *See* Fla. Std. Jury Instr. (Crim.) 3.6(g). While the trial court ruled that both parts of the instruction should be given, the trial court ultimately neglected to provide the defense-of-property portion of the instruction to the jury. The trial court did read the defense-of-person portion of the instruction, telling the jury that Appellant was justified in using non-deadly force against the victim if Appellant "reasonably believed that such conduct was necessary to defend himself against [the victim's] imminent use of unlawful force." However, the trial court did not inform the jury that Appellant would also have been justified in using non-deadly force if the victim "was wrongfully interfering" with Appellant's personal property and Appellant "reasonably believed that his use of force was necessary to prevent or terminate the victim's

wrongful behavior." Fla. Std. Jury Instr. (Crim.) 3.6(g). Defense counsel did not object to the omission of the defense-of-property jury instruction.

During closing argument, the State discussed the property defense, with the prosecutor noting that the husband denied trying to take the dog. The State also argued that, even if the parties were fighting over the dog, it would not justify Appellant's use of force.

The jury subsequently found Appellant guilty of "Battery (Domestic), as charged in the Information." The judgment and order of probation also list Appellant's crime as "Battery (Domestic)."

Following his conviction, Appellant filed a "Motion to Correct Sentencing Errors" pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) asserting that his judgment and sentence should reflect a conviction of "Battery" rather than "Battery (Domestic)." Appellant argued that because domestic battery is not a crime in Florida, the crime listed on his judgment is misleading and has led to adverse consequences. The trial court denied the Motion to Correct Sentencing Errors. This appeal follows.

I.

A trial court's omission of a jury instruction is "subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred." *Ramirez v. State*, 125 So. 3d 171, 175 (Fla. 4th DCA 2013) (quoting *State v. Delva,* 575 So. 2d 643, 644 (Fla.1991)). Where a court has failed to instruct on an affirmative defense, fundamental error occurs where a jury instruction is "so flawed as to deprive defendants claiming the defense . . . of a fair trial." *Smith v. State,* 521 So. 2d 106, 108 (Fla.1988). "This is a rigorous standard, for fundamental error occurs only in those rare cases such as 'where the

interests of justice present a compelling demand for its application.'" *Smith v. State,* 76 So. 3d 379, 385 (Fla. 1st DCA 2011) (quoting *Ray v. State,* 403 So. 2d 956, 960 (Fla.1981)).

In *Thomas v. State*, 831 So. 2d 253 (Fla. 3d DCA 2002), the Third District Court of Appeal was faced with an incorrect jury instruction on the justifiable use of deadly and non-deadly force. The *Thomas* Court found that this error constitutes fundamental error if there is a reasonable possibility that the error involving the instruction may have led to the conviction. *Id.* It also noted that such an error is compounded where the prosecutor emphasizes the lack of a threat of imminent harm during closing arguments. *Id.* at 254.

We find *Thomas* analogous to the instant case. As in *Thomas*, we are faced with an insufficient justifiable-use-of-force instruction and a prosecutor's comments during closing that exacerbate the error. During closing argument, after the jury instructions were read, the State discussed the property defense, noting that the victim denied trying to take the dog. The State also argued that, even if the parties were fighting over the dog, it would not justify Appellant's use of force.

However, defense of property could have been a valid defense to the charge of battery in this case. See § 776.031, Fla. Stat. (2014). Following an extensive discussion in which the State objected, the trial court agreed to give the defense-of-property instruction, but then failed to actually give it, reading only the instruction on defense of person. Had the trial court given the defense-of-property instruction, it would have informed the jury that Appellant was justified in using non-deadly force if the jury found that the victim was wrongfully interfering with Appellant's property and Appellant reasonably believed his use of force was necessary to terminate this wrongful behavior. Fla. Std. Jury Instr. (Crim.) 3.6(g). As the trial court recognized, such a defense was applicable in this case because the State introduced a statement

from Appellant in which he said he fought with his husband only to prevent the husband from leaving with Appellant's dog.

Accordingly, because the trial court agreed to include the defense-of-property instruction, ultimately failed to provide that instruction to the jury, and the prosecutor emphasized during closing that the defense of Appellant's property would not justify the use of force, we find that the jury instruction was so flawed as to deprive Appellant of his theory of defense, and thus fundamental error occurred. Defendant is therefore entitled to a new trial.

II.

"[I]t is a denial of due process for a person to be convicted of a non-existent crime." *Freeman v. State*, 679 So. 2d 364, 364 (Fla. 4th DCA 1996). "A conviction for a non-existent crime is fundamental error that can be raised at any time." *Moore v. State*, 924 So. 2d 840, 841 (Fla. 4th DCA 2006). In *Crockett v. State*, 91 So. 3d 872, 872 (Fla. 2d DCA 2012), the Second District Court of Appeals held that "'Domestic v[iolence] battery' is a nonexistent offense," and remanded the case for the trial court "to correct [appellant's] judgment and sentence to reflect that he was convicted and sentenced for battery . . . , not 'domestic v[iolence] battery.'" *Id.* at 872-83 (alteration original); *see also Swanson v. Allison*, 617 So. 2d 1100, 1101 (Fla. 5th DCA 1993) ("Although [appellant] was arrested and charged with 'domestic violence battery,' there is no such statutory offense. It appears that certain law enforcement officials, prosecution units, and courts have in effect created the offense of 'domestic violence battery' to place the burden on those arrested to demonstrate that pre-trial release would pose no threat of harm.").

We also have previously recognized that there is no crime in the State of Florida by the name of "Domestic Battery." *Jeanbart v. State*, No. 2015-AP-900008-AXXX-MB, *2 n.l (Fla. 15th Cir. Ct. May 31, 2016) (noting that should appellant be found guilty following a new trial

on remand, the judgment should reflect the charge of "Battery" rather than "Domestic Battery"). We reach the same conclusion today as it relates to Appellant's conviction for "Battery (Domestic)." Indeed, while the jury instruction in this case was titled "8.3 BATTERY (DOMESTIC)," the actual text of the instruction covered only simple Battery:

> To prove the crime of Battery (DOMESTIC), the State must prove the following element beyond a reasonable doubt:
>
> 1. TERRENCE NARINESINGH intentionally touched or struck [the victim] against his will.

See Fla. Std. Jury Instr. (Crim.) 8.3 (Battery).

We recognize that the lower court might be labeling battery offenses on judgments and other orders as "Battery (Domestic)" for the purpose of tracking these types of cases; we leave it to the lower court to determine how best to accomplish that task. We hold only that just as a person cannot be convicted of a nonexistent crime, a trial court cannot include a nonexistent crime on the judgment of conviction or sentencing documents.

Accordingly, we **REVERSE** Appellant's conviction and sentence and **REMAND** this case for a new trial. If, after a new trial, Appellant is again convicted of Battery, the judgment of conviction, sentence, and order of probation must reflect the charge of Battery rather than "Battery (Domestic)," or some other variation thereof.

CARACUZZO, JOHNSON, and SUSKAUER, JJ., concur.

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Opinion/Decision filed: APR 2 2 2019

Appeal from County Court in and for
Palm Beach County, Florida;
Judge Debra Moses Stephens

Appealed: September 21, 2017

DATE OF PANEL: OCTOBER 22, 2018

PANEL JUDGES: CARACUZZO, JOHNSON, SUSKAUER

AFFIRMED/REVERSED/OTHER: REVERSED

DECISION BY: PER CURIAM

CONCURRING:	DISSENTING: With/Without Opinion	CONCURRING SPECIALLY: With/Without Opinion
4/22/19		
DATE: J.	J.	J.
4-9-19		
DATE: J.	J.	J.
4/22/19		
DATE: J.	J.	J.