NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

MARK ALLAN LEPAGE

Appellant,

v.

Appeal No. CRC 14-00034 APANO
UCN: 522014AP000034XXXXCR

STATE OF FLORIDA

Appellee.
_____/

Opinion filed October 22, 2014.

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge Cathy McKyton

Thomas M. Mclaughlin, Esquire
Attorney for Appellant

Office of the State Attorney
Attorney for Appellee

**ORDER AND OPINION**

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Mark Allan LePage's, appeal from a conviction, after a jury trial, of Unlicensed Specialty Contracting, a first degree misdemeanor. Mr. LePage raises two issues. First, the trial court erred when it allowed a State witness to give opinion testimony as to the ultimate issue in the case. Second, the

trial court gave a jury instruction that presupposed an element of the charged offense had already been established. We agree and reverse.

*Background*

Appellant was charged with Unlicensed Specialty Contracting, a first degree misdemeanor, in violation of § 489.127(1)(f) Fla. Stat. During the jury trial, the State Attorney called the executive director of the Pinellas County Construction Licensing Board as an expert witness and in direct examination asked:

> If I may, Mr. Fischer, I'd like to give you a hypothetical. Let's assume some facts here. Let's assume that John is the sole owner and officer of a corporation. And Tom is an employee of that corporation. And neither John nor Tom nor the corporation itself are licensed or qualified to engage in contracting. Tom, as an employee of the corporation, enters into an agreement with Mary to install tile flooring. Under what conditions, if any, *is it lawful* for John or Tom to engage in contracting under the name of the corporation on those facts? (emphasis added).

This hypothetical question was identical to the facts of Mr. LePage's case except for the names of the people involved. Mr. LePage's trial counsel objected stating, "[i]mproper opinion, invading the province of the jury, and it goes to a legal issue." That objection was overruled. The witness, Mr. Fischer, answered, in pertinent part, "[i]t wouldn't be legal at all." "It's a violation of the licensing law." "But if nobody is licensed, there's nothing legal about it."

The jury instructions given by the trial court included the following:

> Before you can find the Defendant guilty of the crime of unlicensed specialty contracting, tile and marble, the State must prove the following two elements:
>
> 1. That the Defendant did engage in the business or act in the capacity of a tile and marble specialty contractor *during his transaction with Nancy Sigmon.* (emphasis added).
>
> 2. That at the time the Defendant was not duly registered or certified as a

> tile and marble specialty contractor by the Florida Construction Industry Licensing Board or the Pinellas County Construction Licensing Board.

Mr. LePage's trial counsel had asked that the words "during his transaction with Nancy Sigmon" be removed from the jury instruction. The trial court had expressed concern that the jury instruction was required to mirror the language in the charging document. After additional discussion the disputed language was not removed. In closing argument Mr. LePage's trial counsel argued:

> [The Assistant State Attorney] read some of the specific instructions and you're going to get these instructions. That the Defendant did engage in the business or act in the capacity of a tile and marble specialty contractor during his transaction with Nancy Sigmon. He said there's two elements. I would ask that you think of it as three.

The State Attorney objected arguing:

> Defense Counsel is asking the jury to infer illegally that there is a greater burden than the two elements that the Court's going to read, which are the two legal elements that they will be instructed in. This is misleading the jury if she is permitted to try and persuade them that there are more than two elements to this crime.

The trial court agreed and instructed defense counsel "[y]ou can't use the words: There are three elements ... or consider that there are three elements. ... You can argue the element, whatever you want to argue."

The jury returned a verdict of guilty.

*Standards of Review*

1. *Admission of Evidence.* A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. *Jent v. State,* 408 So.2d 1024, 1029 (Fla. 1981); *See Williams v. State,* 967 So.2d 735, 747-48 (Fla.2007), *cert. denied,* 552 U.S. 1283, 128 S.Ct. 1709, 170 L.Ed.2d 519 (2008); *Johnston v. State,* 863 So.2d 271, 278 (Fla.2003).

That discretion, however, is limited by the rules of evidence. *Johnston,* 863 So.2d at 278. If the trial court mistakenly allows the introduction of inadmissible evidence it will not be reversed if the error was preserved and was harmless.[1]

To determine if a mistake was harmful, the appellate court must perform a harmless error analysis. *Hojan v. State,* 3 So.3d 1204 (Fla. 2009). The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful. *State v. Lopez,* 974 So.2d 340, 351 (Fla. 2008).

2. *Jury Instructions.* An appellate court reviews the giving or withholding by a trial court of a requested jury instruction under an abuse of discretion standard. The court's decision regarding the charge to the jury is reviewed with a presumption of correctness on appeal. *James v. State*, 695 So.2d 1229, 1236 (Fla. 1997). However, "[w]here an instruction is confusing or misleading, prejudicial error[2] occurs where the jury might reasonably have been misled and the instruction caused them to arrive at a conclusion that it otherwise would not have reached." *Brown v. State,* 11 So.3d 428, 432 (Fla. 2nd DCA 2009).

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[1] [T]he defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection. [...] Only when the defendant satisfies the burden of demonstrating the existence of preserved error does the appellate court engage in a *DiGuilio* harmless error analysis. If the error is not properly preserved or is unpreserved, the conviction can be reversed only if the error is "fundamental." *Goodwin v. State,* 751 So.2d 537, 544 (Fla. 1999) (internal citations omitted).

[2] "Prejudicial error" means an error in the trial court that harmfully affected the judgment or sentence. § 924.051(1)(a), Fla. Stat. (2000).

> [Jury] Instructions ... are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred. [...] To justify not imposing the contemporaneous objection rule, "the 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." [...] In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." [...] Thus, for error to meet this standard, it must follow that the error prejudiced the defendant. Therefore, all fundamental error is harmful error. However, we likewise caution that not all harmful error is fundamental. Error which does not meet the exacting standard so as to be "fundamental" is subject to review in accord with *State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986) (discussing the harmless error test).

*Reed v. State* 837 So.2d 366, 370 (Fla. 2002) (internal citations omitted). A misleading jury instruction constitutes both fundamental and reversible error subject to appellate review even in the absence of an objection. *Reeves v. State,* 647 So.2d 994, 995 (Fla. 2nd DCA 1994).

*Law and Analysis*

1. *Limitations of Opinion Testimony.* A witness cannot express their opinion as to the guilt or innocence of a criminal defendant. *Martinez v. State,* 761 So.2d 1074, 1079 (Fla. 2000).

> [A] witness's opinion as to the guilt or innocence of the accused is not admissible. [...] Section 90.703, Florida Statutes (1997), which provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact," would appear to allow opinion testimony of the defendant's guilt. However, such testimony is precluded on the authority of section 90.403, Florida Statutes (1997), which excludes relevant evidence on the grounds that its probative value is substantially outweighed by unfair prejudice to the defendant. [...] "Any probative value such an opinion may possess is clearly outweighed by the danger of unfair prejudice." [...] We find "[i]t is clear that error is occasioned where a witness, including a lay witness, is permitted to offer her opinion about the guilt of the defendant."

*Id.* at 1079 (internal citations omitted). Florida Statute § 90.703 was not intended to permit a witness to testify to legal conclusions or express an opinion upon questions of substantive law. *See* Charles W. Ehrhardt, *Florida Evidence*, § 703.1 (West 2014). When a witness is asked to express an opinion that applies a legal standard to a set of facts, the opinion testimony is generally inadmissible. *Id.*

2. *The Hypothetical Question.* In the present case the State Attorney posed a hypothetical question positing identical facts to Mr. LePage's alleged crime and then asked the expert witness "*is it lawful* [...] to engage in contracting under the name of the corporation on those facts?" (Emphasis added). This hypothetical question was clearly asking if the alleged actions of Mr. LePage were lawful. Stated differently, was Mr. LePage guilty of the charged offense? The objection of Mr. LePage's trial counsel was well taken and should have been granted. The expert witness should not have been permitted to answer that question.

After an examination of the entire record, including the permissible evidence on which the jury could have legitimately relied and the impermissible testimony which might have influenced the jury verdict, this court cannot say beyond a reasonable doubt that the error did not affect the verdict. There is a reasonable possibility that the error contributed to the conviction. The error was not harmless.

3. *The Disputed Jury Instruction.* During the present trial there was no factual stipulation or finding that Mr. LePage had a transaction with Ms. Sigmon; that was for the jury to decide. One of Mr. LePage's defense theories at trial was that he was not involved in contracting or working on Ms. Sigmon's project; another man was responsible. The disputed jury instruction could be reasonably construed as meaning it

was an established fact that Mr. LePage had such a transaction. The instruction was misleading; the jury had the responsibility to determine if Mr. LePage had such a transaction with Ms. Sigmon. The effect of the misleading jury instruction was compounded when the trial court limited the closing argument of Mr. LePage's trial counsel. The misleading jury instruction constituted reversible error.

*Conclusion*

The judgment and sentence of the trial court should be reversed and the case remanded for a new trial.

IT IS THEREFORE ORDERED that the judgment and sentence of the trial court are reversed and the case is remanded to the trial court for a new trial.

ORDERED at Clearwater, Florida this 22nd day of October, 2014.

Original order entered on October 22, 2014 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable Cathy McKyton
Thomas M. Mclaughlin, Esquire
Office of the State Attorney