# Third District Court of Appeal

**State of Florida**

Opinion filed May 28, 2014.

THIS OPINION IS NOT FINAL UNTIL DISPOSITION OF ANY FURTHER MOTION FOR REHEARING AND/OR REHEARING EN BANC. ANY PREVIOUSLY FILED MOTION FOR REHEARING EN BANC IS DEEMED MOOT.

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No. 3D09-280
Lower Tribunal No. 01-8287D

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**John J. Connolly, Jr.,**
Appellant,

vs.

**The State of Florida,**
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Stanford Blake, Judge.

Carlos J. Martinez, Public Defender, and Manuel Alvarez, Assistant Public Defender, for appellant.

Pamela Jo Bondi, Attorney General, and Linda Katz, Assistant Attorney General, for appellee.

Before SHEPHERD, C.J., and SUAREZ and ROTHENBERG, JJ.

ON MOTION FOR REHEARING

SUAREZ, J.

John J. Connolly, Jr. ["Connolly"] moves for rehearing of this Court's opinion of March 2, 2011, affirming his conviction for second-degree murder as a lesser included offense of first-degree murder, and reclassification of that conviction to a life felony for carrying a firearm at the time of the offense. We grant Connolly's motion for rehearing, vacate the conviction and sentence in Case Number 01-8287D, and remand with instructions to discharge him because the trial court impermissibly relied on an uncharged firearm to enhance the only crime for which he was convicted. Without the fundamentally erroneous reclassification, Connolly's conviction for second-degree murder as a lesser included offense of first-degree murder was barred by the applicable statute of limitation.

**BACKGROUND**

In 2005, former FBI agent Connolly was charged by indictment, as a principal, with co-defendants James Bulger, Stephen Flemmi and John Martorano, with first-degree murder (Count 1)[1] and conspiracy to commit first-degree murder (Count 2)[2]. The indictment alleged that Connolly, while actively employed as an

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[1] Count 1 of the indictment states that four co-perpetrators, Bulger, Flemmi, Martorano, and Connolly:

> did unlawfully and feloniously kill a human being, to wit: JOHN B. CALLAHAN, from a premeditated design to effect the death of the person killed or any human being, by shooting the said JOHN B. CALLAHAN with a firearm, in violation of s. 782.04(1), s. 775.087, and s. 777.011, Florida Statutes . . . .

[2] Count 2 states that the same four co-defendants,

FBI agent, participated in a scheme to murder businessman John Callahan in South Florida on or about July 31, 1982. The State of Florida submitted evidence at trial that Connolly met many times with co-defendants Bulger, Flemmi and Martorano in New York and/or Boston over several weeks preceding the murder. The State's evidence at trial indicated that the scheme to murder Callahan occurred during these meetings. Further, the State's evidence indicated Connolly wore his FBI-issued service weapon while he was at these meetings and, by implication, over the time period Callahan was murdered. However, the State's evidence also showed that at the time of the actual murder, which occurred within or between Broward and Miami-Dade Counties, Florida, Connolly and his service weapon were both in Boston, Massachusetts. It was undisputed that co-defendant Martorano used his own gun to shoot Callahan, and that Connolly never carried, displayed, used, or threatened to use the murder weapon.

Connolly moved to dismiss Count 2 of the indictment, conspiracy to commit first-degree murder with a firearm, on the ground it failed to allege an armed conspiracy to commit first-degree murder, and therefore could not be reclassified as a life felony. Furthermore, in 1982, when the murder occurred, the statute of

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> "did unlawfully and feloniously agree, conspire, combine, or confederate [with one another] to commit a criminal offense, to wit: Murder in the first degree with a firearm upon JOHN B. CALLAHAN, in violation of s. 782.04(1), s. 777.04(3), s. 775.087, and s. 777.011, Florida Statutes . . . ."

limitation for a first-degree felony was four years. § 775.15(2)(a), Fla. Stat. (1981). Thus, by the time Connolly was indicted in 2005, the four-year statute of limitation had expired some nineteen years earlier for the first-degree felonies of conspiracy to commit first-degree murder, section 777.04(4)(b), Florida Statutes (1981), and second-degree murder, section 782.04(2), Florida Statutes (1981). "It is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed." State v. Miranda, 793 So. 2d 1042, 1044 (Fla. 3d DCA 2001). Any conviction on those charges was thus barred by the four-year statute of limitation in effect at the time of the 1982 murder. The trial court denied Connolly's motion to dismiss the charge in Count 2 of conspiracy to commit first-degree murder with a firearm. Connolly did not move pre-trial to dismiss Count 1, first-degree murder with a firearm, based on the State's failure to charge him with possession of a firearm because reclassification was not an issue: first-degree murder in 1982, and at present, was a capital felony and cannot be reclassified to a higher offense.

At the conclusion of the trial, during the jury instruction conference, the discussion turned to lesser included offenses. The trial court pointed out that, were Connolly to be convicted of second-degree murder without a firearm, the statute of limitation would be found to have run and Connolly would be discharged. The

defense repeatedly objected to inclusion of any lesser included offenses. The State requested the jury be instructed on second-degree murder with a firearm as a lesser included offense of first-degree murder. The State argued if Connolly were so convicted, it would seek reclassification of that first-degree felony to a life felony pursuant to section 775.087(1), and that a life felony was not barred by the four-year statute of limitation.[3] The trial court granted the State's request over defense counsel's objection, adding "carrying a firearm," as a fourth element to the second-degree murder instructions. The jury was thus instructed that to find Connolly guilty of second-degree murder they must find the following four elements beyond a reasonable doubt: 1) Callahan is dead; 2) His death was caused by the criminal act of Connolly; 3) There was an unlawful killing of Callahan by an act imminently dangerous to another and demonstrative of a depraved mind without regard for human life; and 4) During the act, Connolly carried a firearm.

The jury acquitted Connolly of the Count 2 charge of conspiracy to commit first-degree murder with a firearm, but found Connolly guilty of second-degree murder with a firearm as a lesser included offense of first-degree murder as charged in Count 1. The verdict form simply stated, "Guilty of second-degree murder, with a firearm, as a lesser included offense of first-degree murder." Based

[3] The State's theory justifying reclassification pursuant to section 775.087(1) is that the defendant, though in Boston at the time of the murder, was obligated to wear his FBI-issued service weapon and thus "carried" a firearm. See fn.4, infra.

on the jury's verdict that found Connolly guilty of second-degree murder "with a firearm," a time-barred first-degree felony, the trial court reclassified the conviction to a life felony pursuant to section 775.087(1), Florida Statutes (1981),[4] and sentenced Connolly to forty years in prison.[5]

Connolly appeals from the reclassification of his conviction for second-degree murder, a first-degree felony barred by the statute of limitation, to a life felony pursuant to section 775.087(1), which is not time-barred. Connolly argues

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[4] Section 775.087(1), Florida Statutes (1981) provides,

> Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such a felony the defendant carries, displays, uses, threatens, or attempt to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows: (a) In the case of a felony of the first degree, to a life felony. . .

[5] One month after the trial, Connolly filed a motion in arrest of judgment on grounds that the second-degree murder conviction could not be reclassified to a life felony and was therefore barred by the statute of limitation. The trial court agreed with Connolly that the second-degree murder conviction could not be reclassified, reasoning that, as Connolly was in Boston during the commission of the offense and did not personally carry the murder weapon, the statute of limitation had expired on the second-degree murder offense. The trial court nonetheless denied Connolly's motion, correctly ruling that as defense counsel filed the motion more than ten days after rendition of the verdict, the court had lost jurisdiction as the motion was untimely filed pursuant to Florida Rules of Criminal Procedure 3.610(c), and 3.590(a).

that, as neither the indictment nor the jury verdict support the reclassification, the reclassification was fundamentally erroneous. We agree.

1) COUNT 1 OF THE INDICTMENT FAILED TO PROVIDE NOTICE THAT CONVICTION FOR A LESSER INCLUDED OFFENSE COULD BE RECLASSIFIED BASED ON AN UNCHARGED SECOND WEAPON.

Due process of law requires the State to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him. Art. I, § 9, Fla. Const.; M.F. v. State, 583 So. 2d 1383, 1386-87 (Fla. 1991). There is a fundamental denial of due process when there is a conviction on a charge not made in the information or indictment. See Thornhill v. Alabama, 310 U.S. 88 (1940), and progeny. As noted above, the indictment alleges the four co-defendants killed Callahan "by shooting the said JOHN B. CALLAHAN with a firearm. . . ." That language accuses the four co-perpetrators of shooting the victim with a firearm (singular), but does not allege Connolly personally possessed, used, or carried a firearm, either the murder weapon or Connolly's FBI-issued firearm, during the commission of the murder. The only weapon implied by "shooting . . . JOHN B. CALLAHAN" is the murder weapon. The State acknowledges it was uncontested that the only gun used to shoot the victim was possessed and discharged by co-defendant Martorano and that Connolly is not the person who effected "the death of [the victim] by shooting [the victim] with a firearm."[6] The record is clear that there was only one shooter and

only one weapon involved in the actual offense. Count 1 of the indictment does not reference a specific subsection of section 775.087; Connolly could not reasonably have concluded that the general reference to that statute pertained to him rather than to the actual shooter Martorano. From the language of Count 1, no reasonable person could conclude that the State was planning to apply section 775.087(1), upon possible conviction for a lesser included offense, to a firearm that was not the charged murder weapon. The language, "with a firearm" is singular, and refers to the manner in which John Callahan was killed: it is clearly a reference to the only firearm used to murder Callahan. It is pure sophistry to argue that the general reference to section 775.087 in Count 1 of the indictment put Connolly on notice that his service weapon—an uncharged firearm unrelated to the murder, located in an entirely different state at the time of the offense—could later be the basis for reclassifying a time-barred conviction of a lesser included offense to a non-time-barred life felony, for committing the offense "with a firearm."[7]

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[6] See fn.3, supra.

[7] The State cites to Miller v. State, 460 So. 2d 373 (Fla. 1984), to support its argument that reclassification was proper. We agree that the primary charge in an indictment or information includes all lesser included offenses, for purposes of reclassification, but we cannot agree that Miller supports reclassification pursuant to section 775.087(1) based on a weapon uncharged and unrelated to the commission of the offense. Miller, in addition, involved one defendant, not multiple co-defendants, and it was clearly established that Miller had actually used the handgun during the commission of the crime.

The State argues that Connolly's failure to challenge the sufficiency of the indictment by motion to dismiss constituted a waiver and should have precluded his ability to raise the issue at a later time. The State relies on Mesa v. State, 632 So. 2d 1094 (Fla. 3d DCA 1994), to support its contention that Connolly's failure to object prior to trial to the charging document as flawed for referencing the reclassification statute but failing to specifically allege Connolly personally carried, displayed, used, etc., a weapon, amounts to waiver. The Mesa court concluded that, where the information charging Mesa with attempted second-degree murder failed to allege that the defendant possessed a firearm during commission of the felony, the information was not fundamentally flawed because it generally referenced the firearm enhancement statute.

We find Mesa distinguishable. First, and most important, Mesa involved only one defendant and one gun. Thus, the general reference to section 775.087 in Mesa's charging document was enough to put him on notice that the prosecution was seeking reclassification under subsection (1) and enhancement for possession of a firearm under subsection (2) because he was the sole defendant, and there was only one weapon involved. Further, the reference in the indictment that Mesa "did shoot" the victim put him on notice that, as sole defendant, he was charged with actually using a firearm in the crime. In addition, the jury specifically found that Mesa actually used a firearm via a special verdict form, to which he did not object.

Thus, there was a clear jury finding that Mesa personally used the weapon. Finally, we note that Mesa was charged in the information with second-degree murder, not first-degree murder. Mesa was thus made aware that his conviction could be reclassified as a higher degree felony. In the instant case, Connolly was not the sole defendant, but was one of four co-perpetrators equally charged with first-degree murder, which cannot be reclassified to a higher offense; Connolly did not shoot Callahan; Connolly did not carry, display, possess, use or threaten to use, the murder weapon; and Connolly was miles from the murder at the time it was committed.

Connolly does not challenge the language in Count 1 of the indictment as defective. Rather, he correctly asserts that the indictment fails to charge him with having carried, possessed, or used a second, unrelated firearm, where the evidence at trial confirmed Connolly did not have any possession or control of the murder weapon during the commission of the offense. It is not that the indictment failed to allege all of the essential elements of an offense, but rather that the statutory basis for reclassification upon conviction for a lesser included offense was not charged, i.e., carried, displayed, used, threatened or attempted to use, a second weapon during the commission of the felony. § 775.087(1). "A conviction on a charge not made by the indictment or information is a denial of due process" and an indictment or information that "wholly omits to allege one or more of the essential

elements of the crime" cannot support a conviction for that crime. State v. Gray, 435 So. 2d 816, 818 (Fla. 1983).[8]

We find the State's arguments on the issue of waiver unpersuasive. First-degree-murder as charged in Count 1 of the indictment is a capital felony, punishable by death, and is not subject to reclassification or enhancement because there is no higher punishment level. Connolly thus had no reason to seek to dismiss that count pre-trial. Further, the charging document failed to place Connolly on notice that conviction on a lesser included offense would be subject to reclassification pursuant to section 775.087(1) because the language of Count 1 did not single him out, as one of the four equally charged co-defendants, with actually possessing, carrying, using or discharging a second firearm; the murder weapon was the only weapon charged in Count 1. As this was a multi-defendant case and only one of the defendants, Martorano, used the gun to shoot the victim, Connolly would have no reason to conclude that the general reference in Count 1 to section 775.087 pertained to him rather than the actual shooter. Connolly's only avenue of

[8] The State correctly notes that the test for granting relief based on a defect in a charging document is actual prejudice, and argues that there was no prejudice to Connolly because first-degree murder and the lesser included offense of second-degree murder both carry a maximum penalty of life, citing to State v. Gray, 435 So. 2d 816 (Fla. 1983), and Delgado v. State, 43 So. 3d 132 (Fla. 3d DCA 2010). We find no greater "actual prejudice," however, than the facts presented by Connolly's case: conviction for a first-degree felony alone would have resulted in discharge under the applicable statute of limitation, but reclassification based on uncharged and unproven "carrying" of a weapon completely unrelated to the charged offense resulted in a forty-year sentence.

relief was to object to the inclusion of any lesser included offenses or instructions on second-degree murder as barred by the statute of limitation, which the record clearly shows his defense counsel strenuously and continuously did. We thus conclude Mesa is inapplicable to the specific facts presented in this case.

The State asserts that Connolly cannot claim that he was not on notice of the possibility of reclassification because, as early as two years prior to trial, Connolly had actual notice that the State was seeking to reclassify a lesser charge on the specific basis of Connolly's possession of a firearm during the criminal offense. The State then cites to its Response to Connolly's motion to dismiss Count 2, the conspiracy to commit first-degree murder. As we explain below in this opinion, reclassification upon conviction of a lesser included offense to Count 2 conspiracy would have been legally supportable had Connolly not, in fact, been acquitted of that charge. In that context, Connolly was appropriately charged with carrying his service weapon during the commission of the crime of conspiracy because it is an ongoing offense taking place over a period of time. See generally, Rosen v. State, 757 So. 2d 1236 (Fla. 4th DCA 2000) (explaining application of statute of limitation to continuing, as contrasted with discrete, offenses), and cases cited therein. During the conspiracy, Connolly met with his co-defendants and the evidence indicated that, while participating in these meetings, Connolly wore his service weapon. Reclassification for carrying a weapon during an ongoing offense

is legally supported. See section 3, infra. Connolly was, however, acquitted of the Count 2 conspiracy charge, rendering moot the merit of his pretrial motion to dismiss. As we discussed above, the State's assertion that Connelly was on actual notice of the applicability to him of the reclassification statute to conviction of any lesser included offense within Count 1 is untenable.

The State admits there was no case law to support its theory that reclassification upon conviction of a lesser included offense to first-degree murder could be accomplished where the co-defendant was not present during the offense, and did not actually carry, display, use or threaten to use, the actual firearm used during the commission of the felony. The established case law at time of trial and at present is that, in a felony involving the use of a weapon, a defendant's sentence may only be reclassified upon a showing that the defendant had personal possession of the weapon during the commission of the felony. See State v. Rodriguez, 602 So. 2d 1270 (Fla. 1992). The State's theory underpinning reclassification is, as everyone agreed, an issue of first impression, and Connolly cannot be said to have either anticipated or waived the issue. Where the State failed to allege in Count 1 that Connolly carried, displayed, used, threatened to use or attempted to use a second, unrelated firearm during the commission of the homicide, we conclude reclassification pursuant to section 775.087(1), given the facts in this case, was improper.

2) IT WAS ERROR TO RECLASSIFY BASED ON CONVICTION AS A PRINCIPAL FOR VICARIOUS POSSESSION OF A FIREARM.

Connolly could properly have been convicted as a principal of the lesser included offense of second-degree murder pursuant to section 777.011, Florida Statutes (1981).[9] That crime, however, is a first-degree felony subject to the four-year statute of limitation that began to run when the crime was complete. § 775.15(2)(a), Fla. Stat. (1981). Further, reclassification under section 775.087(1) for use of a firearm requires actual, not vicarious, possession of the firearm. Thus, a defendant's offense may not be reclassified for a co-defendant's possession of a firearm during a felony. State v. Rodriguez, 602 So. 2d 1270 (Fla. 1992).

In Rodriguez, the Florida Supreme Court construed the language of section 775.087(1) and answered this certified question in the negative: "Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extend to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a coperpetrator?" Id. at 1271. The Florida Supreme Court focused on the language of subsection 775.087(1), which requires that *the*

[9] Section 777.011, Florida Statutes (1981), reads:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

*defendant* carry, display, use, threaten, or attempt to use any weapon or firearm. Id. [emphasis in original]. The Court held that when a defendant is charged with a felony involving the "use" of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony. Id. at 1272. The Court explicitly rejected the idea that a defendant could be subject to reclassification under subsection 775.087(1) as a principal. Id. In the case before us, Count 1 of the indictment refers only to the murder weapon fired by co-defendant Martorano and does not charge Connolly with possession or use of a second weapon in the commission of that offense. Martorano's firearm cannot be viewed as constructively possessed by Connolly for purposes of reclassification to avoid the statute of limitation on first-degree felonies. See id.

Further, the verdict form did not include any interrogatory regarding Connolly's actual possession of the firearm alleged in Count 1, nor did the jury, by its verdict, make any finding that Connolly personally possessed the firearm used to shoot the victim. See State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). There is thus no legally supportable basis for reclassification. See also Chase v. State, 74 So. 3d 1138 (Fla. 2d DCA 2011) (holding that defendant's conviction for aggravated battery should not have been reclassified from a second-degree felony to a first-degree felony based on use of a weapon pursuant to section 775.087(1),

where the evidence showed that only the defendant's co-defendant possessed or used a weapon during the offense); Alusma v. State, 939 So. 2d 1081 (Fla. 4th DCA 2006) (reversing reclassification under section 775.087(1) where the defendant was convicted as a principal with his co-defendant, and the verdict did not reflect that the defendant was in actual possession of the firearm during the offense); Parker v. State, 906 So. 2d 1273 (Fla. 5th DCA 2005) (noting that reclassification under section 775.087(1) is impermissible unless the defendant actually possesses a weapon during the commission of the crime); Porter v. State, 737 So. 2d 1119, 1119 (Fla. 2d DCA 1999) (citing Rodriguez for the proposition "that section 775.087(1) does not permit vicarious enhancement"); Clark v. State, 701 So. 2d 912 (Fla. 4th DCA 1997) (same; citing to Rodriguez, 602 So. 2d 1272 (Fla. 1992), and Williams v. State, 622 So. 2d 456 (Fla. 1993)); Robins v. State, 602 So. 2d 1272 (Fla. 1992) (quashing affirmance of reclassification under section 775.087(1) based on co-defendant's wielding of gun during commission of kidnapping offense); Willingham v. State, 541 So. 2d 124 (Fla. 2d DCA 1989) (holding it error to reclassify a sentence for use of a weapon during the discrete act of sale of drugs based on vicarious possession, where the co-defendant possessed the firearm during the transaction). The cited cases demonstrate that, when no evidence is presented that a defendant personally carried, displayed, used, threatened to use, or attempted to use a weapon in committing the charged crime, it

is error for the trial court to enhance the defendant's sentence based on a co-defendant's use of a firearm.

At the jury instruction charge conference, the State requested the instruction for second-degree murder as a lesser included offense of first-degree murder, which the court granted over defense counsel's objection. The pertinent instructions read:

> To prove the crime of Second-Degree Murder, with a firearm, as a lesser included offense the State must prove the following four elements beyond a reasonable doubt:
>
> 1. JOHN CALLAHAN is dead.
> 2. The death was caused by the criminal act of JOHN J. CONNOLLY, JR.
> 3. There was an unlawful killing of JOHN CALLAHAN by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.
> 4. During the "act" the defendant John Connolly carried a firearm.
>
> An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose. . . .

The State's argument was that the meetings Connolly had with the co-defendants in the weeks leading up to Callahan's murder comprised the "act" referred to in the jury instruction. The argument posits that the "act" of meeting with the co-defendants was performed with a single design or purpose, i.e., the killing of John Callahan, and that during the "act" Connolly wore his FBI service weapon as an active FBI agent. As Connolly "carried" his firearm during the

"act," this was sufficient to sustain section 775.087(1) reclassification for "carrying" a weapon during the commission of the offense. We disagree. In Rodriguez, the Florida Supreme Court rejected that very theory. Id. at 1271.

As we previously discussed, the Florida Supreme Court held in Rodriguez that section 775.087(1) does not allow for reclassification without evidence establishing that the defendant had personal possession of the weapon during commission of the felony. 602 So. 2d at 1272. In that case, the firearm described in the information as the one used during the attempted murder "was at no time carried, displayed, used, or attempted to be used" by the defendant. Rodriguez, 602 So. 2d at 1271-72.

The Court noted that the defendant's sentence "could have been "enhanced" (more accurately, reclassified) under section 775.087(1) if the State had charged him with the commission of a felony while carrying the pistol that was found on his person after the chase. "The failure of the State to properly charge Rodriguez precludes it from enhancing his sentence under the carrying portion of the statute." 602 So. 2d at 1272 (emphasis added). In the case before us, Connolly was not charged in Count 1 with carrying, displaying, using, etc., his service revolver during the commission of the murder, and the same conclusion applies. Consequently, the trial court's reclassification was fundamentally erroneous.

3) CONNOLLY WAS ACQUITTED OF CONSPIRACY, THE ONLY CHARGE THAT WOULD SUPPORT RECLASSIFICATION FOR COMMITTING THE OFFENSE "WITH A FIREARM."

There was competent and sufficient evidence presented at trial that Connolly met with the co-defendants over several weeks prior to the actual murder event. Evidence was presented at trial that Connolly was obligated to carry his FBI-issued firearm while on duty as an FBI agent, and that he was observed at various times wearing his firearm during those meetings with the co-defendants. The illegal nature of those transactions and Connolly's participation in those illegal meetings while carrying his service weapon formed the factual basis for charging Connolly with the ongoing crime of conspiracy to commit first-degree murder with a firearm. Had Connolly been convicted as charged in Count 2 of the first-degree felony of conspiracy to commit first-degree murder with a firearm, reclassification under section 775.087(1) would have been proper based on that evidence. A co-defendant's possession of a weapon during an ongoing offense, such as trafficking or conspiracy, can be used to reclassify the sentence upon conviction as a principal. See e.g., Smith v. State, 438 So. 2d 10 (Fla. 2d DCA 1983), review denied, 447 So. 2d 888 (Fla. 1984) (determining reclassification of co-defendant's conviction for use of a firearm during the ongoing offense of possession was proper); Menendez v. State, 521 So. 2d 210 (Fla. 1st DCA 1988) (finding competent substantial evidence that defendant carried or used a firearm during the course of the ongoing

offense of cocaine trafficking sufficient to support reclassification pursuant to section 775.087(1)).

Such precedent is without application here, however, because Connolly was acquitted of conspiracy to commit murder, and the evidence supporting the "with a firearm" element of that charge cannot be transplanted to the separate and discrete charge of murder where the language of Count 1 references only one firearm – the gun Martorano used to kill Callahan. The "with a firearm" elements of Count 1 and Count 2 refer to entirely different criminal acts and do not rely on evidence of possession or use of the same weapon.[10] The two charges in this case and the evidence supporting them are not interchangeable. See Brown v. State, 130 So. 479 (Fla. 1938) (holding that the commission of a substantive crime and a conspiracy to commit the substantive crime are separate and distinct offenses). As we have previously explained, Connolly's conviction cannot be reclassified based on Martorano's possession of the only weapon charged in Count 1. See Rodriguez, 602 So. 2d at 1270 (Fla. 1992) (holding that when a defendant is charged with a felony involving the use of a weapon, his or her sentence cannot be enhanced under section 775.087(1) without evidence establishing that the defendant had

[10] The crimes set forth in Count 1 and Count 2 are different crimes with different elements. The "shooting . . . JOHN B. CALLAHAN with a firearm" element of the first-degree murder charge refers to the actual murder weapon. Evidence of Connolly's possession of his service weapon, however, correctly supports the "with a firearm" element of the conspiracy to commit murder charge set forth in Count 2 of the indictment.

personal possession of the weapon during the commission of the felony) (emphasis added); see also Willingham, 541 So. 2d at 1240 (Fla. 2d DCA 1989) ("A plain reading of section 775.087(1) would be to require proof that Willingham actually carried or used a firearm during the course of the offense. Any other interpretation is not expressed clearly in the statute, and even if susceptible to such a construction, i.e., principal theory can be used to establish use of firearm, the construction more favorable to the defendant must be given effect."); Menendez, 521 So. 2d at 215, n.3; cf. Glynn v. State, 868 So. 2d 1280 (Fla. 4th DCA 2004) (noting the difference between a continuous or ongoing criminal offense and one involving discrete acts, for sentencing purposes).

Furthermore, the conviction cannot be reclassified based upon Connolly's possession of his FBI-issued service weapon in Boston at the time of the murder in Florida. Of the reclassification cases we have examined in this appeal, those cases uniformly present facts showing the weapon used to reclassify the crime to a higher offense was both temporally and spatially related to the crime committed. The facts here are in stark contrast: Connolly was hundreds of miles away in Boston at the time the discrete act of murder occurred; he may or may not have "carried" his service weapon at the time of the murder. It is beyond question that Connolly's service weapon was neither available for use nor was it used in the murder; it had absolutely no spatial or temporal relationship to the discrete crime

charged; it had no purpose related to the crime charged. See Williams v. State, 622 So. 2d 456 (Fla. 1993) (finding it error to enhance defendant's sentence pursuant to sections 775.087(1)-(2), where facts showed the defendant was in Miami at the time the crimes in Pensacola were committed by his cohorts, thus the State consequently failed to show that the defendant had actual physical possession of a firearm during the commission of the crime). The "carrying" element present in Connolly's case was only applicable to a charge for which he has been acquitted. See Brown, 178 So. at 156, which held,

> When the State elected to prosecute for both offenses [conspiracy to commit a substantive crime and the substantive crime] and the defendants were acquitted on the charge of conspiracy, the State is then precluded from introducing evidence only tending to prove that offense of which the defendants have been found not guilty in the effort to establish the guilt of the defendants as to another substantive offense.

We can find no case law interpreting section 775.087(1) to extend to the facts presented in this case. We therefore decline to contort the application of section 775.087(1) to fit these specific facts.

4) THE JURY VERDICT FAILS TO SUPPORT RECLASSIFICATION.

The jury verdict failed to make a specific finding that Connolly, one of four identically charged co-defendants, actually carried, displayed, used, threatened, or attempted to use, a firearm during the commission of the murder (Count 1). As we noted in Streeter v. State, 416 So. 2d 1203, 1206 (Fla. 3d DCA 1982),

> If the State seeks to have a defendant's crime upwardly reclassified and his sentence thus enhanced because a weapon was used, it is incumbent upon it to see that the verdict forms pertaining to any count susceptible to reclassification under Section 775.087 contain the required additional finding that the defendant committed the crime in a manner prohibited by the reclassification statute.

(emphasis added). And, as the Florida Supreme Court held in State v. Overfelt, 457 So. 2d 1385 (1984),

> Before a trial court may enhance a defendant's sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating.

The State argues that the verdict did, in fact, find Connolly guilty of second-degree murder "with a firearm," satisfying Overfelt. This argument fails because, as discussed above, 1) the indictment did not specifically charge Connolly, one of four equally charged co-defendants, with actually carrying, displaying, using, threatening, or attempting to use, a second firearm during the shooting of Callahan; 2) Connolly's service weapon was unrelated to the actual commission of the murder; 3) the "carried a firearm" aspect of Connolly's involvement with the co-defendants was only applicable to the ongoing criminal conspiracy alleged in Count 2, of which he was acquitted; and 4) the jury's verdict fails to specify that Connolly – among the four co-defendants – carried, displayed, used, or threatened to use a separate, uncharged, weapon during the act of second-degree murder. The

words, "with a firearm" in the verdict form are not decisive to reclassification because "with a firearm" merely referred to the manner in which Callahan was killed. It is a reference to the murder weapon, not Connolly's service weapon. In this multiple defendant scenario, the jury verdict is fundamentally flawed. We conclude the verdict in this case cannot be used to support reclassification under section 775.087(1).

Under the factual and legal circumstances presented in this case, which all parties agree is a case of first impression, Connolly's conviction for second-degree murder with a firearm should not have been reclassified to a life felony in order to circumvent the statute of limitation on the underlying first-degree felony. Without the fundamentally erroneous reclassification, the first-degree felony of second-degree murder was time-barred.[11] We therefore grant John J. Connolly, Jr.'s motion for reconsideration, vacate the conviction and sentence in lower tribunal number 01-8287D, and remand to the trial court to discharge Connolly therefrom. Connolly's discharge shall be stayed until any and all post-appeal motions are final.

Reversed and remanded.

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[11] By this opinion we do not approve or disapprove, or comment upon, the merits of the underlying prosecution and conviction. We limit this opinion to addressing the misapplication of the reclassification statute to the facts presented below, and the due process ramifications and resulting prejudice to the defendant.

SHEPHERD, C.J., concurs.

ROTHENBERG, J. (dissenting).

I respectfully dissent. Because the defendant failed to preserve and has otherwise waived the errors he raises on appeal, he must establish fundamental error. Because a careful review of the record and the case law demonstrates that no fundamental error has occurred, the majority's decision to reverse and vacate the defendant's conviction and sentence for second degree murder with a firearm and to forever discharge him from prosecution of the crime proven in this case is grave error.

The indictment charged John J. Connolly, Jr. ("the defendant") and his co-defendants with first degree premeditated murder (Count I) and conspiracy to commit first degree murder (Count II). The defendant was tried, and the jury convicted the defendant of second degree murder with a firearm as a lesser included offense of first degree murder. The second degree murder conviction was reclassified from a first degree felony to a life felony pursuant to section 775.087(1), Florida Statutes (1981), based on the jury's specific finding that the defendant was armed with a firearm during the acts he committed as a principal to the murder.

The defendant does not dispute the sufficiency of the evidence relied on by

the jury in finding him guilty of second degree murder, nor does he dispute that he carried a firearm on his person during the acts he committed as a principal to the murder. The evidence as to both his participation in the murder and his possession of a firearm during his participation is overwhelming. Rather, what the defendant disputes is the legality of the reclassification of the second degree murder from a first degree felony to a life felony based on his actual possession of a firearm. The reclassification issue is dispositive as it is undisputed that the indictment was filed in 2005 and the homicide was committed in 1982, and without the reclassification from a first degree felony to a life felony, the defendant's conviction must be vacated due to the expiration of the four-year statute of limitations that was in effect in 1982.[12] § 775.15(2)(a), Fla. Stat. (1981).

The defendant contends, and the majority concludes, that the firearm reclassification was error because: (1) the indictment did not put the defendant on notice that he could be subject to reclassification; (2) the jury verdict was insufficient to subject him to reclassification; (3) reclassification may not be based on a co-defendant's possession or use of a firearm during commission of the offense; and (4) there was no evidence that the defendant carried a firearm during the actual commission of the murder.

As will be detailed herein, each of these arguments and findings is without

[12] Presently, a prosecution for "a felony that resulted in a death may be commenced at any time." § 775.15(1), Fla. Stat. (2013).

merit. First, the defendant had constructive knowledge at least two years prior to trial, and actual notice prior to the trial court charging the jury, that a conviction for second degree murder, a necessary lesser included offense of first degree premeditated murder, could subject him to a reclassification of the offense based on the defendant's personal possession of a firearm during commission of the murder. Because the defendant did not raise a challenge or an objection to the indictment, claim surprise, lack of due process, or that the second degree murder could not be reclassified due to a defect in the indictment or the evidence presented, he has waived and/or has failed to preserve any objection to reclassification of his second degree murder conviction based on a defect in the indictment. The defendant must therefore establish fundamental error on this claim to warrant a reversal. The defendant cannot demonstrate fundamental error because possession of a firearm is not a necessary element of second degree murder; the indictment charges that the second degree murder was committed with a firearm; the heading of the indictment references section 775.087, the firearm reclassification/enhancement statute; and the State specifically informed the defendant that it intended to prove that he personally carried a firearm during the acts he committed as a principal to the murder.

Second, based on the defendant's request, the defendant's personal possession of a firearm was made an **element** of the crime. Thus, the jury was

instructed that, as a necessary element of second degree murder, it must not only find that the victim's death was caused by an act by the defendant that was "imminently dangerous to another and evincing a depraved mind regardless of human life," §782.04(2) Fla. Stat. (1981), but also that, during the "act," **this defendant carried a firearm**. Thus, the jury's verdict finding the defendant guilty of second degree murder with a firearm necessarily found that the defendant carried a firearm during commission of the murder. Again, because the defendant did not object to the verdict form, he must demonstrate fundamental error, and because the firearm reclassification was treated as an element of second degree murder and the jury found that the grounds upon which the firearm reclassification was based was proven beyond a reasonable doubt, fundamental error cannot be shown.

Third, the reclassification of the defendant's conviction for second degree murder was not based on a co-defendant's possession or use of a firearm during commission of the offense. Rather, the reclassification was based on the defendant's personal possession of a firearm during commission of the murder.

Fourth, there was abundant evidence that the defendant carried a firearm during the acts he committed as a principal to, and in furtherance of, this murder.

Section 775.087(1) provides for the reclassification of an offense where, "during the commission of such felony, the defendant carries, displays, uses,

threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery." Whereas subsection (1) provides for the **reclassification** of the offense, subsection (2) provides for **enhanced penalties**. The defendant's conviction for second degree murder was reclassified under section 775.087(1), which provides as follows:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:
>
> (a) In the case of a felony of the first degree, to a life felony.
>
> (b) In the case of a felony of the second degree, to a felony of the first degree.
>
> (c) In the case of a felony of the third degree, to a felony of the second degree.

## SUMMARY OF THE CASE

The 2005 indictment charged the defendant and his co-perpetrators in Count I as follows:

> Count I
>
> That on or between the 31st day of July, 1982, and the 2nd day of August, 1982, within the Counties of Miami-Dade and Broward, State of Florida, James J. Bulger, Stephen J. Flemmi, John V. Martorano and John J. Connolly, Jr., did unlawfully and feloniously kill a human being, to wit: John B. Callahan, from a premeditated design to effect the death of the person killed or any human being, by shooting the said John B. Callahan with a firearm, in violation of s. 782.04(1), s. 775.087 and s. 777.011, Florida Statutes.

To understand the murder of John B. Callahan ("Callahan") and the

defendant's involvement in Callahan's murder, a summary of the evidence established at trial is necessary. The evidence at trial revealed that Callahan's murder was the last of several murders committed by and/or for the benefit of James Bulger, Stephen Flemmi, John Martorano, and the Winter Hill Gang, an organized crime organization working out of Boston, Massachusetts. The chain of events that led to Callahan's murder began in 1973.

In 1973, the defendant, an agent working for the Federal Bureau of Investigations ("FBI"), was transferred to the Boston division of the FBI where he was assigned to the organized crime division. In 1975, the defendant recruited Bulger and Flemmi to work as FBI informants, and, over time, the defendant became corrupted by his relationship with Bulger, Flemmi, and the Winter Hill Gang. The defendant began providing some of the information he obtained from Bulger and Flemmi to the FBI. However, he would also submit false and misleading information and reports to the FBI to protect Bulger and Flemmi, and provide Bulger and Flemmi with confidential FBI and law enforcement information, which enabled Bulger and Flemmi to avoid arrest and prosecution by federal, state, and local law enforcement.

Flemmi testified that the defendant was considered a member of their criminal organization and that he was essentially on their payroll. In exchange for the defendant's services (providing misleading and false information to the FBI

and giving Bulger and Flemmi confidential law enforcement information), the defendant was paid large sums of money. They also used the defendant as a conduit for the delivery of cash and gifts from Bulger and Flemmi to other FBI agents. Thus, the defendant was working both sides and profiting from each. He benefited professionally by providing organized crime information to the FBI, and he benefitted personally and financially by assisting Bulger and Flemmi.

The jury learned about some of the confidential information the defendant provided to Bulger and Flemmi. For example, in 1976, the defendant warned Bulger and Flemmi that Richard Castucci, another FBI confidential informant, had given the FBI the location of two Winter Hill Gang members who were federal fugitives. Based on the information provided to them by the defendant, Bulger and Flemmi warned the two fugitives, and then, along with Martorano, they murdered Castucci for his disclosures to the FBI. In 1978, the defendant also warned Bulger and Flemmi that they were about to be indicted in a federal racketeering case, but the defendant told them that if they agreed not to kill Anthony "Tony" Ciulla, who was cooperating with the government and was a witness against members of their criminal organization, Bulger and Flemmi would not be indicted. Additionally, the defendant warned Bulger and Flemmi that Martorano was going to be indicted. As a result, Martorano went into hiding in Miami.

In 1978, Callahan, the victim in the instant case, was the owner and

president of World Jai Alai. When Callahan learned that the authorities in Connecticut had discovered his ties to the Winter Hill Gang and organized crime figures in Boston, he sold World Jai Alai to Roger Wheeler ("Wheeler"). Four years later, when Callahan decided that he wanted to repurchase World Jai Alai from Wheeler but Wheeler refused to sell the business, Callahan solicited Bulger, Flemmi, and Martorano to murder Wheeler. On May 27, 1981, Martorano shot and killed Wheeler at a country club in Tulsa, Oklahoma.

During its investigation of the Wheeler murder, the FBI began searching for members of the Winter Hill Gang to cooperate. Brian Halloran ("Halloran"), a member of the Winter Hill Gang who had been indicted for an unrelated murder in Boston, agreed to cooperate with the FBI in the Wheeler murder investigation in order to obtain leniency in his pending case.

When the defendant learned from his supervisor, Special Agent John Morris, that Halloran was cooperating with the FBI and that Halloran had implicated Bulger and Flemmi in the Wheeler murder, the defendant warned Bulger and Flemmi. After this initial warning, the defendant contacted Bulger and Flemmi again to warn them that the FBI had outfitted Halloran with a body wire and had directed Halloran to meet with Callahan. After being alerted by the defendant, Bulger and Flemmi warned Callahan that Halloran intended to inform on him, and on May 11, 1982, Bulger, with the help of other Winter Hill Gang members,

murdered Halloran.

Because the Halloran murder was committed on a public street in Boston, the investigation became intense. In an effort to deflect suspicion away from Bulger, Flemmi, and the Winter Hill Gang, the defendant prepared and submitted a series of false reports suggesting that other organized crime factions in Boston were responsible for Halloran's murder. Despite the defendant's efforts, however, the FBI continued to believe that Bulger and Flemmi were involved in the murders of Wheeler and Halloran, and its investigation focused on locating Callahan to obtain his cooperation. When the defendant learned that the FBI was looking for Callahan, he contacted Bulger and Flemmi and told them that Callahan would likely cooperate and implicate Bulger, Flemmi, and Martorano in the Wheeler murder, and he suggested that they contact Martorano to "handle it."

Thereafter, Bulger and Flemmi met with Martorano, informed him what the defendant had told them, and Martorano agreed to kill Callahan before the FBI was able to locate him, and to kill Callahan in Florida because of the "heat on them" in Boston. After meeting with Martorano, Bulger and Flemmi met with the defendant and told the defendant that Martorano and his associate, Joe MacDonald, were going to "take care of" Callahan. Flemmi testified that the defendant clearly knew that "take care of" meant they were going to have Callahan killed based on the information the defendant had given them—that Callahan would be found and he

would likely cooperate and implicate them in Wheeler's murder. On July 31, 1982, Martorano picked Callahan up at the Fort Lauderdale Airport, shot Callahan in the back of the head, put Callahan in the trunk of a car, and left the car at the Miami International Airport.

In anticipation of Callahan's murder, the defendant filed false reports with the FBI in an effort to mislead the FBI and to protect Bulger and Flemmi. In these reports, the defendant provided alibis for Flemmi and Bulger for both the Halloran murder and the planned Callahan murder, and the defendant falsely reported that Callahan had a falling-out with a group of Cuban drug dealers in Miami.

After Callahan was murdered, the investigation intensified and the defendant continued to manipulate the system to protect Bulger, Flemmi, and himself. However, in 1990, after the defendant had retired from the FBI, Bulger and Flemmi became the subject of a federal grand jury investigation. The defendant, who had maintained his relationship with other FBI agents, continued to pass confidential information to Bulger and Flemmi. The defendant kept Bulger and Flemmi informed as to the progress being made in the FBI's investigation of Bulger and Flemmi, and, when the defendant learned Bulger and Flemmi were about to be indicted by the federal grand jury and arrested, he warned them. Bulger went into hiding. Flemmi, who did not react quickly enough, was arrested.

After Flemmi was arrested, the defendant wrote a letter to the presiding

federal judge in an effort to have Flemmi's case dismissed. Many of the statements he made in this letter were false. He also provided sensitive FBI information and documents to Flemmi's defense attorney and counseled Flemmi to falsely testify that the defendant's supervisor, Special Agent John Morris, warned Bulger about the federal indictment rather than the defendant.[13] Ultimately, however, Flemmi and others agreed to cooperate with the FBI and law enforcement, and an amended indictment was filed in 1995 also charging the defendant, along with previously charged Bulger, Flemmi, and Martorano, with Callahan's murder.

The defendant was tried before a jury, and, on November 6, 2008, he was convicted of second degree murder with a firearm, a lesser included offense of first degree premeditated murder. On March 2, 2011, this Court issued a per curiam affirmance without citation. Thereafter, the defendant filed a motion for rehearing en banc, or in the alternative, for the issuance of a written opinion. Although the defendant's motion for rehearing en banc simply re-argues the same points raised and previously considered by this Court in 2011, and nothing has changed since the panel unanimously affirmed the defendant's conviction three years ago, the

[13] Morris and other FBI agents received money and gifts from Bulger and Flemmi while the defendant was still employed by the FBI. The defendant served as an intermediary to deliver the money and gifts to these agents. Morris, who testified at the defendant's trial, admitted that the defendant delivered money and gifts to him from Bulger and Flemmi.

majority has now reversed itself, authored an opinion reversing the defendant's conviction and sentence, and orders the charges against the defendant be forever discharged.

## THE MAJORITY'S GROUNDS FOR REVERSAL

The majority's grounds for reversal are that: (1) the indictment failed to provide the defendant with notice that, if he was convicted of a lesser included offense of first degree murder, the lesser included offense could be reclassified based on the defendant's personal possession of a firearm; (2) the jury's verdict was insufficient to permit a reclassification of the second degree murder conviction under section 775.087(1); (3) the reclassification of the defendant's conviction for second degree murder based on a co-defendant's possession of a firearm during commission of the murder was error; and (4) there was no evidence that the defendant carried a firearm during commission of the murder.

Because the defendant failed to raise any of these arguments until a month after he was convicted, he must demonstrate that fundamental error has occurred in order to obtain a reversal. As no fundamental error has been shown, reversal of the defendant's conviction and sentence on direct appeal is error.

## THE DEFENDANT MUST ESTABLISH FUNDAMENTAL ERROR

The defendant claims it was fundamental error to reclassify his conviction for second degree murder from a first degree felony to a life felony based on

section 775.087(1). The defendant's arguments are premised on: (1) the indictment, which he claims did not sufficiently put him on notice of the potential for a reclassification under section 775.087(1); and (2) the jury's verdict, which he claims was insufficient to support the firearm reclassification.

The record, however, unequivocally reflects that the defendant failed to preserve these arguments for appellate review. The defendant did not raise any challenge to: (1) the indictment as to Count I, the murder charge; (2) the instructions to the jury, which specifically included the firearm reclassification for second degree murder; and (3) the verdict form presented to the jury.

At no time during the three-and-one-half-years pendency of the case did the defendant challenge Count I (the murder charge) of the indictment. He did not claim it was imprecise, imperfect, or defective, and did not raise any objection to it or seek a bill of particulars. Additionally, at the charge conference, the defendant did not argue that, due to any deficiency or defect in the indictment, the jury could not consider second degree murder with a firearm based on the defendant's personal possession of a firearm during the acts it was alleged he committed as a co-perpetrator or a principal to the murder. Nor did the defendant object to the verdict form. The first time the defendant raised any objection to the indictment, reclassification, or the verdict form relative to Count I was one month after the jury rendered its verdict. Because the defendant waived the objections raised on

appeal, he must demonstrate that fundamental error occurred. See Jackson v. State, 983 So. 2d 562, 568 (Fla. 2008) ("Errors that have not been preserved by contemporaneous objection can be considered on direct appeal only if the error is fundamental.") (citing Goodwin v. State, 751 So. 2d 537, 544 (Fla. 1999)); see also § 924.051(3), Fla. Stat. (2008) ("An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.").

## I. Count I of the indictment was not fundamentally defective

The failure to object to a defect in the indictment (or information) serves as a waiver unless the defendant can demonstrate that the defect was a fundamental defect. A review of the indictment, the case law, and the record demonstrates that Count I was not fundamentally defective because it did not omit an essential element of the offense, and the defendant had both constructive and actual notice that, if he was convicted of second degree murder, the State would be seeking a reclassification of his conviction under section 775.087(1) based on the defendant's personal possession of a firearm during his role as a co-perpetrator or a principal to the murder.

### A. Count I of the indictment did not omit an essential element of the crime

Under Florida law, technical defects in a charging document are treated differently than the failure to allege an essential element of the crime. An

indictment that wholly omits an essential element of a crime is a fundamental defect that may be raised at any time. See State v. Gray, 435 So. 2d 816, 818 (Fla. 1983). That is so because, when an essential element is omitted, the indictment fails to charge a crime. Id. Use or possession of a firearm, however, is not an essential element of second degree murder,[14] but rather, it may serve to allow for a reclassification of the second degree murder from a first degree felony to a life felony or as an enhancement of the sentence imposed. See § 775.087.

Because the defect was not the omission of an essential element of the crime, the defect is only fundamental if the defendant demonstrates that he was denied due process. In other words, because the defendant did not specifically and timely object to reclassification based on a defect in the indictment, and the defect was not the omission of an essential element, he has waived the defect unless he can demonstrate that he had no notice that a conviction for second degree murder could subject him to a reclassification under section 775.087(1) if the jury found he carried a firearm during commission of the felony. See Delgado v. State, 43 So. 3d 132, 133 (Fla. 3d DCA 2010). ("**An information is fundamentally defective only where it totally omits an essential element of the crime or is so vague, indistinct or indefinite that the defendant is misled or exposed to double**

[14] The elements of second degree murder are: (1) the victim is dead; (2) the death was caused by the criminal act of the defendant; and (3) there was an unlawful killing of the victim "by an act imminently dangerous to another and evincing a depraved mind regardless of human life . . ." § 782.04(2), Fla. Stat. (1981).

**jeopardy.**") (emphasis added).

In State v. Burnette, 881 So. 2d 693, 693-94 (Fla. 1st DCA 2004), the First District Court of Appeal reversed the trial court's order granting Burnette a new trial based on a technical deficiency in the information because Burnette failed to raise the issue prior to the verdict. Specifically, the First District found that the failure to object to a technical deficiency in the charging document constitutes a waiver requiring that fundamental error be shown, and explained that **the time to raise a challenge to the charging document is prior to trial so that the deficiency can be cured, not after a verdict has been rendered**.

> [A] defect in an information is waived if no objection is timely made so long as the information does not wholly fail to state a crime. See Williams v. State, 547 So. 2d 710 (Fla. 2d DCA 1989); State v. Duarte, 681 So. 2d 1187 (Fla. 2d DCA 1996); Catanese v. State, 251 So. 2d 572 (Fla. 4th DCA 1971). Where a defendant waits, as here, until after the state rests its case to challenge the propriety of an indictment, the defendant is required to show not only that the indictment is technically defective, but that it is so fundamentally defective that it cannot support any judgment of conviction. See Fla. R. Crim. P. 3.190 and 3.610 [sic]; Ford v. State, 802 So. 2d 1121, 1130 (Fla. 2001) (noting any inquiry concerning the technical propriety of the indictment should have been raised prior to trial at which time any deficiency could have been cured).

Id. at 694; see also State v. Wimberly, 459 So. 2d 456, 458-59 (Fla. 5th DCA 1984) ("There is a difference between an information that completely fails to charge a crime and one where the charging allegations are incomplete or imprecise. The former is fundamentally defective. However, where the information is merely

imperfect or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defect and it cannot be raised for the first time on appeal. . . . If the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted words, it cannot be said that the imperfection of the information prejudiced the defendant in his defenses.") (citations omitted) (quoting Jones v. State 415 So. 2d 852, 853 (Fla. 5th DCA 1982)); Brewer v. State, 413 So. 2d 1217, 1221 (Fla. 5th DCA 1982) (en banc) (affirming the defendant's conviction where the defendant failed to properly preserve the deficiency of the charging document and the deficiency was not fundamental error because there was not a total omission of an essential element of the crime); Kane v. State, 392 So. 2d 1012, 1013 (Fla. 5th DCA 1981) (same); State v. Cadieu, 353 So. 2d 150, 151 (Fla. 1st DCA 1977) (noting that "[t]he law does not favor a strategy of withholding attack on the information until the defendant is in jeopardy, then moving to bar the prosecution entirely").

Mesa v. State, 632 So. 2d 1094 (Fla. 3d DCA 1994), is also instructive. In Mesa, this Court, relying on binding Florida Supreme Court precedent, noted that, even where the charging document fails to include an essential element of a crime, if the charging document references the specific criminal code that the defendant is charged with violating, the defendant's failure to file a pretrial motion to dismiss the indictment or information constitutes a waiver. Id. at 1098. Applying this

standard, this Court held that where the information charging Mesa with attempted second degree murder failed to allege that Mesa possessed a firearm during commission of the felony, **the information was not fundamentally defective because it referenced section 775.087, as one of the statutes the defendant was charged with violating**. Id.

Specifically, in Mesa, this Court recognized that, because Mesa failed to object to the charging document prior to trial and possession of a firearm was not an essential element of the crime charged, it was required to perform a fundamental error analysis. Id. at 1097. This Court determined no fundamental error had occurred because the charging document referenced section 775.087; the jury found the defendant guilty of possessing a firearm during commission of the offense; and there was competent evidence to support the jury's finding. Id. at 1097-98; see also Baker v. State, 4 So. 3d 758, 760-61 (Fla. 1st DCA 2009) (concluding that the defendant must establish fundamental error because he did not raise the defective information prior to trial, and noting that even where the charging document omits an essential element of the crime, the charging document may still withstand challenge if it references the specific section of the code that details the elements of the offense).

### B. The defendant had both constructive and actual notice of the State's intent to enhance his conviction in Count I based on the defendant's personal possession of a firearm

It is beyond dispute that the indictment contained a technical defect. Although Count I specified that the homicide was committed "with a firearm" and also cited to section 775.087 (the firearms reclassification statute), in the heading of the indictment and in the body of both Counts I and II, the indictment did not specify that section 775.087 would be relied on to reclassify the conviction based on this defendant's personal possession of a firearm. Because this is a technical defect, the defendant must demonstrate fundamental error. No fundamental error occurred in this case because the defendant had actual notice that if he was convicted of first degree murder or a lesser included offense of first degree murder, the offense could be reclassified under section 775.087. See Delgado, 43 So. 3d at 133 ("The test for granting relief based upon a defect in the charging document is actual prejudice.") (quoting Gray, 435 So. 2d at 818).

**First**, on February 15, 2006, two-and-one-half years prior to trial, the defendant filed and litigated a motion to dismiss Count II, the conspiracy charge, on the basis that the statute of limitations had run on that count prior to the filing of the indictment. In his motion, the defendant argued that conspiracy to commit murder was subject to a four-year statute of limitations, and **even if this limitations period could be extended for the homicide if the defendant committed the homicide with a firearm, the State would also be required to prove that the defendant was armed with a firearm at the time he conspired**

**with others to commit the homicide in order to permit reclassification of the conspiracy.** This argument clearly shows that the defendant recognized the potential for reclassification upon a conviction of the homicide.

In its response, the State readily acknowledged that the jury must find that the defendant actually carried a firearm during the charged offense in order for the defendant to be subject to reclassification under section 775.087(1), and that although one of the co-defendants was the primary user of the weapon utilized to commit the murder, the defendant could also be eligible for reclassification based on his own personal possession of a firearm during commission of the offense. The State explained that section 775.087(1) provides for the reclassification of a first degree felony to a life felony if during commission of the felony the defendant carried any weapon. The State not only bolded and underlined "carried" and "any," it also specifically told the defendant in its response that it intended to prove at trial that the defendant **carried** a firearm within the meaning of section 775.087(1) during the relevant time periods alleged in the indictment.

The trial court's order denying the defendant's motion to dismiss Count II additionally put the defendant on notice that a conviction in Count I could also result in a reclassification of that offense. The trial court's order specifically found that a first degree felony could be reclassified to a life felony under section 775.087(1); there is no statute of limitations for a life felony; and the defendant

was on notice that if he was convicted of conspiracy, the State intended to seek a reclassification of the offense from a first degree felony to a life felony under section 775.087 because conspiracy was designated as a life felony in the caption of the indictment, section 775.087 was referenced in the heading of the indictment and in the body of each count of the indictment, and the State alleged in the body of the conspiracy count that the conspiracy was committed with a firearm.

Although the defendant's motion and the State's response were directed to the conspiracy charge, these pleadings put the defendant on notice that Count I could also be reclassified because the indictment referenced section 775.087 in both the heading and in the body of the murder charge in Count I, and alleged that the homicide was committed with a firearm. This is especially true because the State told the defendant that it intended to seek reclassification of the conspiracy to commit first degree murder by proving at trial that the defendant carried a firearm during the acts he committed in furtherance of the conspiracy. Because the acts committed by the defendant in furtherance of the conspiracy are the same acts that made the defendant a co-perpetrator or a principal to the murder, the defendant was on notice that a conviction in Count I could subject him to a reclassification of the offense based on his personal possession of a firearm.

Additionally, the majority's finding that the defendant had no notice that a conviction in Count I could be reclassified because first degree premeditated

murder is a capital felony, which cannot be reclassified because there is no higher classification, is without merit. Because first degree murder cannot be further enhanced, the only purpose in referencing section 775.087 in the heading and in the body of Count I was to put the defendant on notice that a conviction for a lesser included offense in that count could subject him to a reclassification of the lesser offense. Second degree murder is a **necessary** lesser included offense of first degree premeditated murder. See State v. Montgomery, 39 So. 3d 252, 259 n.4 (Fla. 2010) (citing Fla. Std. Jury Instr. (Crim.) 7.2). The defendant was therefore on notice that the jury would be given the option of considering second degree murder as a lesser included offense, and if the jury found the defendant guilty of second degree murder, and it additionally found that the defendant carried a firearm during commission of the second degree murder, section 775.087(1) would be used to reclassify his first degree felony to a life felony, which would not be subject to the statute of limitations.

It is well-established Florida law that a lesser included offense of the crime alleged in the charging document can be reclassified based on the defendant's use of a weapon. See Miller v. State, 460 So. 2d 373, 374 (Fla. 1984). The defendant was therefore put on notice that if he was convicted of a lesser included offense of first degree premeditated murder, section 775.087(1) would apply if the State proved and the jury found that the defendant carried, displayed, used, threatened,

or attempted to use a firearm during commission of the homicide. Because second degree murder is a necessary lesser included offense of first degree premeditated murder, the defendant was specifically on notice that the jury would be charged with considering second degree murder as a lesser included offense. Thus, the indictment was not fundamentally defective.

**Second**, and even more conclusive on the issue of notice, the defendant **admitted to having actual notice** during post judgment litigation. He admitted that he had been placed on notice that the State intended to seek reclassification of the homicide offense, but he did not move to dismiss that count based on his belief that reclassification would not become an issue because first degree murder could not be reclassified to a higher offense.[15] Although the defendant mistakenly failed to consider the lesser included offenses of first degree murder when he did not challenge the sufficiency of the indictment regarding the homicide charge, he cannot attribute his failure to do so on the lack of notice.

**II. <u>The defendant waived any objection to reclassification of his conviction for</u>**

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[15] In his motion for arrest of judgment dated December 15, 2008, the defendant conceded:

> At a prior hearing the state argued that a citation to F.S. §775.087, by itself, at the end of a count in an indictment was sufficient to charge anything from possession of a firearm to use of a firearm during the commission of an offense. In this case, the defendant did not move to dismiss the first degree murder count in the indictment based on its failure to charge Mr. Connolly with possession of a firearm because reclassification was not an issue-since first degree murder cannot be reclassified to a higher degree felony.

**second degree murder based on a defect in the indictment by not raising any objection until one month after his conviction**

While the defendant objected at the charge conference to the trial court instructing the jury on conspiracy with a firearm (Count II), he specifically limited his objection to the conspiracy count.

> **Defense Counsel**: I object to the instruction with a firearm because it is not charged in the indictment. This goes back to an argument that was made a while ago with regard to our motion to dismiss because the statute of limitations has run. If we look at Count 2.
> **The State**: Count 1 or 2?
> **Defense Counsel**: If we look at Count 2, what is charged is a conspiracy to commit the crime of first degree murder with a firearm. What should be charged is armed conspiracy to commit first degree murder with a firearm and the way it is charged it is not the substantive charge of conspiracy is not charged with a firearm [sic]. Therefore, I object to this instruction and renew my motion to dismiss Count 2 because the statute of limitations has run.

The defendant's only objection to Count I, the homicide count, was his objection to second degree murder as a lesser induced offense because second degree murder was time barred. However, second degree murder is a necessary lesser included offense of first degree murder. Thus, the trial court must instruct the jury on second degree murder, as a lesser included offense of first degree premeditated murder, unless both the State and the defendant specifically request that the instruction not be given and they waive any objections to the failure to provide second degree murder as an option the jury may consider. See McKiver v. State, 55 So. 3d 646, 649 (Fla. 1st DCA 2011). In this case, after consulting with the defendant, defense counsel informed the trial court that the defendant was not

requesting any lesser included offenses of first degree murder, stating that "[f]rom the get go we said we wanted first degree or nothing." Defense counsel's objection to the second degree murder instruction was because second degree murder is a first degree felony, and, as defense counsel correctly noted, a conviction for second degree murder without the reclassification would have been time barred. However, the State did not waive its right to have the jury instructed on second degree murder. Furthermore, the trial court noted that the firearm reclassification was charged in the indictment and that the second degree murder would not be time barred if it was reclassified under section 775.087(1). The trial court accordingly agreed to instruct the jury on second degree murder. Importantly, the defendant did not object based on a defect in the indictment, the reclassification of the second degree murder, claim he was not put on notice, or suggest that the trial court not permit the jury to consider whether the defendant carried a firearm during commission of the murder. Thus, the defendant waived any objection he may now have regarding the reclassification of the second degree murder based on a deficiency or defect in the indictment.

Furthermore, when addressing how to fashion the jury instructions and the verdict form, the trial court and all parties agreed that it would be improper to instruct the jury on a time barred offense and that second degree murder with a firearm would be the only lesser included offense of first degree murder not barred

by the statute of limitations. The trial court and the parties discussed how to instruct the jury on the firearm reclassification of second degree murder. Importantly, defense counsel specifically requested that the defendant's possession of a firearm during commission of the offense be instructed as an **element** of second degree murder that the State must prove beyond a reasonable doubt, rather than allowing the jury to consider whether the defendant was armed with a firearm for reclassification purposes via a special interrogatory, because everyone agreed that the second degree murder would be time barred without the firearm reclassification.

Based on the defendant's specific request, reclassification of the second degree murder was treated as an essential element of the offense for purposes of the jury instructions and the verdict form. The jury was instructed that, before it could find the defendant guilty of second degree murder, as a lesser included offense of first degree murder, they must find beyond a reasonable doubt that the defendant personally carried a firearm during the act or acts he committed as a co-perpetrator or as a principal to the murder. Therefore, not only did the defendant not object to the possible reclassification, he **affirmatively sought to include it** as an element of second degree murder.

As the record clearly reflects that the defendant had actual and constructive notice that a conviction for second degree murder could and would be reclassified

to a life felony not barred by the statute of limitations based on his personal possession of a firearm, and the defendant failed to object on the basis of a defect in the indictment prior to the jury's verdict, he waived the objections now before us on appeal, and he has not demonstrated fundamental error. Also, although the majority has performed a fundamental error analysis, to the extent the majority appears to suggest that the defendant preserved or did not waive the objections to the technical defects in the indictment, the majority is incorrect. The defendant objected to second degree murder as a lesser included offense because the statute of limitations had run on that offense. He did **not** object to the reclassification of the second degree murder, object on the basis of a defect related to Count I of the indictment, or object that the jury should not consider whether the defendant carried a firearm during the acts he committed as a co-perpetrator or a principal to the murder. Thus, his waiver is clear, and he cannot rely on these technical deficiencies after being convicted on a charge he knew was being asserted against him.

## III. The reclassification of second degree murder was based on the defendant being armed with a firearm, not on a co-defendant's use of a firearm during commission of the homicide

The majority is correct that the defendant's conviction for second degree murder could not be reclassified under section 775.087(1) based on a co-defendant's possession or use of a weapon or firearm during commission of the

murder. Florida law is well-settled that section 775.087(1) does not permit vicarious enhancement. See State v. Rodriguez, 602 So. 2d 1270, 1271 (Fla. 1992) (holding that "section 775.087(1) does not, by its terms, allow for vicarious enhancement because of the action of a codefendant"); Chase v. State, 74 So. 3d 1138, 1139 (Fla. 2d DCA 2011) (reversing the reclassification of the defendant's conviction for aggravated battery where there was no evidence that the defendant possessed or used a weapon during commission of the offense); Campbell v. State, 935 So. 2d 614, 618 (Fla. 3d DCA 2006) (finding that it was error to reclassify Campbell's conviction for conspiracy to traffic in cocaine under section 775.087(1) where there was no evidence that Campbell had actual physical or personal possession of a weapon at any time during the conspiracy); Parker v. State, 906 So. 2d 1273, 1273 (Fla. 5th DCA 2005) (noting that enhancement under section 775.087(1) is impermissible unless the defendant actually possesses a weapon during the commission of a crime); Betancourt v. State, 767 So. 2d 557, 557 n.1 (Fla. 3d DCA 2000) (noting that the State properly conceded below that the reclassification of the kidnapping conviction was error where the co-defendant, not the defendant, possessed the firearm).

Contrary to the majority's decision, however, the defendant's second degree murder conviction in the instant case was not reclassified based on a co-defendant's possession or use of a firearm during commission of the murder. The

reclassification was based solely on the defendant's actual and personal possession of a firearm during his involvement in the homicide.

The defendant was convicted as a co-perpetrator or as a principal of the second degree murder of Callahan. See § 777.011, Fla. Stat. (2005)[16] (making those who "aid, abet, or procure the commission of a felony principals in the first degree). Second degree murder is the unlawful killing of the victim "by any act" imminently dangerous to another and evincing a depraved mind regardless of human life . . . ." § 782.04(2), Fla. Stat. (1981). Florida's standard second degree murder jury instruction defines an "act" as "a series of related actions arising from and performed pursuant to a single design or purpose." Fla. Std. Jury Instr. (Crim.) 7.4. The principal jury instruction given by the trial court regarding principal and accomplice liability explains:

> If the defendant helped another person or persons commit or attempt to commit a crime, the defendant is a principal and must be treated as if he had done all the things the other person or persons did if
>
> 1. the defendant had a conscious intent that the criminal act be done and
> 2. the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person or persons to actually commit or attempt to commit the crime.
>
> To be a principal, the defendant does not have to be present when the crime is committed or attempted.

Fla. Std. Jury Instr. (Crim.) 3.5(a).

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[16] We have cited to section 777.011, Fla. Stat. (2005), as that is the principal instruction that was agreed to by the parties and instructed by the trial court.

The State presented evidence that the defendant intended by his actions and words to "incite, cause, encourage, assist or advise" Bulger, Flemmi, and Martorano to kill Callahan. When the defendant's efforts to deflect suspicion away from Bulger, Flemmi, and the Winter Hill Gang regarding the Halloran murder were unsuccessful, and the defendant learned that the FBI was attempting to locate Callahan in an effort to obtain his cooperation, the defendant contacted Bulger and Flemmi and encouraged them to contact Martorano to "handle it." The defendant knew that by providing this confidential FBI information to Bulger and Flemmi and by suggesting that they contact Martorano to "handle it," the defendant was essentially signing a death warrant for the murder of Callahan.

When the defendant had provided similar information to Bulger and Flemmi, they murdered or procured the murder of the cooperating witness. For example, when the defendant warned Bulger and Flemmi that Richard Castucci was cooperating with the FBI, Bulger, Flemmi, and Martorano murdered Castucci. When the defendant learned that Halloran was cooperating with the FBI, the defendant warned Bulger and Flemmi, and Bulger, Flemmi, and other Winter Hill Gang members murdered Halloran. Thus, when the defendant contacted Bulger and Flemmi and told them that the FBI was looking for Callahan and he believed Callahan would likely cooperate with the FBI and implicate Bulger, Flemmi, and Martorano, the defendant knew the likely result—Callahan would be murdered.

The State also presented evidence that the defendant committed other "acts" to make him liable as a principal to the murder of Callahan in addition to inciting, encouraging, causing, and/or advising Bulger and Flemmi to kill or to have Callahan killed. For instance, the defendant filed false FBI reports and provided alibis for Bulger and Flemmi in an effort to pave the way for Bulger, Flemmi, and Martorano to murder Callahan without becoming suspects. Additionally, the defendant told the FBI that Callahan had a falling out with a group of Cuban drug dealers in Miami so that when Callahan's body was found in Miami, the FBI would focus its investigation on Cuban drug dealers in Miami rather than on Bulger and Flemmi in Boston.

The State also introduced uncontroverted evidence that the defendant was armed with a firearm throughout his participation in the "acts" that made him liable as a co-perpetrator or as a principal to Callahan's murder. Thus, the defendant's conviction for second degree murder was not reclassified based on a co-defendant's possession or use of a firearm. The defendant's second degree murder conviction was reclassified based on the evidence and the jury's verdict that during the acts the defendant committed as a co-perpetrator and a principal—acts that "did incite, cause, encourage, assist, or advise" Bulger, Flemmi, Martorano, and Martorano's associate to kill Callahan—the defendant was personally armed with a firearm, i.e. he "carried" a firearm on his person.

## IV. The jury specifically found that the defendant personally carried a firearm during the acts he committed that made him liable as a co-perpetrator and/or a principal to Callahan's murder

The defendant alleges, and the majority concludes, that the jury's verdict is insufficient to support the firearm enhancement. The defendant and the majority are incorrect, however, as the State, the defense, and the trial court all recognized prior to charging the jury that, without the firearm enhancement, the statute of limitations had run on second degree murder. Thus, the **defense requested** that when charging the jury on second degree murder, as a lesser included offense of first degree premeditated murder, the trial court must include a **fourth element** to second degree murder, which would require that before the jury could find the defendant guilty of second degree murder, it must also find beyond a reasonable doubt that the defendant personally carried a firearm during commission of the felony. The State agreed, and the trial court instructed the jury as follows:

> To prove the crime of **Second Degree Murder, with a Firearm**, as a lesser included offense the State must prove the following four elements beyond a reasonable doubt:
>
> 1. JOHN CALLAHAN is dead.
> 2. The death was **caused by the criminal act of JOHN J. CONNOLLY, JR.**
> 3. There was an unlawful killing of JOHN CALLAHAN by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.
> 4. During the **"act" the defendant John Connolly carried a firearm**.

An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose.

An act is "imminently dangerous to another and demonstrating a depraved mind" if it is an act or series of acts that:

1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and
2. is done from ill will, hatred, spite or an evil intent, and
3. is of such a nature that the act itself indicates an indifference to human life.

In order to convict of Second Degree Murder with a Firearm, it is not necessary for the State to prove the defendant had an intent to cause death.

(emphasis added).

The trial court's instructions to the jury, which were read to the jury and then provided to the jury during its deliberations, specifically charged that, before the jury could find the defendant guilty of **second degree murder with a firearm**, it must find beyond a reasonable doubt that **the defendant carried a firearm** during the act (or acts) the defendant committed and which caused Callahan's death.

The State also helped clarify for the jury the State's theory of prosecution, the trial court's instructions, and the verdict form in its closing arguments. The State explained to the jury that there was no dispute that the defendant was not physically present when Martorano killed Callahan, but the defendant need not be present when the killing takes place so long as the defendant did some act or said some word which was intended to incite, cause, encourage, assist, or advise the

other person or persons who actually committed the murder under the law regarding principals and accomplices.

The State then explained that there were two guns in this case: the gun used by John Martorano, who actually shot Callahan, and the gun carried by the defendant when he committed the acts that made him a principal to the murder. The State went over the jury instructions for second degree murder and the evidence that had been presented regarding the defendant's possession of a firearm during his role in Callahan's murder.

Specifically, the State told the jurors that before they could find the defendant guilty of second degree murder with a firearm, as a lesser included offense of first degree premeditated murder, the State had to prove **four** elements beyond a reasonable doubt. When addressing the fourth element, that during the "act" the defendant carried a firearm, the State explained:

> And the fourth, which is a unique act element, which applies to this and the criminal conspiracy as well, is that during the act the defendant, John Connolly, carried a firearm.
> Now what does that mean? It does not mean that John Connolly had to have a gun and shoot Callahan. **It meant and it means that during the time John Connolly is advising, discussing, assisting and conspiring with Flemmi, Bulger and ultimately Martorano that he had a gun.**
> And how do you know he had a gun? Because he's an FBI agent, and all the witnesses told you that as a FBI agent he's required to carry his gun.
> **He carried his gun. He had his gun. Flemmi saw it when they met.** And if you--when he's meeting with his informants every agent says, you don't meet with an informant without a gun.

> And he's an FBI agent. And, you know, he was carrying his gun. He doesn't have to have used his own gun, just had to have had it at the time he's discussing it with them.
> And the act includes a series of related actions arising from and performed pursuant to a single design or purpose. And in this case, it's the murder of John Callahan.

(emphasis added).

Lastly, the verdict form presented to the jury specifically required the jury to find that the defendant carried a firearm in order to convict him of second degree murder. Notably, while the firearm language was not included in the verdict form for first degree murder, it **was** included in the verdict form for second degree murder.

**VERDICT-COUNT I**

We the jury, in Miami-Dade County, Florida, this 6 day of NOVEMBER, 2008, find the defendant, JOHN J. CONNOLLY, JR.,

**COUNT 1 (check only one):**

☐ GUILTY of FIRST DEGREE MURDER AS CHARGED IN COUNT 1 OF THE INDICTMENT.

☑ GUILTY of SECOND DEGREE MURDER, WITH A FIREARM, AS A LESSER-INCLUDED OFFENSE OF FIRST DEGREE MURDER.

☐ NOT GUILTY.

Based on the fact that, pursuant to the defendant's request, the firearm reclassification was treated as an element of second degree murder; the State's arguments to the jury; the trial court's instructions to the jury that it must find that the defendant carried a firearm during the acts he committed as a co-perpetrator or

as a principal to Callahan's murder as a necessary element of second degree murder with a firearm; and the jury's verdict reflecting that the State proved the firearm element beyond a reasonable doubt, the jury's verdict sufficiently supports the firearm reclassification of the second degree murder.

## V. Reclassification of the second degree murder was lawful because the State presented evidence and the jury found that the defendant personally carried a firearm during his role as a co-perpetrator or as a principal to second degree murder

The majority finds, as a matter of law, that section 775.087(1) does not permit reclassification of an offense unless the defendant possessed **the** weapon **used** during commission of the murder. The majority further suggests that second degree murder cannot be a continuing or "on-going" offense, and, thus, because the defendant was not present when the actual shot that killed Callahan was fired, section 775.087(1) cannot be applied to reclassify the second degree murder based on the evidence the defendant personally carried a firearm during the acts he committed as a principal to the murder. In other words, although the majority concedes that the defendant need not be present when the trigger is pulled to be lawfully convicted of the homicide, it believes the law requires that the defendant be present when the trigger was pulled to permit a reclassification of the murder under section 775.087(1).

The majority is incorrect, and its holding improperly narrows section 775.087. Section 775.087(1) does not require the defendant's use or possession of

the actual murder weapon. Rather, section 775.087(1) allows for reclassification of an offense if the defendant carries **any** firearm at any time during commission of the felony. In this case, the acts committed by the defendant (during which it is undisputed that he was carrying a firearm) were the very acts relied on by the State as both the elements of second degree murder and the acts the defendant committed as a principal to the second degree murder. Thus, section 775.087(1) was correctly applied to reclassify the offense.

### A. Section 775.087(1) does not require the defendant's use or possession of the murder weapon

Section 775.087(1) provides, in relevant part as follows:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant **carries**, displays, uses, threatens to use, or attempts to use **any weapon or firearm**, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified: . . . .

(emphasis added). The statute is clear and unambiguous. "Use" of "the" firearm (or weapon) during the commission of the felony is not required. It is merely one of many options from which the State can choose to reclassify an offense. Here, the jury found that the defendant carried a firearm during his acts giving rise to the second degree murder conviction. If the defendant "carries" "any" weapon during the commission of the felony, section 775.087(1) is applicable.

### B. Second degree murder, depending on the circumstances, may be a

**continuing offense**

The majority reaches its conclusion by finding that the second degree murder was committed only at the precise moment Martorano pulled the trigger and fired the shot that killed Callahan, and, because the defendant was not present at that finite moment, section 775.087(1) may not be used to reclassify his conviction for second degree murder although he was carrying a firearm during the acts he committed in furtherance of the murder. Again, the majority is incorrect. The statute establishing the elements of second degree murder do not provide such limiting language, and the law governing principals and accomplices specifically contemplates that the acts committed by a co-defendant in the furtherance of the felony may be committed at any time and any place.

Neither section 777.011, the statute pertaining to principals, nor section 782.04(2), the statute pertaining to second degree murder, requires that the defendant be present or that he commit the **last act** that led to the victim's demise. Section 777.011, the principal statute, holds the defendant legally responsible as a principal, whether or not he is present when the crime is committed, if he "**did some act**"—not the last act—"or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit or attempt to commit the crime." See State v. Dene, 533 So. 2d 265, 270 (Fla. 1988) (holding that, pursuant to section 777.011, a principal does not have to

be at the scene of the crime); State v. Lowery, 419 So. 2d 621, 623-24 (Fla. 1982) (holding that, although Lowery was not present when a co-felon murdered the victim, Lowery was as equally culpable as his co-felon who actually did the killing as a principal under section 777.011); Hall v. State, 403 So. 2d 1321, 1323 (Fla. 1981) (holding that even if Hall did not pull the trigger, he was a principal to the murder because an aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme).

Additionally, section 782.04(2), the second degree murder statute, only requires the State to prove that the victim's death was caused by a criminal act or acts of the defendant. The statute specifies that the act or acts that will subject a defendant to prosecution under section 782.04(2) are those that are "imminently dangerous to another and evincing a depraved mind regardless of human life . . . ." Under section 782.04(2), an act is imminently dangerous to another and evincing a depraved mind if it is an act or series of acts that: (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another; (2) is done from ill will, hatred, spite or evil intent; and (3) is of such a nature that the act itself indicates an indifference to human life. Conyers v. State, 569 So. 2d 1360, 1361 (Fla. 1st DCA 1990). Thus, contrary to the majority's conclusions, the law does not require that the defendant be present or that he commit the last act that caused the defendant's death.

The acts the defendant committed (divulging key information and directing Bulger and Flemmi to "handle" Callahan) clearly support his conviction for second degree murder because it is undisputed that the defendant was armed during these acts. Although section 782.04(2) provides that "it is not necessary for the State to prove the defendant had an intent to cause death" to be convicted of second degree murder, the State clearly proved that the defendant committed acts that a person, especially this defendant, would reasonably know would result in Callahan's death. As explained previously, the defendant knew Bulger and Flemmi had murdered at least two other individuals in similar circumstances.

It is also important to note that the defendant had a personal interest in silencing Callahan. The defendant knew that once Callahan began cooperating with the FBI, Bulger and Flemmi would be arrested, and then the defendant, himself, would become vulnerable. If Bulger and Flemmi were arrested, either or both could decide to cooperate with the FBI for reduced sentences and "give up" the defendant, which is precisely what happened when Flemmi was arrested. The defendant's act of divulging the information and asking Bulger and Flemmi to "handle" Callahan was itself sufficient to support a conviction for second degree murder, and the State presented evidence that the defendant was armed with a firearm during this act. As Wayne R. LaFave's authoritative treatise on Substantive Criminal Law recognizes, speech itself can be the act that gives rise to

criminal liability for murder.

> Mere thoughts must be distinguished from speech; an act sufficient for criminal liability may consist of nothing more than the movement of the tongue so as to form spoken words. Some crimes are usually committed by the act of speech, such as perjury and false pretenses and the inchoate crimes of conspiracy and solicitation. Other crimes, usually committed by other forms of activity, may nevertheless be committed by **spoken words**; thus one person can murder another by maneuvering him into the electric chair by giving perjured testimony at his trial for a capital crime. And, because one is guilty of a crime if he encourages or commands, or hires another to commit it, it would seem practically all crimes may be committed by conduct which includes no voluntary bodily movement other than speaking.

1 Wayne R. LaFave, Substantive Criminal Law § 6.1(b) (2d ed. 2003) (emphasis added) (footnotes omitted).

Because this act committed by the defendant (providing the information, incentive, encouragement, and direction to Bulger and Flemmi to kill Callahan), was done from "ill will . . . or evil intent," and was "of such a nature that the act itself indicates an indifference to human life," and this act led to Callahan's death, the defendant, under the law, is treated as an actual participant in the murder. It makes no difference whether the defendant had hired (procured) a hit man, turned to his mob friends to murder Callahan, or pulled the trigger himself, he is equally guilty.

See Hayes v. State, 118 So. 3d 1008 (Fla. 1st DCA 2013) (noting that Florida Standard Jury Instruction (Criminal) 3.5(a) implements section 777.011, which defines "principal in the first degree" as follows: "Whoever commits any criminal

offense against the state, whether felony or misdemeanor, or aids, abets, counsel, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such defense.").

Also, it does not matter whether he served as a lookout, provided the gun, or provided the information. See Staten v. State, 519 So. 2d 622, 624 (Fla. 1988) ("Under our law, both the actor and those who aid and abet in the commission of a crime are principals in the first degree. . . . Clearly, the getaway driver who has prior knowledge of the criminal plan is 'waiting to help the robbers escape' falls into this category and is, therefore, a principal.") (quoting Enmund v. State, 399 So. 2d 1362, 1370 (Fla. 1981)). As long as the State proves that the act the defendant committed was "imminently dangerous to another and evincing a depraved mind regardless of human life," and the act caused the victim's death, § 782.04(2), the defendant is guilty as a co-perpetrator of the second degree murder of Callahan. And because the defendant was armed with a firearm when he committed this act, reclassification under section 775.087(1) was lawful.

The majority's "last act" argument is premised on its holding that second degree murder cannot be a "continuing crime" and, therefore, because the acts committed by the defendant occurred prior to the actual shooting, his conviction

for second degree murder could not be reclassified even though he was armed with a firearm when he committed these acts. The majority's "last act" requirement is without merit. There is no requirement that the defendant commit the last act that caused the victim's death, that he be present during this final act, or that he possessed the weapon used during the final act that caused the victim's death to be charged as a principal for murder.

For example, consider a homicide committed by poisoning the victim. In this hypothetical, the victim's husband and son decide to murder the victim, and they begin lacing the victim's food with a deadly poison. While the husband is out of town on a business trip, the son uses the last of the poison they were feeding the victim, so the son obtains another bottle of the lethal substance, and, after the son administers two more doses, the victim finally dies. It is undisputed that the husband was not present when the last dose of poison was administered, and the final dose was from a second batch of poison obtained by the son. Although the weapon (poison) used by the son during the "last act" was not the same weapon used by the husband, it cannot be disputed that both are criminally liable for the murder, and each was armed with a weapon during the acts they committed that were imminently dangerous to another and evincing a depraved mind regardless of human life. Clearly both are guilty of at least second degree murder with a weapon. The reasoning of the majority opinion would not allow the husband's

sentence to be reclassified, while the son's could—an absurd result.

In Menendez v. State, 521 So. 2d 210, 212 (Fla. 1st DCA 1988), the First District Court of Appeal found that Menendez's trafficking offense was an on-going offense, and, thus, section 775.087(1) did not require that he be in possession of a firearm during any particular point during the crime. Here, as in Menendez, the crime was on-going, and the defendant was armed while he committed acts which were intended to, and which did, incite, cause, encourage, assist, or advise his partners in crime (Bulger, Flemmi, and Martorano) to commit the murder. Thus, the reclassification of the defendant's conviction for second degree murder was lawful.

What the majority is essentially doing is grafting a requirement into the text of section 775.087(1) that is not present—that the carrying of the firearm must be "both temporally and spatially related to the crime committed." However, the Florida legislature intended that the reach of section 775.087 be as broad as possible while allowing the State to exercise its discretion when the firearm was not used in furtherance of the felony. Section 775.087(1) provides for a reclassification of a felony whenever a person "carries, displays, uses, threatens to use, or attempts to use any weapon" or firearm "during the commission" of the felony.

We must assume that the Florida legislature chose its words carefully when it drafted section 775.087, and it clearly chose to use very broad language to encompass a wide variety of factual permutations. Not only does section 775.087(1) permit reclassification where a weapon is used during the commission of a felony, it also allows the offense to be reclassified if the defendant "carries, displays, threatens to use, or attempts to use" any weapon. It is clear that the ambit of section 775.087(1) allows harsher sentencing for defendants who in any way associate with a weapon while engaging in a dangerous crime.

The Legislature has also made its intent clear that section 775.087 is to be applied broadly through subsequent legislation. Section 27.366, Florida Statutes (2005), provides, in relevant part:

> It is also the intent of the Legislature that prosecutors should appropriately exercise their discretion in those cases in which the offenders' possession of the firearm is incidental to the commission of a crime and not used in furtherance of the crime, used in order to commit the crime, or used in preparation to commit the crime.

Although section 27.366 addresses the application of subsections (2) and (3) of section 775.087, the Legislature would not have enacted section 27.366 unless section 775.087 provides prosecutors with the discretion to reclassify offenses and/or enhance sentences where possession of a firearm is "merely incidental" to the commission of the crime, as it was here. To accept the majority's

interpretation of section 775.087 would, therefore, reduce section 27.366 to mere surplusage.

## SUMMARY

Because the defendant did not timely object to the reclassification of second degree murder based on a defect in the indictment, he must demonstrate fundamental error to obtain a reversal of his conviction and sentence as to second degree murder with a firearm. The defect in the indictment was not a failure to charge an element of the crime, and the defendant had actual notice that the State intended to prove that he carried a firearm during his role as a principal to the murder and that the State would seek a reclassification of the murder charge. Therefore, no fundamental error has been shown. The jury's finding was also legally sufficient to permit reclassification of the second degree murder. The defendant specifically requested, and the trial court instructed the jury, that the firearm reclassification of second degree murder was to be treated as an element of second degree murder. Thus, the jury was instructed that the lesser included offense of first degree murder was **second degree murder with a firearm**. The jury was also instructed that unless it concluded that the State proved beyond a reasonable doubt that the defendant carried a firearm when he committed an act or acts that were imminently dangerous to another and evincing a depraved mind regardless of human life, and that these acts caused Callahan's death, the jury must

find the defendant not guilty. Thus, it cannot be disputed that the jury found that the defendant carried a firearm during the acts giving rise to his conviction for second degree murder.

Lastly, reclassification under section 775.087 does not require **use** of **the** weapon that actually killed the victim or the defendant's physical presence during the last act that resulted in the victim's death. Thus, because the reclassification of the defendant's conviction for armed second degree murder was based on his personal possession of a firearm during his role as a principal to the murder, the reclassification was not error.

Accordingly, I would deny rehearing.