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IN THE SUPREME COURT OF FLORIDA

JOHN RICHARDS,

Petitioner,

v. Case No. SC14-184

STATE OF FLORIDA,

Respondent.

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ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged with attempted second degree murder arising from the stabbing of a fellow homeless man. At trial, State witnesses testified that Petitioner spontaneously bit and then stabbed the victim, David Russell. (Trial Tr., Vol. 3, p. 167, 208-209). Two witnesses further testified that Petitioner expressed that he tried "to kill the motherfucker" and referenced knowledge that the victim was "bleeding out."(Trial Tr., Vol. 3, p. 193, 222-223). Following a charge conference, the parties agreed that the trial court would instruct the jury on the permissive lesser offenses of aggravated battery, aggravated assault, battery and assault, and, at Petitioner's request, the crime of attempted manslaughter. Richards v. State, 128 So. 3d 959 (Fla. 2d DCA 2013)review granted, No. SC14-184, 2016 WL 3127691 (Fla. May 26, 2016); (Trial Tr., Vol. 3, p. 365-367). Following closing arguments, the court instructed the jury as agreed. (Trial Tr., Vol. 3, p. 414-418). The jury convicted Petitioner of attempted second degree murder. (Trial Tr., Vol. 3, p. 434-435).

On direct appeal, Petitioner challenged his conviction, arguing that the trial court had given an erroneous manslaughter instruction. While the appeal was pending, this Court issued

its decision in Williams v. State, 123 So. 3d 23 (Fla. 2013). A three judge panel of the Second District Court of Appeal, applying Williams, affirmed Petitioner's judgment and sentence. Richards, 128 So. 3d at 963-964. The Second District reasoned that, despite the erroneous instruction, relief under a fundamental error analysis was unavailable. It concluded that the erroneous instruction was more than one step removed from the offense with which Petitioner was convicted. The Second District further concluded that Petitioner's assertion of a self-defense theory resulted in him conceding the issue of intent. This concession prevented the issue of intent from supporting a fundamental error claim.

SUMMARY OF THE ARGUMENT

The District Courts of Appeal correctly concluded that the jury instruction given in this case, while erroneous under Williams v. State, 123 So. 3d 23 (Fla. 2013), did not entitle Petitioner to relief under a theory of fundamental error.

ARGUMENT

ISSUE

THE SECOND DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE ATTEMPTED MANSLAUGHTER JURY INSTRUCTION GIVEN IN PETITIONER'S CASE DID NOT CONSTITUTE FUNDAMENTAL ERROR.

On retrial for attempted second degree murder, Petitioner presented a claim of self-defense. He claimed that he believed himself in danger when he first bit, then stabbed his victim in the neck. In support of this defense, Petitioner specifically requested that the trial court instruct the jury on the crime of attempted manslaughter. The trial court agreed and instructed the jury in accordance with the standard jury instruction. Petitioner did not object.

Subsequently, this Court found the standard jury instruction on attempted manslaughter to be in error. Williams v. State, 123 So. 3d 23 (Fla. 2013). The Second District Court of Appeal applied this Court's precedent and determined that the attempted manslaughter instruction, given at Petitioner's request during his trial, did not result in fundamental error. Petitioner now seeks a decree from this Court that the Second District Court of Appeal erred in applying this Court's precedent. Petitioner's fundamental error claim is based on two substantive arguments:

> 1) the Second District Court of Appeal erred in finding that the crime of attempted manslaughter was more than one step removed from the crime of attempted second degree murder; and
>
> 2) the Second District Court of Appeal erred in finding that no issue of intent existed, based on Petitioner's theory of defense.

Respondent rejects Petitioner's contention that the Court of Appeals erred in applying this Court's precedent in Williams or that any conflict exists between the Second District's resolution of this case and the decisions of sister courts.

The Williams decision left untouched the principles of fundamental error previously, and subsequently, enumerated by this Court and properly applied by the Second District Court of Appeal in this case. Despite a defendant's right to "'have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged,'" jury instructions are, nevertheless, "subject to the contemporaneous objection rule." State v. Delva, 575 So. 2d 643, 644 (Fla. 1991) citing Gerds v. State, 64 So. 2d 915, 916 (Fla. 1953)(emphasis added). The contemporaneous objection rule requires a litigant to object to an error at the time it is made. When a defendant forgoes raising an objection at trial, his only option to obtain review on appeal is to raise a claim of fundamental error. State v. Delva, 575 So. 2d at 644.

Fundamental error only exists where the mistake "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So. 2d 481 (Fla. 1960). "In other words, 'fundamental error occurs only when the omission is ***pertinent or material*** to what the jury must consider in order to convict.'" State v. Delva, 575 So. 2d at 644-45 citing Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982)(emphasis added). Where the alleged error arises from a jury instruction on "an affirmative defense, as opposed to an element of the crime, fundamental error only occurs where a jury instruction is 'so flawed as to deprive defendants claiming the defense ... of a fair trial.'" Martinez v. State, 981 So. 2d 449, 455 (Fla. 2008) citing Smith v. State, 521 So. 2d 106, 108 (Fla. 1988).

A. Two Steps Removed

In the context of a jury instruction, fundamental error only exists when the erroneous instruction is for a crime that is two, or more, steps removed from the crime for which the defendant is convicted. "The significance of that distinction is more than merely a matter of number or degree, since [when an instruction is two steps removed] the jury is given a fair opportunity to exercise its inherent "pardon" power by returning

a verdict of guilty as to the next lower crime." State v. Abreau, 363 So. 2d 1063, 1064 (Fla. 1978). Thus, "[o]nly the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible. Where the omitted instruction relates to an offense two or more steps removed, . . . reviewing courts may properly find such error to be harmless." Id. at 1064.

In this case, the trial court instructed the jury on the charged offense, attempted second degree murder, the lesser offenses of aggravated battery and assault and attempted manslaughter. The schedule of lesser included offenses for attempted second degree murder, at the time the stabbing occurred, did not include the crime of attempted manslaughter. The Schedule of Lesser Included Offenses in the Florida Standard Jury Instructions (Criminal) 6.4 (2006); In re Standard Jury Instructions In Criminal Cases--Report No. 2013-02, 137 So. 3d 995 (Fla. 2014)(amending schedule of lesser included offenses for second degree murder to include attempted voluntary manslaughter as a category one lesser included offense). In fact, the schedule contains no category one necessarily included lesser offense and includes only the crimes of attempted assault, attempted battery, assault and battery as category two lesser offenses. In response to the defense's request, the

trial court included the jury instruction on attempted manslaughter. After discussion among the parties, the trial court read the aggravated battery instruction followed by the attempted manslaughter instruction.

By agreement among the parties, and consistent with the schedule of lesser included offenses, the attempted manslaughter offense was listed after the battery instruction, making it as two steps removed from the charged offense of attempted second degree murder. Moore v. State, 932 So. 2d 524, 527 (Fla. 4th DCA 2006)("The schedule of lesser included offenses is designed to be a complete, authoritative compilation that is presumed to be correct and upon which a trial court can confidently rely."). Thus, at the outset, any error on this point has been waived.

The attempted manslaughter charge is properly placed two steps from the charged offense of attempted second degree murder. As observed herein, there are no necessary lesser included offenses to the charge of attempted second degree murder. This fact is a key distinction between the present case and the decisions Petitioner cites as authority. In Williams, Cisneros-Gonzales Grandison and Pierce, the State charged the defendants with attempted or accomplished first degree murder. Williams v. State, 123 So. 3d 23, 25 (Fla. 2013); Cisneros-Gonzalez v. State, 185 So. 3d 714 (Fla. 3d DCA 2016); Grandison

v. State, 133 So. 3d 1064, 1064 (Fla. 4th DCA 2014); Pierce v. State, 121 So. 3d 1091, 1092 (Fla. 5th DCA 2013).

When the charge is first degree murder, the schedule of lesser included offenses voluntary manslaughter is one step removed from murder in the second degree. That is why the defendants' second degree murder convictions in those cases were "one step removed" from the manslaughter charge with the erroneous instruction. Not so when the primary charge is attempted second degree murder. Accordingly, these authorities are not persuasive on the question presented in this case. Williams, 123 So. 3d at 25("Amos Augustus Williams was charged with the attempted first-degree murder of his ex-girlfriend Samantha Lindsay in 2006. . . Williams was ultimately convicted of attempted second-degree murder."); Cisneros-Gonzalez, 185 So. 3d at 714(the pleadings filed in the Third District's docket in this case reflect that the State originally charged Appellant with attempted first-degree murder); Grandison, 133 So. 3d at 1064("Grandison was charged with the attempted first degree murder of his wife. . .He was subsequently convicted of attempted second degree murder, a lesser included offense."); Pierce, 121 So. 3d at 1092("Pierce was charged with attempted first-degree premeditated murder with a firearm and a number of additional charges. As to the attempted murder charge, the

jury was instructed on attempted first-degree murder, attempted second-degree murder, and attempted voluntary manslaughter by act."); see also Mike v. State, 41 Fla. L. Weekly D954 (Fla. 2d DCA Apr. 15, 2016)(where, without citation to authority, the Second District Court of Appeal notes that "Mr. Mike was convicted of attempted second-degree murder, a crime one step removed from attempted manslaughter.").

Aggravated assault and battery are the proper, enumerated, permissive lesser included offenses of attempted second degree murder. The crime of attempted manslaughter is, at most, a permissive lesser included offense. Thus, the trial court was required to determine the order in which the lesser included offenses would be listed on the verdict form. When ordering lesser included offenses on a verdict form, "[t]he charged crime should be followed [] by the determined lesser included offenses in descending order by degree of offense." Sanders v. State, 944 So. 2d 203 (Fla. 2006).

Aggravated battery is a second degree offense. § 784.045, Fla. Stat. (2007). Attempted manslaughter is a third degree offense. §§ 782.07(1), Fla. Stat. (2007); 777.04(4)(d), Fla. Stat. (2007). Thus, the trial court was obliged to place attempted manslaughter in descending order below aggravated battery, thereby, making it two steps removed from the offense

of which the jury convicted Petitioner. This distance gave the jury an opportunity to use its pardon power; an opportunity which the jury rejected. State v. Abreau, 363 So. 2d at 1064.

The crime of attempted manslaughter being two steps removed from the crime of second degree murder, any error in the attempted manslaughter instruction is too far removed to support a claim of fundamental error. Accordingly, even had Petitioner not foreclosed appellate review by requesting the attempted manslaughter instruction, agreeing to its placement on the verdict form and declining to challenge the verdict form on direct appeal, the Second District properly denied Petitioner's fundamental error claim.

B. The Issue Of Intent

Fundamental error relief is also unavailable given that the error in the manslaughter instruction was not a "material element" in dispute at trial. Under a fundamental error analysis, the Court must look at the subject instruction and determine if the error "'applies to an element of the crime that is in dispute' and 'is pertinent or material to what the jury must consider' to convict." Williams, 123 So. 3d at 29(fundamental error "where the defendant is convicted of a crime no more than one step removed from the improperly instructed offense."). Such a finding is a condition precedent

to a conclusion that fundamental error exists.

As reflected in Williams, the attempted manslaughter instruction erroneously required proof of intent to kill, instead of properly requiring an intentional act that could have resulted in death. Thus, a material element at issue in a manslaughter case, intentional action, was the sole error in the instruction. Petitioner's defense strategy prevents him from relying on this fact to support a claim for relief based on fundamental error.

In this case, Petitioner argued that he stabbed the victim in self-defense. A claim of self-defense both admits and seeks to excuse criminal action. Martinez, 981 So. 2d at 453; Bolin v. State, 297 So. 2d 317 (Fla. 3rd DCA 1974). By claiming self-defense, Petitioner conceded the only intent relevant in an attempted manslaughter case- the commission of an intentional act. Lamb v. State, 18 So. 3d 734, 735 (Fla. 1st DCA 2009)("attempted manslaughter by act requires only an intentional unlawful act."). Petitioner's citations to cases holding that a manslaughter conviction can arise from an "imperfect self-defense" claim, reflect the effect of the concession at the heart of a self-defense claim. see e.g., Dorsey v. State, 74 So. 3d 521, 525 (Fla. 4th DCA 2011); Pierce v. State, 376 So. 2d 417, 418 (Fla. 3d DCA 1979).

Petitioner's defense reflects that he intentionally stabbed the victim to defend against the victim's alleged attack. As stated in Griffin, the only question of intent which arises in regard to the crime of attempted voluntary manslaughter is the existence of an intentional act which could have resulted in the victim's death. Griffin v. State, 160 So. 3d 63 (Fla. 2015). Since attempted voluntary manslaughter does not require proof of an intent to kill, Petitioner's concession of committing an intentional act removed the question of intent from the "pertinent and material" matters to be considered by the jury in assessing the attempted manslaughter charge.

By pursuing this defense, without reservation, Petitioner admitted the elements of the attempted manslaughter offense. Brown v. State, 41 Fla. L. Weekly D788 (Fla. 2d DCA Mar. 30, 2016)("By arguing without qualification that he or his friend acted in self-defense, Mr. Brown necessarily conceded that either intentionally caused the victim's death."). The Second District correctly concluded that the question of intent was not a material issue as it pertained to the erroneous jury instruction on review.

This analysis should not alter based on an argument that intent was still at issue because Petitioner's self-defense claim did not concede the state of mind relevant to the crime of

attempted second degree murder. Petitioner does not challenge the second degree murder instruction given in his case. Thus, the fundamental error analysis is limited to the challenged instruction and the "material elements" at issue in ***that*** instruction. Given that a self-defense claim admits intentional action, the self-defense claim lodged in this case conceded a material issue in dispute on a attempted manslaughter charge.

Moreover, the concession inherent in a self-defense claim is not withdrawn when a jury rejects that defense. The admission at the heart of that defense carries forward as the jury evaluates the charged and lesser included offenses and the conceded element is counted against the defendant on each offense. Thus, while a jury which "finds that the killing was not justified or excusable, [] must then determine the degree of the offense based upon the intent, if any, that the State proves existed at the time of the homicide," the jury must include the concession in doing so. Griffin v. State, 160 So. 3d at 69("Certainly, where a defendant expressly concedes one or more elements of a crime, those elements [are] no longer in dispute for purposes of a fundamental error analysis."). The jury's rejection of the affirmative defense should not place compel the State to then prove an element which a defendant has already strategically conceded.

Taken in its totality, Griffin does not support application of the fundamental error doctrine to Petitioner's case. First, Griffin involved a defense distinct from the one asserted by Petitioner. In Griffin, the State charged the defendant with second degree murder for the shooting death of the victim. The defense argued misidentification, not self-defense. Griffin admitted to being present and interacting with the victim but denied any responsibility for the shooting. This Court determined that Griffin only admitted the manner of the death, by gunshot, not the underlying intent. Griffin, 160 So. 3d at 68. The Court concluded that a mere denial of identity and "remaining silent on the remaining element of the crimes" did not relieve the State of its burden of proof. Griffin, 160 So. 3d at 68. Accordingly, the jury needed to consider intent as to every charged and lesser included homicide offense in reaching its verdict.

In contrast, Petitioner in this case argued that he acted in self-defense. Such a defense admits the criminal act and seeks to excuse it. Martinez, 981 So. 2d at 453("Thus, when a defendant asserts a claim of self-defense, he admits the commission of the criminal act with which he was charged but contends that the act was justifiable."). Moreover, with an offense such as attempted manslaughter, such an admission admits

the intent element of the offense; namely, an intentional act. Any attempt to apply Griffin's intent analysis must be tempered by the critical differences in affirmative defenses asserted by the two defendants.

Griffin is further distinguishable based on the fact that the erroneous instruction in Griffin was for an offense one step removed from the offense on which the jury received the erroneous instruction. In 2011, the State charged Griffin with a completed murder in the second degree and voluntary manslaughter. The schedule of lesser offenses identifies voluntary manslaughter as a category one necessary lesser included offense of second degree murder. The Schedule of Lesser Included Offenses in the Florida Standard Jury Instructions (Criminal) 7.4 (2016).

In contrast, in this case the State charged and the jury convicted Petitioner of ***attempted*** second-degree murder, an offense which, in 2007 when the crime occurred, was more than one step removed from the offense of attempted manslaughter, the offense on which Petitioner's erroneous instruction claim is based. Richards v. State, 39 So. 3d 431, 432 (Fla. 2d DCA 2010)(reciting that the stabbing occurred in October 2007"); In re Standard Jury Instructions In Criminal Cases--Report No. 2013-02, 137 So. 3d at 1004-1007(adding category one lesser

included offense to crime of attempted second degree murder); but see Wimberly v. State, 162 So. 3d 73, 74 (Fla. 4th DCA 2014)(although statute was not amended until 2014- the year the opinion was released- Fourth District identifies attempted voluntary manslaughter as a category one felony for crime committed prior to 2010); Wimberly v. State, 41 So. 3d 298 (Fla. 4th DCA 2010)(original direct appeal affirming conviction for attempted second degree murder with a firearm).

Finally, the question presented in Griffin should be limited to the narrow issue decided in that case. The issue presented in Griffin was whether the defense of misidentification removed the question of intent from being at issue, such that fundamental error relief was unavailable. The decisions on review, Wimberly v. State and Griffin v. State, specifically addressed the intent element as it related to the erroneous instruction. Wimberly v. State, 162 So. 3d 73, 75 (Fla. 4th DCA 2014)("Petitioner was charged with attempted first-degree murder but convicted of a lesser offense. Intent was a disputed issue at trial, and the erroneous instruction was pertinent to an issue that the jury had to consider in order to convict."); Griffin v. State, 128 So. 3d 88, 90 (Fla. 2d DCA 2013), decision quashed, 160 So. 3d 63 (Fla. 2015)("There is no dispute regarding the elements of an offense when the manner of

the crime is conceded and the sole defense is mistaken identity. [ ] Because there was no dispute regarding the element of intent, the erroneous jury instruction on the intent element of the lesser included offense of manslaughter did not constitute fundamental error.").

Griffin's intent analysis applies to the narrow question of misidentification defenses, and its language regarding other material elements in unchallenged homicide instructions should be limited to that context. This conclusion is supported by the opinion's opening affirmation, which makes clear that a fundamental error analysis should focus on the erroneous instruction:

> We begin by reaffirming that our precedent requires that, for an unpreserved error in jury instruction to be found fundamental on appeal, the error must be "pertinent or material to what the jury must consider in order to convict."

Griffin, 160 So. 3d at 67-68(internal citations omitted).

Having found that the defense of misidentification did not prevent the issue of intent from being a disputed issue at trial, the Griffin Court concluded that the question of intent must be considered in regard to each of the applicable homicide offenses, be they the primary charge or a lesser offense. By arguing self-defense, Petitioner in this case conceded the issue

of intent as to the erroneous instruction and the Court need not consider the question of intent as it relates to offenses with non-challenged instructions.

"[A] defective instruction in a criminal case can only constitute fundamental error if the error pertains to a material element that is disputed at trial." Daniels v. State, 121 So. 3d 409, 418 (Fla. 2013). Here, Petitioner did more than dispute a single material element of the offense. He admitted the elements of the attempted manslaughter offense and sought to excuse his actions by claiming that he acted in self-defense.

As reflected in the record, Petitioner bit the victim and then responded to the victim's defending himself by stabbing the victim in the neck. Richards, 39 So. 3d at 432("The Defendant pulled out a knife and began waving it around. When Mr. Russell complained about this, the Defendant bit him on the arm. Mr. Russell tried to get the Defendant to stop biting him by grabbing the Defendant's face. When Mr. Russell did this, the Defendant cut Mr. Russell's ear with the knife and stabbed him in the neck."). Petitioner then claimed self-defense, removing the issue of intent from the jury's consideration of the challenged instruction. Based on this concession, the error in the manslaughter instruction "did not prevent the jury from considering whether the evidence fit the elements of

manslaughter." Brown v. State, 41 Fla. L. Weekly D788 (internal citation omitted).

Whether a fact is a material element in dispute for purposes of a fundamental error analysis is not the same question as whether the State has met its burden of proof. Respondent does not suggest that the concession as to one element relives the State of its burden of proving an offense. The State did successfully prove the elements of second degree murder and the jury convicted Petitioner on that charge.

What Respondent is arguing is that a defendant who chooses to assert a defense is bound by his admissions. The concession of intent inherent in Petitioner's self-defense claim meant that the issue of intent was no longer in dispute as it related to the erroneous instruction. Further, admissions made in pursuit of a self-defense claim applied to any and all charges against Petitioner. Accordingly, no basis for fundamental error relief exists. The Second District properly determined that the erroneous instruction did not address a material issue in dispute and, therefore, did not support relief under the principle of fundamental error.

CONCLUSION

The Second District properly concluded that the erroneous attempted manslaughter instruction given in this case did not constitute fundamental error. The Second District's conclusion is consistent with this Court's decisions in Williams and Griffin. The Second District's ruling should therefore be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida Court's eFiling Portal to William L. Sharwell, Assistant Public Defender, Office of the Public Defender, this 25th day of July, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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