

IN THE SUPREME COURT OF FLORIDA

JOHN RYNELL RICHARDS , :

Petitioner, :

vs. :

Case No. SC14-184

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The trial transcript is contained in a 3-volume Addendum to the record. References to the transcript are designated by the letter "A", followed by volume number, and the page number.

STATEMENT OF THE CASE AND FACTS

Petitioner, John Rynell Richards, was charged by information with attempted first degree murder in connection with a stabbing following a dispute over consumption of alcohol. Petitioner's conviction for the lesser offense of attempted second degree murder was reversed by the Second District Court of Appeal because the jury instruction on the justifiable use of deadly force was found to be fundamental error. Richards v. State, 39 So. 3d 431 (Fla. 2d DCA 2010).

Prior to retrial, a second amended information was filed charging attempted second-degree murder. (v1:R11-12) A jury trial was held on February 15th and 16th 2011, before the Honorable Richard Luce, Circuit Judge. (A1-3) The relevant facts as summarized by the Second District Court of Appeal:

Mr. Richards was charged with attempted second-degree murder after he stabbed David Russell in the neck, apparently in an altercation over some beer. During his trial, Mr. Richards testified that both men were seated on a bench in the park, when Mr. Russell, not satisfied with the vodka that he had been sharing with friends, began to hound Mr. Richards for a beer, a request Mr. Richards repeatedly rejected, citing his lack of funds to buy more when his current supply was exhausted. Unable to take "no" for an answer, Mr. Russell helped himself to some of the beer Mr. Richards was drinking after Mr. Richards sat it down for a moment.

Mr. Richards complained, and Mr. Russell responded with various threats and a punch to Mr. Richards' face. Mr. Richards explained that he tried to stand up but Mr. Russell, who was now standing, "pushed me back down, slammed me on the bench and grabbed me by the throat." Mr. Richards stated that he pulled out his knife in self-defense and that "after I stuck him, he stopped, well, squeezing my throat" and eventually he slumped down and Mr. Richards was able to get up.

An officer who interviewed Mr. Richards after the stabbing testified that Mr. Richards had told him that Mr. Russell had "bowed up" on him and he "wasn't going to be disrespected" and that he "hoped he killed the dude, as he needed to make sure that other people understood that he wasn't to be disrespected." Other witnesses offered a different account. They said they saw Mr. Richards lean over and bite Mr. Russell and then start swinging the knife at Mr. Russell's head and throat. One of the witnesses said he pried the knife from Mr. Richards' hand while Mr. Russell held Mr. Richards' wrist. Mr. Russell then punched Mr. Richards in the face before collapsing.

Richards v. State, 128 So. 3d 959, 961 (Fla. 2d DCA 2013)

During the charge conference the trial judge stated that an attempted voluntary manslaughter instruction had been given the previous trial. (A3:T365) The trial judge would give the attempted voluntary manslaughter instruction if requested by defense counsel. The instruction was requested. (A3:T366)

The jury was instructed:

The next lesser that will appear on your verdict is called attempted voluntary manslaughter. To prove this crime the State must prove the following element[s] beyond a reasonable doubt:

John Richards committed an act or procured the commission of an act which was intended to cause the death of David Russell or would have resulted in the death of David Russell except that someone prevented John Richards from killing David Russell or he failed to do so.

(A3:T416)

Mr. Richards was convicted of attempted second-degree murder.

(v1:R13) Mr. Richards was sentenced to thirty years in prison as a prison releasee reoffender based upon what took place at his original sentencing without objection. (v1:R14-17; A3:T449-451)

A pro se notice of appeal was timely filed on March 14, 2011. A notice of appeal filed by defense counsel was also timely filed. (v1:R22, 34)

Mr. Richards argued on appeal that the jury instruction on attempted voluntary was fundamental error. The Second District Court of Appeal rejected this argument:

In Williams, the supreme court held that "a trial court commits fundamental error in giving the standard jury instruction on attempted manslaughter by act where the defendant is convicted of a crime *no more than one step* removed from the improperly instructed offense."

123 So.3d at 27 (emphasis added). Here, Mr. Richards was convicted of attempted second-degree murder, a second-degree felony. See § 782.04(2), Fla. Stat. (2007) (classifying second-degree murder as a first-degree felony); 777.04(4)(c), Fla. Stat. (2007) (providing that an attempt to commit a crime that is a first-degree felony is classified as a second-degree felony). The jury was instructed, and the verdict form confirmed, that the next lesser offense was not attempted manslaughter—it was aggravated battery, which like attempted second-degree murder is a second-degree felony. See § 784.045, Fla. Stat. (2007). Attempted manslaughter, which is a third-degree felony, followed aggravated battery in the instructions and on the verdict form. See §§ 782.07(1) (defining manslaughter as a second-degree felony); 777.04(4)(d) (providing that an attempt to commit a crime that is a second-degree felony is classified as a third-degree felony). Thus, the jury here was properly instructed on the next lower crime. Because Mr. Richards was convicted of an offense not one but two steps removed from attempted manslaughter, the error was not fundamental.

It was not fundamental for an additional reason. As explained in Daniels v. State, 121 So.3d 409, 418 (Fla.2013):

[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. Accordingly, where the trial court fails to correctly instruct on an element of the crime over which there is dispute, and that element is both pertinent and material to what the jury must consider in order to decide if the defendant is guilty of the crime charged or any of its lesser included offenses, fundamental error occurs.

Mr. Richards' intent was not disputed at trial.

Mr. Richards never claimed that he did not intend to kill Mr. Russell. Mr. Richards' sole defense was that the stabbing was done in self-defense. So, in deciding whether to find Mr. Richards guilty of attempted second-degree murder or any of the lesser offenses, the only issue that was disputed that the jury had to consider was whether Mr. Richards' actions were justified as self-defense. Cf. id. (explaining that where the defendant was charged with first-degree premeditated murder and argued in closing that he did not intend to kill the victim but only to scare someone with the gun, while the State argued that he did intend to kill the victim, the defendant's intent or lack of intent was clearly before the jury as a disputed issue).

Finally, even if the error had been fundamental, Mr. Richards waived the error because he affirmatively requested the jury instruction he now challenges. While affirmatively asking for a standard jury instruction would not normally amount to a waiver of fundamental error, in this case Mr. Richards asked that the jury be instructed on attempted manslaughter even though attempted manslaughter was not included as either a category one or two lesser offense of attempted second-degree murder. But for Mr. Richards' affirmative request for the instruction, it would not have been given. The supreme court has held that fundamental error may be waived where defense counsel requests the erroneous instruction. Armstrong v. State, 579 So.2d 734, 735 (Fla.1991).

Richards v. State, 128 So. 3d 959, 963-64 (Fla. 2d DCA 2013).

A notice to invoke the discretionary jurisdiction of this Court was filed on January 23, 2014. On May 26, 2016, this Court accepted jurisdiction and ordered briefing.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal erred in refusing to find that the jury instruction which erroneously required intent to kill fundamental. It is undisputed that the jury instruction was wrong based upon the decision of this Court in Williams v. State, 123 So. 3d 23 (Fla. 2013). The Second District was wrong to find the error not fundamental due to intent not being at issue and because the offense was more than one step removed. This Court should find the error to be fundamental and order a new trial because there was no waiver.

This Court should find fundamental error and reverse the Second District Court of Appeal because Mr. Richards did not concede the issue of intent by claiming self-defense at trial. Mr. Richards was entitled to have the jury accurately instructed on attempted manslaughter because once the jury found that that the attempted homicide was not justified due to self-defense because intent became relevant to determine the degree of the attempted homicide. The State was still required to prove each element beyond a reasonable doubt.

This Court as well as other Florida courts have found the offense of attempted second-degree murder to be one step removed from attempted voluntary manslaughter. Defense counsel did not

waive the issue by requesting that the standard instruction from the first trial be used again. There is no indication that defense counsel was aware of the error and she did not affirmatively agree to the instruction with knowledge that it was wrong. A correct jury instruction was critical to the jury resolving whether Mr. Richards should be found guilty of attempted second-degree murder or attempted voluntary manslaughter. Therefore, this Court should find the error to be fundamental and order a new trial.

ARGUMENT
ISSUE

FUNDAMENTAL ERROR OCCURRED WHEN THE JURY WAS
ERRONEOUSLY INSTRUCTED THAT ATTEMPTED
VOLUNTARY MANSLAUGHTER REQUIRED INTENT TO
KILL.

The Second District Court of Appeal denied Mr. Richards a fair trial when it refused to find fundamental error based on an attempted voluntary manslaughter instruction which erroneously required intent to kill. There is no doubt that the jury instruction was erroneous under this Court's decision in Williams v. State, 123 So. 3d 23, 30 (Fla. 2013). This Court should find the error to be fundamental because intent was at issue; the offense was not more than one step removed; and the issue was not waived by trial counsel. A new trial should be ordered.

In Williams, this Court found the jury instruction on attempted voluntary manslaughter which erroneously required intent to kill to be fundamental error:

Based on the foregoing analysis, we hold that the attempted manslaughter by act jury instruction given in this case constituted fundamental error. In so holding, we must quash the Fourth District's decision below and approve the decision of the First District in the certified conflict case of Lamb. The First District in Lamb correctly

held that the trial court committed fundamental error by giving the standard jury instruction for attempted manslaughter by act because it added the additional element that the defendant "committed an act intended to cause the death" of the victim, when attempted manslaughter by act requires only an intentional unlawful act. See Lamb, 18 So.3d at 735.

Williams v. State, 123 So. 3d at 30.

This Court should find fundamental error and reverse the Second District Court of Appeal because contrary to the opinion of the Second District Court of Appeal intent was in dispute during the trial. Mr. Richards did not concede the issue of intent by claiming self-defense at trial. Mr. Richards was entitled to have the jury accurately instructed on attempted voluntary manslaughter because once the jury found that that the attempted homicide was not justified intent became relevant to determine the offense of conviction. A new trial should be ordered because the error went to an issue that was in dispute and had to be resolved by the jury.

The error of the Second District in this case is remarkably similar to the error of the Second District which this Court reversed in Griffin v. State, 160 So. 3d 63 (Fla. 2015). In Griffin, the Second District erroneously concluded that intent was not at issue due to the defense of misidentification so that

the erroneous manslaughter instruction was not fundamental error. Id. at 67. In this case, the Second District erroneously concluded that that intent was not at issue because Mr. Richards claimed self-defense at trial. Richards, 128 So. 3d at 963.

This Court's explanation in Griffin as to why the Second District was wrong is equally applicable to this case:

When the question before the jury is whether an unlawful homicide occurred, and the jury finds that the killing was not justifiable or excusable, the jury 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. A homicide found to be unlawful is not automatically just one offense, but will be one of several possible homicide offenses depending upon the nature of the intent or the lack of any intent at the time of the homicide.

....

Thus, it can be seen that in every killing alleged to be an unlawful homicide, the jury must necessarily consider the intent behind the killing, or find lack of any intent behind the killing, before it can determine what, if any, offense has been committed.

Griffin, 160 So. 3d at 68-69.

Mr. Richards never "conceded" the intent element of the State's case when he put forth a defense of self-defense. The State was still required to prove every element of the charge beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364

(1970); Sandstrom v. Montana, 442 U.S. 510, 520 (1979); see also United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976)

("[F]ailure to establish an alibi does not properly constitute evidence of guilt since it is the burden of the government to prove the complicity of the defendant, not the burden of the defendant to establish his innocence").

Mr. Richards' intent or mental state at the time of the events remained an issue that the jury was required to determine even though he argued self-defense at trial. In the event that the jury did not find Mr. Richards' conduct justified or excusable, it still could find that the prosecution failed to prove every element of the crime charged, and could return a verdict of guilty of some lesser offense. Therefore, a correct attempted voluntary manslaughter by act instruction "was critical to what the jury had to consider in this case" to determine if Mr. Richards was guilty of attempted second-degree murder or attempted manslaughter by act. Williams v. State, 123 So. 3d 23, 28 (Fla. 2013).

This result is consistent with Florida cases recognizing that imperfect self-defense is classic manslaughter. The conclusion of the Second District intent was not at issue because Petitioner argued self-defense is wrong. Mr. Richards' intent was pertinent

and material to what the jury had to consider given the law of self-defense in Florida. Florida courts have long recognized that manslaughter can be the proper result in a case of imperfect self-defense. See Dorsey v. State, 74 So. 3d 521, 524 (Fla. 4th DCA 2011) ("While the jury may reasonably reject the theory of self-defense involving a defendant's impulsive overreaction to a victim's attack, such a case warrants a conviction for manslaughter, not second degree murder."); Pierce v. State, 376 So. 2d 417, 418 (Fla. 3d DCA 1979) (recognizing that jury could have found manslaughter based upon overreaction and use of excessive force).

Mr. Richards' mental state was at issue and before the jury despite the claim of self-defense. This Court in Williams explained precisely why intent was at issue in this case such that the error was fundamental:

However, because the jury found Williams guilty of attempted second-degree murder, an offense not requiring proof of intent to cause the death of the victim, it must have determined that Williams did not intend to cause the victim's death. And, because the instruction given for attempted manslaughter by act erroneously included an intent to kill element, the jury was left with attempted second-degree murder as the only viable lesser included offense under the instructions given. Thus, a correct attempted manslaughter by act instruction was critical to what the jury had to consider in this case to determine if Williams

was guilty of attempted first-degree murder, attempted second-degree murder, or attempted manslaughter by act.

Williams, 123 So. 3d at 28.

The facts of this case are similar to Williams in that both cases involved a struggle. The jury found that Mr. Richards acted with a depraved heart rejecting his claim of self-defense. The issue of intent was before the jury which might have declined to find manslaughter because the erroneous instruction required intent to kill. Therefore, this Court should find the error to be fundamental because intent or mental state was at issue as in Griffin and Williams.

This Court should also find the error to be fundamental because, contrary to the opinion below, the offense of attempted second degree murder is not more than one step removed from the offense of attempted voluntary manslaughter. The decision below was wrong when it stated, "Because Mr. Richards convicted of an offense not one but two steps removed from attempted manslaughter, the error was not fundamental." Richards v. State, 128 So. 3d 959, 963 (Fla. 2d DCA 2013).

In Williams, the defendant was charged with attempted first degree murder and convicted of attempted second degree murder. This Court found fundamental error in a jury instruction which

required intent to kill for the offense of attempted voluntary manslaughter. This Court explained "that a trial court commits fundamental error in giving the standard jury instruction on attempted manslaughter by act where the defendant is convicted of a crime no more than one step removed from the improperly instructed offense." Williams, 123 So. 3d at 27.

Like the defendant in Williams, Mr. Richards was convicted of attempted second degree murder after a trial in which the jury was improperly instructed that the crime of attempted voluntary manslaughter required an intent to kill. Yet while this Court found that the offense of attempted voluntary manslaughter was not more than one step removed in Williams, the Second District reached a different conclusion below in Richards.

The Second District Court of Appeal found fundamental error in a different case which appears to contradict the opinion in this case (with one common panel member) on the issue of being one step removed:

"[A] trial court commits fundamental error in giving the standard jury instruction on attempted manslaughter by act where the defendant is convicted of a crime no more than one step removed from the improperly instructed offense." Williams v. State, 123 So. 3d 23, 27 (Fla. 2013). Mr. Mike was

convicted of attempted second-degree murder, a crime one step removed from attempted manslaughter.

Mike v. State, 2D14-4538, 2016 WL 1468884, (Fla. 2d DCA Apr. 2016).

Other District Courts of Appeal have similarly concluded that the offense of attempted voluntary manslaughter by act is one step removed from the offense of attempted second-degree murder. See Grandison v. State, 133 So. 2d 1064, (Fla. 1st DCA 2014) (offense of attempted second degree murder not more than one step removed from attempted manslaughter so jury instruction containing intent to kill was fundamental error); Pierce v. State, 121 So. 3d 1091 (Fla. 5th DCA 2013) (appellate counsel ineffective for failing to argue fundamental error where defendant convicted of attempted second degree murder a crime one step removed from attempted manslaughter where manslaughter instruction contained intent to kill);

More recently, in Cisneros-Gonzalez v. State, 185 So. 3d 714 (Fla. 3d DCA 2016), the court explained:

However, based upon the State's proper confession of error pursuant to Griffin v. State, 160 So. 3d 63 (Fla. 2015), we reverse and remand for a new trial on the attempted second-degree murder conviction. Like the defendant in Griffin, the defendant here was convicted of a crime one step

removed from the erroneous manslaughter instruction, and he did not concede the issue of intent.

Id.

There is little difference between the instant case and Cisneros-Gonzalez, Pierce, Grandison, Mike, and Williams, where the Courts found that the offense of attempted-second degree was not more than one step removed from the offense of attempted manslaughter by act and that the attempted manslaughter instruction which erroneously required intent to kill. The result should be the same in this case as the erroneous attempted manslaughter instruction went to a contested issue that had to be resolved by the jury. Therefore, the error should be considered fundamental.

This Court should order a new trial based upon fundamental error. This case is distinguishable on the issue of waiver from Armstrong v. State, 579 So.2d 734, 735 (Fla.1991), because in Armstrong defense counsel proposed an edited version of the standard jury instruction and then argued for it. In Armstrong defense counsel specifically requested an abbreviated version of the standard instruction on excusable homicide which left out references to "killing in the heat of passion, upon sudden provocation, or upon sudden combat." Id. at 734. Defense counsel

argued the omitted portions of the instruction were not relevant to the case since the defense was the killing was the result of accident and misfortune. Id. 11at 735.

There was no such deliberate editing of a standard jury to fit a defense in this case. Instead, defense counsel requested the standard instruction on attempted voluntary manslaughter which had been used without incident in the first trial. There was no indication that defense counsel was aware that the standard instruction was flawed when it was requested or that she exploited the error.

Defense counsel's request that the attempted voluntary manslaughter instruction from the first trial be used again should not be considered a waiver of fundamental error because there is no indication she was aware of the defect and that she affirmatively agreed to it. The trial in this case took place on February 15th and 16th 2011, slightly over two years prior to this Court's decision in Williams.

This Court should find no waiver under Armstrong like the courts in Beckham v. State, 884 So. 2d 969 (Fla. 1st DCA 2010) and Black v. State, 695 So. 2d 459 (Fla. 1st DCA 1997), because there was no indication that defense counsel was aware of the error in this case or that she affirmatively agreed to it.

In Beckham, defense counsel stated on the record that he had reviewed the jury instructions with the prosecutor. Defense counsel answered affirmatively when asked if he was in agreement with the prosecutor. There was no objection when written copies of instructions were provided. There was no objection when the jury was charged with a manslaughter instruction that was faulty because the term justifiable or excusable homicide was not explained. The Court held Armstrong did not apply because "[t]he record does not show that defense counsel was aware of the incomplete instruction and affirmatively agreed to it." Id. at 973.

Similarly, in Black v. State, 695 So. 2d 459 (Fla. 1st DCA 1997), the jury instruction on manslaughter explained justifiable homicide but failed to explain excusable homicide and the defendant was convicted of second degree murder. The record did not contain a transcript of the charge conference. Defense counsel agreed that the charges as read to the jury were as discussed at the charge conference. The First District refused to find waiver:

Before the exception recognized in Lucas can apply, defense counsel must be aware that an incorrect instruction is being read and must affirmatively agree to, or request, the incomplete instruction. These circumstances do

not exist on the instant record. As such, we must reverse the judgment and sentence and remand for a new trial.

Black, 695 So. 2d at 461.

As explained by the Second District Court of Appeal in a different case:

We note that an exception to this fundamental error rule arises when defense counsel affirmatively agrees to the omission or the alteration of a jury instruction. See Roberts v. State, 694 So.2d 825, 826 (Fla. 2d DCA 1997) (citing Armstrong v. State, 579 So.2d 734, 735 (Fla.1991)). Before this exception applies, defense counsel must be aware of the omission, alteration, or incomplete instruction and affirmatively agree to it. Cf. Black v. State, 695 So.2d 459, 461 (Fla. 1st DCA 1997). In the instant case, there is no indication that Van Loan's trial counsel knew that the omission was error and agreed to the omission. The trial court shoulders the responsibility to properly instruct the jury on the definitions of excusable and justifiable homicide. See Blandon, 657 So.2d at 1199-1200.

Van Loan v. State, 736 So. 2d 803, 804 (Fla. 2d DCA 1999).

This Court should find there was no waiver like the courts in Van Loan, Beckham and Black because there is no indication that defense counsel had any idea that the standard instruction for attempted manslaughter instruction from the previous trial was in any defective when she asked that it be read.

When Mr. Richards testified and his lawyer argued self-defense, he did not concede that the stabbing was done with a depraved mind. Even if the jury disbelieved Richards' testimony, it still had to determine whether all the elements of second-degree murder were proved, including that the defendant's act was done from ill will, hatred, spite, or an evil intent. The erroneous instruction went to heart of what the jury had to consider in deciding between attempted second-degree murder and attempted voluntary manslaughter. Florida courts have long recognized extremely reckless behavior or overreaction to a potential threat is manslaughter rather than second-degree murder. See Light v. State, 841 So. 2d 623, 626 (Fla. 2d DCA 2003) ("[E]xtremely reckless behavior itself is insufficient from which to infer any malice. Moreover, . . . an impulsive overreaction to an attack or injury is itself insufficient to prove ill will, hatred, spite, or evil intent.") As summarized by the Fourth District Court of Appeal:

We also have reversed second degree murder convictions where it was clear that the defendant impulsively overreacted to an immediate provocation. See, e.g., Dorsey v. State, 74 So.3d 521, 524-25 (Fla. 4th DCA 2011) (evidence was insufficient to support second degree murder conviction where defendant, after being confronted by a number of heavily intoxicated men, and punched in

the face by victim, impulsively overreacted by shooting); McDaniel v. State, 620 So.2d 1308, 1308 (Fla. 4th DCA 1993) (reversing second degree murder conviction of father who overreacted by using excessive force—a knife—to “ward off further attack” by his son); accord Poole v. State, 30 So.3d 696, 698-99 (Fla. 2d DCA 2010) (reversing second degree murder conviction where evidence conclusively established that victim lunged at defendant “in an apparent attack” causing defendant, who had “nowhere to retreat,” to lash out with a knife).

Henry v. State, 145 So. 3d 924, 927 (Fla. 4th DCA 2014).

Had the jury been given the necessary tools, meaning the accurate manslaughter instruction, it may have found Mr. Richards guilty of attempted manslaughter under the theory that the evidence was insufficient to show that Richards acted with a depraved mind. The flawed manslaughter instruction removed the lesser option by providing the extra intent to kill element. The jury may have concluded that attempted second-degree murder was the only viable option it had to choose from because that offense did not require it to find intent to cause the death. A new trial should be ordered.

CONCLUSION

This Court should quash the Second District's decision in this case and remand with directions that Mr. Richards be granted a new trial consistent with this Court's holding in Williams.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com and to Assistant Attorney General Cerese Taylor at cerese.taylor@myfloridalegal.com, on this 15 day of June, 2016.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully Submitted,



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