IN THE SUPREME COURT OF FLORIDA

ARNOLD JEROME KNIGHT,

Petitioner,

vs. Case No. SC18-309

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I. A defendant does not waive fundamental error in jury instructions prepared by the state by merely accepting the proposed instructions in general.

The notion that defense lawyers knowingly refrain from objecting to Montgomery/Williams[1] error to build in reversible error is a chimera. It ignores the pitfalls in relying on an appellate court to find fundamental error and reverse a conviction of second-degree murder or attempt. First, intent to cause death must be in issue and not conceded by the defense. Griffin v. State, 160 So. 3d 63, 70 (Fla. 2015). Second, for Montgomery error, there must be no verdict choice of manslaughter by culpable negligence or third-degree felony murder supported by the evidence. McCloud v. State, 209 So. 3d 534, 542 (Fla. 2017). Third, appellate counsel must raise the issue. Otherwise, the defendant, who is usually indigent and pro se, must file a timely postconviction motion asserting ineffective assistance of counsel. See Lawrence v. State, 149 So. 3d 1162, 1163 (Fla. 1st DCA 2014) (denying untimely postconviction motion by pro se defendant asserting that trial counsel was ineffective in failing to object based on Montgomery; previous claim asserting appellate counsel failed to raise error on appeal also denied as untimely). Fourth, the appellate court must reverse rather than simply affirm without opinion,

1. State v. Montgomery, 39 So. 3d 252 (Fla. 2010); Williams v. State, 123 So. 3d 23 (Fla. 2013).

the outcome in most direct criminal appeals.[2] If the appellate court wrongly affirms, the defendant, usually *pro se*, must file a petition for a writ of habeas corpus, and hope the appellate court acknowledges its error. See, e.g., Crenshaw v. State, 2018 WL 3862808 (Fla. 3d DCA Aug. 15, 2018). Respondent's argument that forgoing an objection to Montgomery/Williams error "all but assures defense counsel that the client will receive a new trial" (Ans. brf. at 15) is belied by precedent and experience.

Defense counsel has a stronger incentive in ensuring that if jurors reject premeditated first-degree murder, they will have an alternative to second-degree murder that omits intent to kill. "When presented with a choice between the lesser-included offenses of second-degree murder and manslaughter, juries contemplating first-degree murder charges may have chosen--and by proper logic were directed to choose--the greater of the two lesser-included offenses where no intent to kill was found." Middleton v. State, 41 So. 3d 357, 361 (Fla. 1st DCA 2010). The same is true for Williams error in attempted homicide cases.

Those who search for corrupt intent in failing to avoid error under Montgomery or Williams are apt to find it. Here, the prosecutor could have

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2. " The PCA is the most common decision in the District Courts of Appeal of Florida. This has been true for the past two decades and continues to be true today." Craig E. Leen, Without Explanation: Judicial Restraint, Per Curiam Affirmances, and the Written Opinion Rule, 12 F.I.U. L. Rev. 309 (Spring 2017).

intentionally drafted an erroneous attempted manslaughter instruction in the hope it would lead jurors to instead choose attempted second-degree murder, then wait for appellate counsel to miss the issue or the appellate court to affirm in a review-proof opinion. More likely, the prosecutor simply compiled the instructions from a source that had not been updated. But the first scenario is plausible, belying Respondent's contention that "the perverse incentive" to allow the error to go unchallenged "is unique to defense attorneys." (Ans. brf. at 17)

Even with no incentive, numerous appellate lawyers representing defendants failed to assert error under Montgomery, including within the First District where the error was first recognized. See, e.g., Lawrence, 149 So. 3d at 1163; Jenkins v. State, 75 So. 3d 1288, 1290 (Fla. 1st DCA 2011); Hartley v. State, 65 So. 3d 584, 585 (Fla. 1st DCA 2011); Sharpe v. State, 39 So. 3d 342, 342 (Fla. 1st DCA 2010); Horne v. State, 23 So. 3d 834, 834 (Fla. 1st DCA 2009); Toby v. State, 29 So. 3d 1138, 1138–39 (Fla. 1st DCA 2009); Coleman v. State, 110 So. 3d 971, 972 (Fla. 2d DCA 2013); Deravil v. State, 98 So. 3d 1172, 1174 (Fla. 2d DCA 2012); Betts v. State, 100 So.3d 78, 80 (Fla. 2d DCA 2011); Marshall v. State, 240 So. 3d 111, 118 (Fla. 3d DCA 2018); Molina v. State, 150 So. 3d 1280, 1283 (Fla. 3d DCA 2014); Wimberly v. State, 162 So. 3d 73, 74 n.1 (Fla. 4th DCA 2014); Francois v. State, 151 So. 3d 496, 497 (Fla. 4th DCA 2014); Page v. State, 201 So. 3d 207, 208 (Fla. 5th DCA 2016); Paul v. State, 183 So. 3d 1154, 1155 (Fla. 5th DCA 2015).

This list is not exhaustive. A failure to raise the issue on appeal confers no advantage on the defendant. In fairness, the same omission by a defendant's attorney in the heat of trial should not be attributed to "tactical inaction." Knight v. State, 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018), at *7.

In light of the trapdoors between unobjected-to error under Montgomery and Williams and reversal of a conviction of second-degree or attempted second-degree murder, Respondent overstates its case in arguing that "under the current system, it is easier to obtain relief when the issue is unpreserved than when it is preserved." (Ans. brf. at 16) In this case, a correct instruction could have resulted in a conviction of attempted manslaughter with a weapon, halving Knight's sentence from 30 to 15 years. If the objection to the erroneous instruction were overruled, the issue would have been preserved and red-flagged for appellate counsel, increasing the likelihood it would have been raised on appeal and a reversal obtained. Either result would constitute relief. By contrast, declining to object could have led appellate counsel to miss the issue entirely on direct appeal, like many of his colleagues even after Montgomery, forcing Knight to successfully navigate the shoals of postconviction proceedings *pro se*.

The state suggests as an alternative to counsel's "deliberate silen[ce]" that "the 'intent' language was not an important consideration for the defense." (Ans. brf. at 21 n.3) There is no "unimportant consideration" exception to Montgomery

and Williams. Knight pled not guilty; at trial, defense counsel did not concede the issue of intent. Cf. Griffin, 160 So. 3d at 69. Nor did defense counsel incorporate the erroneous language into his closing argument, in contrast to Joyner v. State, 41 So.3d 306, 307 (Fla. 1st DCA 2010). Further, as Respondent acknowledges, defense counsel argued there was no intent to kill.[3]

The state repeats the First DCA's regrettable speculation in several opinions that counsel who object to the Montgomery error would "risk being found incompetent as a consequence." (Ans. brf. at 16). Neither the First DCA nor Respondent has identified any instance of a court finding an attorney ineffective or incompetent for making a timely, well-founded objection to an erroneous jury instruction. Given the obligation of all counsel to "keep abreast of changes in the law," under the Comment to Florida Bar Rule 4-1.1, such a finding is inconceivable.

According to Respondent, the trial court "made a notable effort to get the jury instructions right" by giving defense counsel the opportunity for input. (Ans. brf. at 22) Unfortunately, the court's effort fell short of personally assuring that the jury received correct instructions. Under similar circumstances, the Third DCA recently observed:

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3. From the defense opening statement: "My client never intended to kill anyone." (R5.80) From the defense closing: "Was there a plan. Did Mr. Knight intend to kill Ms. Strange. Does the evidence support that." (R7.441)

> The responsibility to ensure that the jury is properly instructed ultimately rests with the trial court, not counsel. While counsel may assemble and submit proposed instructions, the court may not delegate to counsel the court's non-delegable duty to assure that the jury is instructed on the correct law to be applied to the case.

Silva v. State, 2018 WL 4495362 (Fla. 3d DCA Sept. 20, 2018), at *3.[4] The trial court's non-delegable duty requires more than just giving defense counsel an opportunity to review proposed instructions. Approval of the First DCA decision would absolve trial courts of the responsibility to ensure that the instructions they give jurors accurately state the law.

Respondent again overshoots the mark in stating that Knight "advocates for a system where the contemporaneous objection rule is eradicated as to jury instructions." (Ans. brf. at 14) The state has taken a passage from the Summary of the Argument in the Initial Brief out of context. Knight's aims are modest and narrow: adherence to precedent holding that (1) an explicit waiver or request is necessary for an instruction on (2) an offense no more than one step removed from the offense of conviction, (3) which contains an error on an element in issue that (4) deprived the jury of the opportunity to find the defendant guilty of the offense as correctly instructed, and (5) on which the defendant did not rely in closing

4. In reversing a conviction for error in the self-defense instructions after defense counsel approved the instructions in a "standard colloquy," the Third DCA in Silva acknowledged conflict with the First DCA decision in Knight.

argument. This case falls within these narrow, well-established criteria. This Court should spurn the efforts of the First District panel and Respondent to submit the law of waiver in criminal jury instructions to the judicial wrecking ball.

II. When intent is in dispute, an attempted manslaughter instruction that erroneously includes an element of intent to cause death causes harmful error by depriving the jury of a reliable alternative to its verdict of attempted second-degree murder.

Dean v. State, 230 So. 3d 420 (Fla. 2017), cannot support the weight of the claims Respondent makes for it. The State contends that Dean abrogates or at least limits the jury pardon doctrine. (Ans. brf. at 25) In reply, no change to the jury pardon doctrine garnered the vote of four Justices in Dean. The State asserts that a majority of this Court found harmless an error that previously would have been deemed fundamental error. (Ans. brf. at 25, 27) The word "harmless" does not appear in the majority opinion, and a finding of harmless error cannot be inferred from the Court's approval of the affirmance of Deans' conviction "[f]or the reasons expressed in Justice Polston's concurring opinion and Justice Quince's concurring in result only opinion," 230 So. 3d at 425, because Justice Quince did not rely on harmless error.

The decision in Dean did two things with lasting impact. First, it approved the Fourth DCA's affirmance of his conviction and vacated his prison releasee reoffender sentence for insufficient evidence. Second, the Court established that manslaughter is a necessarily lesser included offense of second-degree felony

murder, answering the certified question.[5] Nothing more. As the Fourth District has recognized, the lack of a majority of Justices who agreed on a single rationale for affirmance of the conviction left Dean with no further holding that may be applied going forward. Caruthers v. State, 232 So. 3d 441, 441 (Fla. 4th DCA 2017), rev. denied, 2018 WL 987286 (Fla. Feb. 20, 2018); Hargrett v. State, 2018 WL 4212143 (Fla. 4th DCA Sept. 5, 2018), at *2 n.4.

Respondent asserts that the Dean majority "could not have reached the conclusion that manslaughter is a lesser included offense of second-degree felony murder and affirm the Fourth District without determining that the jury pardon power no longer justifies an immediate finding of reversible error." (Ans. brf. at 29) This would amount to a reading of tea leaves inferring a *sub silentio* abrogation of decades of precedent. Further, leaving Justice Lewis aside for the moment, Justice Pariente agreed that manslaughter is a lesser included offense of second-degree felony murder, creating a majority for the affirmative answer to the certified question. Dean, 230 So. 3d at 429 (Pariente, J., concurring in part and dissenting in part). Consistent with his concurrence in Daugherty v. State, 211 So. 3d 29 (Fla. 2017), Justice Lewis could have opted to retain the jury pardon doctrine but agreed

5. The Court subsequently placed manslaughter and attempted manslaughter in the "Category One" boxes for lesser included offenses on second-degree felony murder and attempted second-degree felony murder. In re Standard Jury Instructions in Criminal Cases—Report 2017-06, 236 So. 3d 282 (Fla. 2018).

with Justice Quince that Dean was not entitled to an instruction on manslaughter because it was a permissibly lesser included offense of second-degree felony murder and was not supported by the evidence. Petitioner cannot puzzle out any other explanation for the majority's reliance on Justice Quince's concurrence in result only as an alternative ground for affirmance of Dean's conviction.

Respondent reprises its claim in Point I that "intent was not an issue based on the facts." (Ans. brf. at 26) This is also its only argument countering precedent holding that a correct instruction on attempted manslaughter is necessary to give a jury that has rejected premeditation an alternative to attempted second-degree murder that omits intent to kill. (Ans. brf. at 33-38) Petitioner has already responded to both contentions. See infra at 2, 4-5. Briefly, Knight pled not guilty, his counsel argued to the jury that he did not intend to cause death, and jurors found he had no premeditated intent to kill.

Precedent does not condition reversal on an accused being deprived of his only defense by an erroneous instruction on a necessarily lesser included offense. See Griffin, 160 So. 3d at 70 (requiring reversal of conviction based on Montgomery error although misidentification was sole defense). The State distinguishes Griffin on grounds that Knight's "intent to kill is obvious." (Ans. brf. at 34) Considering evidence that he lay in wait, one might observe that a premeditated intent to kill was equally "obvious." Yet the jury acquitted him of

attempted first-degree murder. “Intent is always pertinent in a homicide prosecution and where, as here, the jury concludes there was no intent to kill, the question then arises what nonintentional homicide lesser offenses are available for the jury's consideration and supported by the evidence.” State v. Dominique, 2017 WL 1177619 (Fla. Mar. 30, 2017). This is a decision for a correctly instructed jury, not attorneys or judges after the fact.

In sum, Respondent makes no argument not already hashed out in the various opinions in Dean, State v. Spencer, 216 So. 3d 481 (Fla. 2017), and Haygood v. State, 109 So. 3d 735 (Fla. 2013). The question is whether there are adequate grounds to overcome stare decisis and abrogate decades of this Court’s precedent on error in instruction on lesser included offenses from Rojas v. State, 552 So. 2d 914 (Fla. 1989),through Roberts v. State, 242 So. 3d 296 (Fla. 2018). Unlike State v. Michel, 2018 WL 3613383 (Fla. July 12, 2018) (rehearing pending), in which a plurality advocated receding from a decision issued two years earlier, no intervening decision justifies abrogation of the eleven decisions from 1989 through 2017 cited at page 29, footnote 4 of the initial brief.

The State’s remaining argument is primarily factual, but facts are adjudicated in accord with constitutional, statutory, and decisional law. An unbroken string of precedent—Dean is not precedential—requires reversal of Knight’s conviction. Any path to affirmance should explicitly justify why the

Court should dispense with *stare decisis* without falsely attributing precedent from Rojas to Roberts solely to operation of the jury pardon doctrine. See Haygood, 109 So. 3d at 745 (Pariente, J., concurring) ("[T]he reason that the giving of the erroneous manslaughter by act instruction constitutes fundamental error … is not … an application of the pardon power, but rather the overriding requirement that every defendant receive the benefit of accurate jury instructions regarding the elements of a disputed offense if those instructions could have resulted in a lesser verdict.")

To reiterate from the opinion of the First DCA in Montgomery:

> [I]f the jury found the defendant did not intend to kill, the erroneous instruction effectively precluded the jury from choosing between two possible verdicts: second degree murder or manslaughter by act. Under the erroneous instruction, the jury was directed to pick the greater of these two offenses.... Such interference with the jury's deliberative process tainted the underlying fairness of the entire proceeding.

Montgomery v. State, 70 So. 3d 603, 608 (Fla. 1st DCA 2009), approved, 39 So. 3d 252 (Fla. 2010) (quoting Hankerson v. State, 831 So. 2d 235, 237 (Fla. 1st DCA 2002)). This was as true when Knight was tried in 2014 as when the First DCA decided Montgomery in 2009. Other defendants continue to receive relief from Montgomery/Williams error. See, e.g., Franklin v. State, 2018 WL 4039131 (Fla. 2d DCA 2018) (granting new trial for ineffective assistance of appellate counsel in

failing to raise error occurring in 2013 trial). The same relief—an opportunity for a verdict of attempted manslaughter from a jury correctly instructed on its crucial element of intent-- should be extended to Knight for the unwaived Montgomery/Williams error in his February 2014 trial.

CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Kaitlin Weiss, Assistant Attorney General; Gary Lee Caldwell, amicus counsel for the Florida Public Defender Association; and Rocco J. Carbone, amicus counsel for the Florida Association of Criminal Defense Lawyers, this 2nd day of October, 2018. I certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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