IN THE SUPREME COURT OF FLORIDA

ERIC MARTINEZ,

Petitioner,

v. CASE NO. SC06-1597

STATE OF FLORIDA,

Respondent.
______________________________/

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS

Respondent submits the following additions/corrections to the Petitioner's Statement of Facts:

During voir dire, defense counsel explained to the potential jurors that this case involved domestic violence, and accordingly identity would not be an issue. (T. 82-83). Counsel then asked for the jurors' reactions to a scenario where alcohol and stress lead to an escalation in an argument, eventually turning physical and out of control. (T. 87-99). No questions were asked regarding the use of self defense.

In his opening statement, defense counsel more explicitly framed the defense in this case, noting that the evidence would show this to be a case of "spontaneous combustion" from a lethal combination of frustration/jealousy and alcohol. (T. 134-37). Counsel contended that there was no premeditation and this was not an attempted murder. (T. 135, 137).

The victim testified that she did not have a weapon at any time during the incident. (T. 157). She further explained that she got away from the Defendant at one point and headed for the door, but slipped on her own blood. (T. 157-58). The Defendant continued to attack her after she fell to the ground. (T. 158).

The victim's mother heard the victim shouting that the Defendant was killing her. (T. 185). She went to the victim's bedroom and banged on the door, where she heard the victim

telling the Defendant "don't kill me" and claiming that she would stay with him. (T. 186). The attack lasted approximately five minutes, after which the Defendant unlocked the bedroom door and ran away. (T. 186-88).

The victim had numerous laceration and puncture wounds to her face, chest, arm, back, and body. (T. 179, 195).[1] She was stabbed six or seven times. (T. 177). The responding officer testified that the bed and floors in the victim's room were covered in blood, and the victim herself was covered in blood from head to toe. (T. 194-95). She had multiple lacerations on her back, including a wound on her back that was so deep it had penetrated her lung (referred to as a "sucking chest wound"). (T. 195-96). In closing argument, the prosecutor contended that this chest wound itself indicated that the Defendant had an intent to kill. (T. 314).

Scissors were found on the floor next to the bed, and when the Defendant was apprehended (10-12 blocks away) he had a straight razor in his pocket, covered in blood. (T. 199-202). The Defendant was examined for injuries. The only injury he sustained was a minor quarter-inch cut on his pinky finger, which was cleaned and bandaged with gauze by the Fire Rescue personnel.

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[1]The victim's medical report indicated that she had an open wound into her chest cavity, a collapsed lung, a fractured finger, an open wound to her forearm, and multiple stab wounds to her back, upper chest, head, and breast bone. (T. 299-301). These wounds were further documented by pictures presented to the jury. (T. 161-63).

(T. 202-04). No further medical treatment was provided or necessary. (T. 203).

During his testimony, the Defendant denied taking the razor out of his pocket at any time during the altercation with the victim, claiming that he only had the razor so that he could shave at his father's house. (T. 238-39, 244, 246). He claimed that the victim's wounds were self-inflicted, while they were struggling. (T. 242). She swung the scissors at him and he blocked them, causing her to get cut while he was trying to take the scissors away. (T. 245). Additional cuts were inflicted when they both fell to the ground. (T. 245-47).

The Defendant acknowledged that he had no wounds to his face or chest, explaining that he was a man and the victim was a woman. (T. 249-50). He claimed that he suffered from three cuts to his hand, not just the small cut on his pinky finger, and that he was taken to a doctor for treatment, but it was too late to get stitches. (T. 243).

On cross-examination, the prosecutor asked specific questions about the chest wound suffered by the victim, as follows:

> Q: You did attack her. Didn't you?
>
> A: Like I said, we were struggling, both of us. I was defending myself from her. And there were some cuts that she got herself, while she had that in her hand, that thing in her hand.

Q: Let me ask you this then. How about the sucking chest wound in her back. You stabbed her in the back with a pair of scissors and you shoved it heard (sic) enough into her body that it penetrated the ribs, the fat, the cartilage and went into her lung, while she was not facing you.

You stabbed her in the back. **Are you claiming that's in self defense, too?**

A: **That, I can't say, no** but like I said, we were both very drunk.

Q: Right. You can't explain how you stabbed her in the back?

A: We both made a big mistake. We both made big mistakes.

* * *

Q: You can't explain to this jury how she wounded (sic) up stabbed in the back hard enough that it punctured her lung, right. You don't know how she did that?

A: Like I said, again, we were drunk. We were both drunk. We were both throwing at each other, hitting each other.

Q: Now, can you answer the question that I'm asking you. The question is, can you tell the jury how she managed to get herself stabbed in the back?

It would be pretty hard for her to stab herself. Right?

A: There was no blood on the ground. There was blood on the floor and she slipped several times.

Q: **Are you suggesting that she reached around and accidentally stabbed herself in the back like this?** Take a look at me.

Are you suggesting that she did this to herself?

A: **No.**

(T. 251-53) (emphasis added).

The Defendant denied that he ran from the scene. (T. 229). He testified that everything had calmed down between him and the victim and he was talking to her normally when her mother kicked the door open, so he walked away. (T. 229).

The trial court held a lengthy charge conference, going through each jury instruction individually and ascertaining whether either side had an objection. (T. 256-69, 272-74, 332-33). Defense counsel specifically agreed to the instruction at issue here. (T. 263-65).

During closing argument, defense counsel argued at length that there was no premeditation and this was really an aggravated battery – an argument that got out of hand due to the heated domestic situation and the alcohol. (T. 282-84, 287-90). In rebuttal, counsel admitted that intoxication was not a defense, but contended that it certainly influenced the Defendant's capacity for reflection. (T. 330-31). Counsel concluded by stating that a verdict of aggravated battery would be the right result. (T. 331-32). Defense counsel's rebuttal argument did not contain a single reference to any self defense theory. (T. 326-32).

The jury quickly returned a verdict finding the Defendant guilty of attempted first degree murder as charged in the information, with a weapon, and that an aggravated battery was inflicted. (T. 361-62). The need for a jury finding as to the commission of an aggravated battery, where attempted felony murder was not part of the charges, is due to the

reclassification provisions of section 775.087(1), Florida Statutes. Under that section, a first degree felony is reclassified to a life felony if the defendant committed an aggravated battery during the course of the felony.

On appeal, the district court affirmed the Defendant's conviction, finding that the forcible felony instruction was confusing but that this unpreserved error did not rise to the level of fundamental error. Martinez v. State, 933 So. 2d 1155 (Fla. 3d DCA 2006).

SUMMARY OF ARGUMENT

The self defense instruction given in the trial court properly tracked the language of the statute defining the parameters of the justifiable use of deadly force under Florida law. District court decisions limiting the reach of this statute are incorrect and should be disapproved of by this Court.

Even if the instruction was erroneous, such error should not be deemed fundamental. This Court has consistently held that an error in instructing the jury on an affirmative defense is not fundamental and must be preserved below to be subject to review on appeal. Self defense is a classic affirmative defense, and an alleged error in the instruction on such a defense must be preserved below.

Finally, the record clearly demonstrates that any error in the instruction on self defense did not reach down into the validity of the trial itself and accordingly was not fundamental under the circumstances of this case. The claim of self defense is belied even by the Defendant's own version of events. The Defendant is not entitled to relief where, as here, the error did not affect the result of the trial.

ARGUMENT

THE JURY WAS PROPERLY INSTRUCTED ON SELF DEFENSE, AND CLAIMS TO THE CONTRARY ARE NOT SUBJECT TO REVIEW ABSENT A TIMELY OBJECTION.

The "forcible felony" jury instruction has been the subject of numerous negative opinions in the last few years, as reflected in the Merits Brief of Petitioner (at p. 9-11). The State submits that the basic premise that there is something wrong with this instruction is based on a series of cases which should be disapproved of by this Court.

At the very least, an objection should be required before a defendant may raise on appeal the issue of the allegedly erroneous instruction. This Court has always required that a defendant properly preserve any objection to an instruction on an affirmative defense, and the same result should be reached here.

THE FORCIBLE FELONY EXCEPTION TO SELF DEFENSE

Chapter 776 of the Florida Statutes sets out the boundaries for the legal use of force in this state, including the use of force to protect an individual's home and person, as well as in defense of others. This chapter also specifically limits the use of force by an aggressor - prohibiting in relevant part a self defense claim by someone who is attempting to commit, committing, or escaping after the commission of a forcible felony. §776.041, Fla. Stat. See.generally Ivester v. State, 398 So. 2d 926, 930 n.2 (Fla. 1st DCA 1981) (noting that this section limits the circumstances in which one may defend against excessive force), rev. denied, 412 So. 2d 470 (Fla. 1982).

In short, the Legislature has determined that an individual cannot commit a crime and then claim self defense when the victim or a bystander opposes him. A classic application of this principle would involve a convenience store robbery. For example, a defendant enters a convenience store and points a knife at the clerk, asking him to empty the register. As the clerk is doing so, a customer approaches the defendant from behind and hits him in the head with a bottle. The defendant turns and stabs the customer.

At his subsequent trial, assuming the jury believes this version of events, the defendant could not successfully claim self defense for his aggravated battery of the customer. While ordinarily an individual who has been hit in the head with a bottle would be justified in using force to repel this attack, the Legislature has determined that a person who is committing a crime (in this example, the robbery) is not entitled to use deadly force.

As an additional example, the State asks this Court to consider a scenario more closely analogous to the instant case. Suppose a defendant is upset with his girlfriend, so he decides to kill her and begins choking her and cutting her. At this point, the girlfriend grabs a pair of scissors and cuts the defendant's pinky finger. The defendant takes the scissors away and stabs

the girlfriend again.

At his subsequent trial, assuming the jury believes this version of events, the defendant could not successfully claim self defense for the stabbing of his girlfriend. While ordinarily the girlfriend's action of stabbing the defendant would justify the defendant's use of force to repel this attack, the Legislature has determined that a defendant who is committing a forcible felony (in this example, attempted murder) is not entitled to use deadly force in self defense.

The key in both scenarios is **when** the alleged justification arose. If it arose after the defendant was committing a crime(or, of course, attempting to commit a crime, or escaping from the commission of a crime), he cannot validly act in self defense. On the other hand, if the justification arose before he committed the crime – if, for instance, the defendant in the first example was merely engaging the clerk in innocent conversation, not committing a robbery, when the customer hit him with the bottle, then this exception would not apply and he would be justified in using force.[2] Indeed, the very title of this section – "use of force by aggressor" – illustrates the purpose of its limitation.

[2]Of course, numerous additional considerations come into play as well, including whether the defendant withdraws from the situation, the appearance of danger, and the possibility of retreating. (T. 341-45).

The standard jury instruction, given in this case, tracks the language of the statute as it explains the various justifications and exceptions for self defense, including the forcible felony exception. (T. 341-45). Contrary to the holding of the lower court, and numerous other district courts, the instruction in this case accurately and properly explained the law of self defense. See Marshall v. State, 604 So. 2d 799, 803 (Fla. 1992) (plain language of section 776.041 provides that self defense is legally unavailable to person committing forcible felony), cert. denied, 508 U.S. 915 (1993); Perkins v. State, 576 So. 2d 1310 (Fla. 1991) (following plain language of statute, determining 776.041 exception not applicable to cocaine trafficking, which was not listed as a forcible felony).

DISTRICT COURT CASE LAW

Problems with the standard jury instruction discussed above began with the Fourth District Court of Appeal's decision in Giles v. State, 831 So. 2d 1263 (Fla. 4th DCA 2002). There, the defendant objected to the standard instruction at trial. Id. at 1264. On appeal, the court determined this objection was well-founded, reasoning that the forcible felony exception only applies when the accused was engaged in a separate forcible felonious act at the time of the charged crime. Id. at 1266. In

other words, the court concluded that the exception applied **only** in the convenience store robbery scenario discussed above. Applying the exception to the fight with the girlfriend scenario, the court concluded, was circular, confusing to the jury, and basically negated the defense. Id.

Shortly thereafter, the same court expanded its holding in Giles, concluding that this error was fundamental and need not even be brought to the attention of the trial court to mandate reversal on appeal. See Rich v. State, 858 So. 2d 1210 (Fla. 4th DCA 2003). The other district courts quickly fell in line with this case law, following Giles and Rich with little additional discussion or reasoning in support. See, e.g., Grier v. State, 928 So. 2d 368 (Fla. 3d DCA 2006), rev. denied, 952 So. 2d 1191 (Fla. 2007); Cleveland v. State, 887 So. 2d 362 (Fla. 5th DCA 2004); Zuniga v. State, 869 So. 2d 1239 (Fla. 2d DCA 2004); Barnes v. State, 868 So. 2d 606 (Fla. 1st DCA 2004). Indeed, the district courts have gone on to find ineffective assistance of appellate counsel for failing to raise this standard jury instruction as fundamental error. See, e.g., Granberry v. State, 919 So. 2d 699 (Fla. 5th DCA 2006); Davis v. State, 886 So. 2d 332 (Fla. 5th DCA 2004), rev. denied, 898 So. 2d 81 (Fla. 2005); Fair v. Crosby, 858 So. 2d 1103 (Fla. 4th DCA 2003).

The State submits that the district courts have improperly ignored the plain language of section 776.041. Nothing in this statute in any way limits its applicability to cases where the defendant engages in some additional and independent felonious act,

and the cases creating such a limitation should be disapproved of by this Court.[3]

FUNDAMENTAL ERROR IN AN AFFIRMATIVE DEFENSE

Even if the jury instruction was somehow misleading, the district court properly concluded that this error was not fundamental here. Moreover, the State submits that this error cannot be fundamental, under this Court's precedent.

In general, an objection must be raised at trial to preserve an issue for appeal. This requirement "is based on practical necessity and basic fairness in the operation of the judicial system." City of Orlando v. Birmingham, 539 So. 2d 1133, 1134 (Fla. 1989). Without an objection, the trial judge has no opportunity to rule upon a point of law and to correct any error at an early stage of the proceedings. Id. at 1134-35.[4]

This Court has stated repeatedly that jury instructions are subject to the contemporaneous objection rule. See, e.g., Archer v. State, 673 So. 2d 17, 20 (Fla.), cert. denied, 519 U.S. 876 (1996). Accordingly, instructions are reviewable in the absence of an objection only if the error "is pertinent or material to what the jury must consider in order to convict." Cardenas v. State, 867 So. 2d 384, 390-91 (Fla. 2004) (quoting Reed v. State, 837 So. 2d 366, 370 (Fla. 2002)).

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[3] Indeed, this "independent" forcible felony requirement has been applied in such an odd manner that even cases involving multiple felonies have been reversed based on the court giving the standard instruction. See Houston v. State, 919 So. 2d 489 (Fla. 2d DCA 2005); Shepard v. Crosby, 916 So. 2d 861 (Fla. 4th DCA 2005), rev. denied, 930 So. 2d 622 (Fla. 2006); Bates v. State, 883 So. 2d 907 (Fla. 2d DCA 2004). One is left to wonder how this instruction can **ever** be properly given.

Where, then, the error is relevant to a *contested element* of the charged offense, the error is fundamental. See, e.g., Reed, 837 So. 2d at 369 (incorrect definition of malice, an essential element of offense, disputed at trial, was fundamental error). On the other hand, where the error relates even to an element of the crime, but that element is not in dispute, the error is not fundamental and an objection must be lodged to preserve the issue for appeal. Battle v. State, 911 So. 2d 85, 88-89 (Fla. 2005), cert. denied, 546 U.S. 1111 (2006); State v. Delva, 575 So. 2d 643, 645 (Fla. 1991). See also State v. Weaver, 957 So. 2d 586, 588-89 (Fla. 2007) (no fundamental error in instructing on alternative uncharged manner of committing battery where State never argued this element was present and presented no evidence on it); Cardenas, 867 So. 2d at 392-93 (no fundamental error where improper instruction on presumption of impairment neither omitted nor misdefined an essential element of crime); Wuornos v. State, 644 So. 2d 1012, 1020 (Fla. 1994) (no fundamental error in defining aggravating factor in a constitutionally inadequate manner), cert. denied, 514 U.S. 1070 (1995);

[4]Here, for example, the trial court went to great lengths to ensure that each jury instruction was considered and agreed upon by the parties. (T. 256-69, 272-74, 332-33). The Defendant agreed to the forcible felony instruction as worded here. (T. 263-65). Cf. Swanson v. State, 921 So. 2d 852 (Fla. 2d DCA 2006) (reversing conviction where defense counsel not only did not object to forcible felony instruction, but actually affirmatively sought the erroneous instruction at trial); Crumbley v. State, 876 So. 2d 599, 601 (Fla. 5th DCA 2004) (contemporaneous objection rule prevents litigant from allowing an error to go unchallenged so it may be used as tactical advantage later).

State v. Smith, 573 So. 2d 306, 310 (Fla. 1990) (no fundamental error in failing to give long form instruction on excusable homicide even where there was evidence to support that defense).

This Court has been appropriately reluctant to expand the application of the fundamental error doctrine to errors in instructing the jury. Most relevant to the case at bar, this Court has refused to expand this doctrine when the alleged error involved an *affirmative defense* to a crime, rather than an element of the crime.

For example, this Court rejected a defense argument that the failure to instruct on voluntary intoxication as a defense to felony murder constituted fundamental error, reasoning as follows:

> Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error. Voluntary intoxication is a defense to, but not an essential element of, [the charged crime.] Therefore, the state did not have to disprove voluntary intoxication in order to convict. ... Because the complained of instruction went to [the defendant's] defense and not to an essential element of the crime charged, an objection was necessary to preserve this issue on appeal.

Sochor v. State, 619 So. 2d 285, 290 (Fla.), cert. denied, 510 U.S. 1025 (1993).

This Court applied similar reasoning in considering an *erroneous* instruction on the affirmative defense of entrapment. Holiday v. State, 753 So. 2d 1264, 1269 (Fla. 2000). Though the erroneous instruction failed to accurately reflect the burden of

proof on this defense, it was not so flawed as to deprive the defendant of a fair trial, and accordingly was not deemed to be fundamental error. Id. See also Smith v. State, 521 So. 2d 106 (Fla. 1988) (erroneous instruction on affirmative defense of insanity did not constitute fundamental error).

This Court has defined the characteristics of an affirmative defense as follows:

> An "affirmative defense" is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, "Yes, I did it, but I had a good reason."

State v. Cohen, 568 So. 2d 49, 51-52 (Fla. 1990).

Clearly, under this definition self defense is a classic affirmative defense.[5] Accordingly, an erroneous instruction on this issue must be brought to the attention of the trial court to be preserved for appeal. See Bridges v. State, 878 So. 2d 483, 484 (Fla. 4th DCA) (following Sochor, Holiday, and Smith, the failure to instruct on justifiable use of non-deadly force could not be raised for first time on appeal), rev. denied, 890 So. 2d 1114 (Fla. 2004); Goode v. State, 856 So. 2d 1101, 1102 n.1 (Fla.1st DCA 2003) (same).

This Court has consistently held that an error in instructing the jury on an affirmative defense is not fundamental and must be preserved below. The instant case falls squarely under those holdings, and the fundamental error doctrine should

not be applied under these circumstances.[6]

THE ALLEGED ERROR HAD NO EFFECT ON THE TRIAL

Finally, even if the alleged error at issue here could be fundamentally erroneous under some circumstances, the district court properly concluded that it was not fundamental in the instant case.[7] As this Court noted in Holiday, 753 So. 2d at 1270 n.3, relief is not appropriate where the defense was "tenuous at best and the facts do not present a compelling demand for relief." The same is true for the self defense claim advanced here.

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[5]That the State bears the ultimate burden to prove that the crime was not committed in self defense makes this no less of an affirmative defense. Cf. Holiday, 753 So. 2d at 1267-68 (noting that affirmative defense of entrapment placed ultimate burden of proof on State to show beyond a reasonable doubt defendant's predisposition to commit the crime); Smith, 521 So. 2d at 107-08 (noting that at that time the affirmative defense of insanity placed ultimate burden of proof on State to prove beyond a reasonable doubt that defendant was sane).

[6]The State notes that this holding will not prejudice defendants whose trials were actually affirmatively harmed by an erroneous instruction on their defense, as those defendants would have a remedy for ineffective assistance of counsel under Rule 3.850.

[7]Finding that an error in instructing the jury on an affirmative defense *can* be fundamental error *in certain cases* is quite different from a broad conclusion that, for example, the giving of a forcible felony jury instruction *is* fundamental error and per se reversible no matter the circumstances. As discussed above, however, the State submits that a more appropriate resolution of this issue would be a finding that an error in the instruction on the affirmative defense of self defense *cannot* be fundamental error and must be preserved by objection.

As discussed by the district court, there simply was no credible evidence to support the Defendant's theory of self-defense. The Defendant based this defense on his testimony that the victim instigated the altercation by coming at him with a scissors. (T. 228). He further testified that, contrary to the physical evidence (including pictures), he was actually cut three times and was taken to the doctor, where he should have received stitches for his injuries. (T. 243).

However, during his testimony he essentially admitted that he was clearly stronger than the victim and came out of the altercation in a much better condition than she did. (T. 249-1850). More importantly, he could not explain how the victim ended up with numerous wounds to her back, including a wound so deep that it penetrated her lung. (T. 252-53). Even he admitted that he could not claim he stabbed her in the back in self defense. (T. 252). The Defendant's own testimony, then, belies his selfdefense claim.

As the court below discussed in detail, the self defense claim was at best tangential here, and the main thrust of the defense was that this altercation was a mutual struggle and the victim's injuries accidental, the unfortunate product of immaturity, jealousy, and alcohol, rather than a premeditated design to kill. Martinez, 933 So. 2d at 1167-75. Cf. Sutton v. State, 929 So. 2d 1105, 1107 (Fla. 4th DCA 2006) (self defense not applicable where defendant stated that he fired gun because

he lost control of trigger and stumbled over stones), receded from on other grounds (sentencing), Yisrael v. State, 938 So. 2d546 (Fla. 4th DCA 2006).

Additionally, the State notes that the alleged error in the instruction did not relate to a significant factor, such as who had the burden of proof, but rather applied only to a single limited exception to the justifiable use of force. Contrary to the Defendant's argument, this did not completely deprive him of this defense, and the jury was specifically instructed that if it had a reasonable doubt as to whether the Defendant was justified in the use of deadly force it should find him not guilty. (T. 344-45).

This Court has recognized the necessity of considering the actual facts of a case in analyzing whether an error is fundamental, noting that "[i]f the error was not harmful, it would not meet our requirement for being fundamental." Reed, 837 So. 2d at 370.[8] See also Sampson v. State, 903 So. 2d 1055, 1056-57 (Fla. 2d DCA 2005) (under Reed, defendant was required to show he was prejudiced by error before it would be considered to be fundamental); Roberson v. State, 841 So. 2d 490, 492 (Fla. 4th DCA) (noting that Reed applied a "non-categorical approach to erroneous jury instructions in criminal cases"), rev. denied, 848 So. 2d 1155 (Fla. 2003).

[8]Indeed, if the alleged error had been preserved by objection below, a harmless error review would be appropriate. Certainly no lesser standard should be used for reversal where there is no objection below.

Fundamental error is found only where an error reaches 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." Delva, 575 So. 2d at 644-45 (quotation omitted). Such a determination cannot be made in a vacuum, especially where the alleged error concerns an instruction on an affirmative defense. Rather, the effect of the error – whether it reached down into the validity of the trial itself – must be evaluated in the context of the trial, considering the nature and credibility of the defense at issue, other defenses propounded to the jury, the magnitude of the error itself, and the other evidence at trial.

This case well illustrates a situation where the issue of self defense was supported only by self-serving testimony that was completely unrealistic and even contradictory. Considering the evidence in this case, especially the Defendant's own testimony, there is no reasonable possibility that the alleged one-sentence error in a three page instruction on self defense in any way affected the jury's verdict, let alone tainted the trial to such an extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Indeed, defense counsel himself recognized the futility of such a defense here, instead focusing on other, more credible arguments.

The Defendant notes that under Florida law, a defendant is entitled to an instruction on a lawful defense, however weak or improbable the evidence supporting that defense may be. See,e.g., State v. Weller, 590 So. 2d 923, 927 (Fla. 1991); Charles v. State, 945 So. 2d 579, 582 (Fla. 4th DCA 2006). The State submits that this standard itself opens the door for affirmative defenses with little realistic chance for success (as was the case here). Accordingly, an error in instructing on an affirmative defense will often have no effect on the trial, let alone an effect so damaging it taints the validity of the trial itself.

If anything, then, this lenient standard for giving an instruction on an affirmative defense actually weighs *against* a finding that an error in such an instruction can be deemed fundamental.

In conclusion, the State submits that the jury was properly instructed on self defense. Even if the instruction was erroneous, such an error is not fundamental and must be preserved to be raised on appeal. Finally, even if this error could be fundamental in some circumstances, it was not fundamental here, where the error was not so significant that it reached down into the validity of the trial itself. The district court's decision should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court find that the jury instruction used below was proper or, in the alternative, that it was not fundamentally erroneous.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief on the Merits has been furnished by U.S. mail to Robert Godfrey, counsel for Petitioner, 1320 N.W. 14th Street, Miami, Florida 33125, this _____ day of August, 2007.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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