

IN THE SUPREME COURT OF APPEAL

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. SC13-1236

JIMMY MOORE, JR.,
Respondent.

_____ /

ANSWER BRIEF OF RESPONDENT ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

STATE OF FLORIDA, :
Petitioner, :
VS. : CASE NO. SC13-1236
JIMMY MOORE, JR., :
Respondent. :
_____ :

ANSWER BRIEF OF RESPONDENT ON THE MERITS

I PRELIMINARY STATEMENT

Respondent accepts the state's statements of the case and facts insofar as they are supported by the record.

II SUMMARY OF ARGUMENT

Issue I. The First District Court below ruled that the jury instruction error on intent in manslaughter would be fundamental error, except that, the court found that the error was waived. Contrary to the district court's opinion below, the fundamental error in the instruction on manslaughter was not waived.

Defense counsel did not request an incorrect instruction; rather, counsel acquiesced in giving the instruction which the state submitted as the current, correct standard jury instruction on manslaughter, a claim which was incorrect. No party cited Montgomery, infra, controlling caselaw which had been decided a few months before respondent, Jimmy Moore's, trial.

The state's argument to extend the concept of waiver to include defense "agreement" or acquiescence to a jury instruction, when counsel did not understand that it contained an error, would subvert the concept of fundamental error in jury instructions, which is designed to protect the defendant's right to due process of law, and which requires the trial court to correctly instruct the jury on the law.

Issue II. The First District held essentially that, because respondent's sole defense was identity - that he was not the one who committed the crime - this was the equivalent of conceding the other elements of the crime. Thus, because respondent did not specifically argue that the crime was justifiable or excusable, an error in the jury instructions on justifiable and excusable homicide that otherwise would be fundamental, should be found to be harmless. Such a ruling would require this court to recede

from its previous decision in State v. Lucas, infra.

This court rejected this approach in Griffin, infra, another case in which the defense was misidentification. Although Griffin addressed the element of intent per se, rather than the omission of the definitions of justifiable and excusable homicide as part of the manslaughter jury instruction, the holding of Griffin is equally applicable here. In Griffin, this court held in effect that contesting proof of identity does not mean the defendant has conceded all other elements of the crime. Thus, an error in the jury instruction on intent is fundamental error, unless the defendant has conceded the element in question. As in Griffin, respondent did not concede intent or concede that the crime could not be justifiable or excusable. Under Lucas and Griffin, the error in omitting the jury instructions on justifiable and excusable homicide was fundamental error.

III ARGUMENT

ISSUE I

CERTIFIED QUESTION: IN ORDER FOR COUNSEL TO WAIVE AN ERROR IN A JURY INSTRUCTION THAT WOULD OTHERWISE BE FUNDAMENTAL, IS IT ONLY NECESSARY THAT COUNSEL AFFIRMATIVELY AGREE TO THE INSTRUCTION, OR IS IT ALSO NECESSARY FOR COUNSEL TO AFFIRMATIVELY AGREE TO THE PORTION OF THE INSTRUCTION THAT IS ERROR AND/OR TO BE AWARE THAT THE INSTRUCTION IS ERRONEOUS?

Standard of review

The certified question is a legal issue which is reviewed de novo.

Argument

The First District Court below ruled that the jury instruction error would be fundamental error, except that, the court found that the error was waived. Moore v. State, 114 So.3d 486 (Fla. 1st DCA 2013). Contrary to the district court's opinion below, the fundamental error in the jury instruction on manslaughter was not waived.

The trial court erred in instructing the jury that, to convict of manslaughter, it had to find that respondent, Jimmy Moore, intended to cause death. This court held a similar error in the manslaughter by act instruction was fundamental error in State v. Montgomery, 39 So.3d 252 (Fla. 2010). This court held the same jury instruction given at Moore's trial here - the 2008 pre-Montgomery amended instruction - was fundamental error in Daniels v. State, 121 So. 3d 409, 414 (Fla. 2013) (Daniels II).

The error here was similar to the error in Daniels. The First District below agreed the error would be fundamental, except

that, the court found the error was waived. Respondent contends the district court's finding of waiver was error and must be reversed.

The state begins by arguing that only "affirmative agreement to an instruction is necessary to waive fundamental error" (State/Petitioner's Initial Brief on Merits (PIB), p. 9).

The state seems to argue that this principle can be found in the discussion of invited error in this court's opinion in Universal Ins. Co. of N. Am. v. Warfel, 82 So. 3d 47 (Fla. 2012) (PIB 9). However, respondent did not invite fundamental error here. Further, taking the state's argument to its logical conclusion would destroy the concept of fundamental error in jury instructions, apparently unless defense counsel were utterly silent, which does not appear to be a rational or useful choice. See York v. State, 932 So.2d 413, 414 (Fla. 2d DCA 2006) (defendant remaining silent on a jury instruction, neither objecting nor agreeing to it) (PIB 11).

The state's argument that the common determinant of the cases it cited is

what the actions of a party reasonably communicated to the trial court and opposing counsel. . .

(PIB 12), is disingenuous in this case, where the erroneous instruction did not originate with defense counsel, but with the prosecutor. The prosecutor proposed the erroneous instruction and repeatedly argued that it was a correct statement of the law. At the state's prompting, defense counsel was attempting only to agree to the correct standard jury instruction; defense counsel

was not seeking a modified instruction for some advantage. The state argues that, in York, supra, the defendant's "lack of affirmative objection" "did not mislead the court into thinking its action was correct by agreeing to it" (PIB 13). Since the state also argues that the trial court inquired several times whether defense counsel wanted any other instructions or changes to the manslaughter instruction (PIB 17-19), it does not appear from the record that counsel's failure to object misled the court into thinking the jury instruction was correct.

This court said in Universal Ins. Co. that "Universal's assertion that the error was invited is without merit." 82 So.3d at 65. As the state has argued (PIB 10), this court has held that fundamental error is waived where defense counsel requests an erroneous instruction. Id., citing Armstrong v. State, 579 So.2d 734, 735 (Fla. 1991) (citing Ray v. State, 403 So.2d 956 (Fla. 1981)). Fundamental error is also waived where defense counsel affirmatively agrees to an improper instruction. Universal Ins. Co., citing State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction.") (citing Armstrong, 579 So.2d at 734).

These principles are not in dispute in this case, nor is there any dispute that defense counsel did not request the erroneous jury instruction. Rather, the only point of contention is whether defense counsel's acquiescence to the prosecutor's statement that its proposed jury instruction was the correct, current

standard jury instruction constituted "affirmative waiver" as a term of art. Respondent contends that counsel's acquiescence, when counsel was not clearly put on notice of the error, did not constitute "affirmative waiver," thus the fundamental error was not waived.

Armstrong and Ray explain what constitutes affirmative waiver. In Armstrong, defense counsel requested a modified instruction on excusable homicide tailored to his theory of the case. Thus, Armstrong's counsel affirmatively waived the instruction error. In Ray, the court found that the facts failed to prove waiver of the correct jury instructions.

In the lower court opinion in Daniels, the district court said:

. . .we do not believe that counsel's acquiescence, silence, or argument in favor of the challenged instruction here constitutes waiver or invited error. See also Curry v. State, 64 So.3d 152 (Fla. 2d DCA 2011) (concluding that issue of fundamental error in instruction was not waived by counsel's acquiescence to the giving of one manslaughter instruction and advice against the giving of the other).

Daniels v. State, 72 So.3d 227, 229-30 (Fla. 2d DCA 2011) (Daniels I). This portion of Daniels was not disturbed by this court's subsequent decision finding error in the instruction.

Moreover, the Fifth District has explains why, in this situation, more than counsel's failure to object or an "agreement" to an incorrect statement of the law is required to constitute waiver. The court said:

During the charge conference, Paul's attorney, referring to the first trial which resulted in a hung jury, stated: "I think the instructions - it's on a single

charge, so the instructions are rather straightforward. And I think they are the exact same instructions you gave the last time." In response to the trial judge's further inquiry whether there was any objection to simply reprinting the same instructions used in the earlier trial, defense counsel stated he had no objection. We do not agree that Paul's attorney's statement or his failure to object establishes waiver or invited error. Any discussion of fundamental error presupposes a failure to lodge a contemporaneous objection, a fact underlying the supreme court's review in Montgomery and this court's review of Paul's trial. To the extent Joyner v. State, 41 So.3d 306 (Fla. 1st DCA 2010), holds otherwise, we disagree. See also Reddick v. State, 56 So.3d 132 (Fla. 5th DCA 2011). (emphasis added)

Paul v. State, 63 So.3d 828, 829 (Fla. 5th DCA 2011), quashed on other grounds, 137 So.3d 1021 (Fla. 2014). (Paul was quashed based on this court's decision in Haygood v. State, 109 So.3d 735 (Fla. 2013)).

In its brief here, the state argues that a party's request for an instruction, or affirmative agreement to an instruction, self-evidently proves that fundamental error was waived (PIB 16), although neither Universal Ins. Co. nor Amstrong, supra, made such a ruling. The state argues that

an additional requirement that there must be evidence a party is specifically aware of an erroneous instruction is not only outside the above test, but would contravene the goal of the invited error doctrine. This is particularly true in the instant case, where the error at issue is an omission, rather than an inclusion, of language.

(PIB 16). The state argues that the record would not necessarily reveal the knowledge of a party or counsel, and

[i]ndeed, it is precisely those parties that would intentionally inject error who are most likely to obscure any awareness they possess of a specific erroneous instruction.

(PIB 16). The "parties" who would intentionally inject error in

this scenario are almost certainly defense counsel, because it is not clear what the penalty would be for a prosecutor who intentionally injected error into jury instructions. When this court is presented with a case in which it appears that defense counsel knowingly injected error into the jury instructions, this court should deal with that issue. However, this is not that case.

The state argues that finding fundamental error here would contravene the goal of the invited error doctrine. The state argues this is particularly true here because the error is an omission, rather than an inclusion, of language (PIB 16). Taking the second part of this argument first, in this case, two arguments on the manslaughter instruction have been split into two issues. Issue I argues error in instructing the jury that conviction of manslaughter requires finding that respondent intentionally caused death, i.e., intended to kill; Issue II argues error in failing to instruct on justifiable and excusable homicide in the manslaughter instruction. The state at this point and later seems to have mixed up its Issue II argument with its Issue I argument.

Issue I argues that the jury was erroneously instructed that, to convict of manslaughter, the jury had to find that respondent "intentionally caused death." That is, the error was in the inclusion of erroneous language, not an omission. The state also argues later in Issue I regarding the matter in Issue II when it argues that defense counsel "affirmatively agreed" to omitting a definition of justifiable and excusable homicide (PIB 20). That

is not at issue in Issue I, and respondent contends it was fundamental error and was not waived.

Second (returning to Issue I), the state in no way - except possibly in its reference to York, supra - explains how the long-standing principle of fundamental error in jury instructions survives its theory that affirmative waiver does not require defense counsel to have any idea what the error is when counsel unknowingly "agrees" to an erroneous instruction. The state does not explain how its theory of waiver is not inconsistent with this court's findings of fundamental error in Montgomery, Haygood, Daniels II, supra, and their progeny. Universal Ins. Co. was decided in 2012, after Montgomery but before Daniels and Haygood. However, Haygood and Daniels follow Montgomery. Here, the incorrect jury instruction on manslaughter by act in the instant case interfered with the jury's function of finding facts and applying the facts to the law based on proper instructions. Haygood, 109 So.3d at 743.

Universal is a civil case, so it is no surprise that it did not cite Montgomery, although it did cite other criminal cases, primarily Armstrong and Ray. As a civil case, Universal had no reason to address the issues of the criminal defendant's right to due process of law, or the trial court's duty to correctly instruct the jury on the law in a criminal case. As this court said in Daniels II:

We remain mindful that, in the realm of criminal jury instructions, "[i]t is an inherent and indispensable requisite of a fair and impartial trial ... that a defendant be accorded the right to have a Court cor-

rectly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence." Delva, 575 So.2d at 644 (quoting Gerds v. State, 64 So.2d 915, 916 (Fla. 1953)). (emphasis added)

Daniels, 121 So.3d at 417, citing State v. Delva, 575 So.2d 643, 645 (Fla. 1991).

In Daniels, this court said that

"Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error." Garzon, 980 So.2d at 1042 (quoting Stewart, 420 So.2d at 863).

121 So.3d at 417-18, citing Garzon v. State, 980 So.2d 1038 (Fla. 2008). In Daniels, the issue of intent to kill was clearly before the jury as a disputed issue. 121 So.3d at 418. Intent to kill was also at issue in the instant case. Without repeating the argument made in Issue II in this brief, this court's decision in Griffin v. State, ____ So.3d ____ (no. SC13-2450) (Fla. March 12, 2015), explains how, unless the defendant has conceded intent - which did not happen here - it remains a jury question.

The state proposes that finding a waiver of a fundamental error in the jury instruction, where defense counsel was unaware of the error, is a correct principle because:

It is in this manner that the principle of fairness towards both the tribunal and the opposing party binds a litigant to their word and prevents them from receiving the benefit of changing their position on appeal.

(PIB 16). This approach would not be "fair" to the defendant, as it would not be fair to bind a defendant to an unwitting error in the law; the result of such an approach would be to allow unfair convictions of murder or manslaughter without recourse when a

properly instructed jury would have acquitted the defendant of murder or manslaughter. Moreover, no reasonable principle would bind a litigant to his or her "word" when that position was based on an unknowing error of law. The state's position is untenable. The state proposes a bright-light rule that simply does not account for a criminal defendant's right to due process of law, or for the trial court's duty to correctly instruct the jury on the law. The state would put the error in an insurance case on the same level as the error in respondent's case, which resulted in his conviction of second-degree murder and a sentence of life in prison.

No, a defendant should not be allowed to "inject error" into the proceedings and then alter his position on appeal to his advantage (PIB 21). However, for this principle to apply, first the state must show that defense counsel did inject error into the proceedings, or that counsel sought to modify the instructions to the defendant's advantage, but the state has failed to show such error. Instead, what the record seems to show is that the trial court was not certain of what a correct jury instruction would say; the prosecutor believed he had a correct instruction, and he persuaded defense counsel well enough that defense counsel agreed to the proposed instructions. However, the instructions were erroneous. While the trial court offered to discuss the instructions several times, it is not clear defense counsel understood that the proposed instruction was error; defense counsel never acknowledged any error, nor of course, did the

state. This was fundamental error which was not waived.

In other cases, trial counsel and appellate counsel have been found to be ineffective in failing to object or failing to raise on appeal errors under Montgomery and Haygood. See, e.g., Molina v. State, 150 So.3d 1280, 1284 (Fla. 3d DCA 2014); Ivaldi v. State, 88 So.3d 334 (Fla. 3d DCA 2012); see also Dawkins v. State, ___ So.3d ___ (no. 3D13-2501) (Fla. 3d DCA 2014). Although ineffectiveness of counsel was found in those cases after post-conviction proceedings, the rulings are so clear that ineffectiveness is also found on the face of the record here. Trial counsel was ineffective. Montgomery was decided in April, 2010; rehearing was denied June 28, 2010. Moore's trial began June 28, 2010 and ended on July 1, 2010. Therefore, defense counsel (as well as the prosecutor and the trial court) should have been aware of the decision in Montgomery at the time of trial, but no mention was made of it.

Defense counsel may have acquiesced in an erroneous instruction proposed by the state, but this did not constitute waiver. This issue was not waived, and the error was fundamental.

ISSUE II

CERTIFIED QUESTION: WHEN A DEFENDANT IS CONVICTED OF EITHER MANSLAUGHTER OR A GREATER OFFENSE NOT MORE THAN ONE STEP REMOVED, DOES THE FAILURE TO INSTRUCT THE JURY ON JUSTIFIABLE OR EXCUSABLE HOMICIDE CONSTITUTE FUNDAMENTAL ERROR NOT SUBJECT TO A HARMLESS ERROR ANALYSIS EVEN WHERE THE RECORD REFLECTS THERE WAS NO DISPUTE AS TO THIS ISSUE AND THERE WAS NO EVIDENCE PRESENTED FROM WHICH THE JURY COULD FIND JUSTIFIABLE OR EXCUSABLE HOMICIDE?

Standard of review

At the charge conference below, there was no discussion of the instructions necessary to explain justifiable or excusable homicide, or manslaughter as a residual offense. The omission of these instructions were fundamental error. Fundamental error is a legal issue which is reviewed *de novo*.

Argument

In State v. Lucas, 645 So.2d 425 (Fla. 1994), this court answered a certified question in the affirmative, holding the

failure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless-error analysis where the defendant has been convicted of either manslaughter or a greater offense not more than one step removed, such as second-degree murder. Lucas, 645 So.2d at 427.

Moore v. State, supra, 114 So.3d at 489.

On this issue, the district court followed this court's precedent in Lucas, and held that the failure to instruct on justifiable or excusable homicide as part of the jury instruction on manslaughter, a crime one step removed from the offense at conviction of second-degree murder, was fundamental error. However, the court argued that because respondent, Jimmy Moore's, only defense was identity, he did not put intent or justifiable or

excusable homicide at issue, and thus, in the district court's opinion, this court should recede from Lucas and find the error was not fundamental.

Although the case involved fundamental error in the intent element of manslaughter, as opposed to the failure to instruct on justifiable and excusable homicide as part of the manslaughter instruction, this court has recently and utterly rejected the district court's reasoning in Griffin v. State, _____ So.3d _____ (no. SC13-2450) (Fla. March 12, 2015).

This court said in Griffin:

[W]e are constrained to hold that a sole defense of misidentification does not concede or fail to place in dispute intent or any other element of the crime charged except identity when the offense charged is an unlawful homicide. The district court concluded that where identity is the defense, "[t]here is no dispute regarding the elements of an offense when the manner of the crime is conceded and the sole defense is mistaken identity."

Slip op at 3.

The district court therefore assumed that the "manner of the crime" . . . included the intent with which the crime was committed, that intent being ill will, spite, or evil intent required for second-degree murder.

Id. This conclusion was incorrect, however, because

[t]he district court's analysis and conclusion overlook the fact that Griffin did not have an obligation to argue that the manner of the shooting did not establish the requisite intent, or to expressly dispute any other elements of the crime.

Slip op. at 4. The court said:

It must be remembered, as we said long ago, that "[t]he plea of not guilty puts in issue every material element of the crime charged in the information, and before a jury is warranted in returning a general verdict of guilty against an accused every material element of the crime charged must be proved to their satisfaction

beyond all reasonable doubt." Licata v. State, 81 Fla. 649, 88 So. 621, 622 (1921).

Id.

In sharp contrast, the First District said in its decision below:

Because we believe that a defendant should not receive a new trial based on an unobjected-to erroneous instruction concerning a matter that was not in dispute and could not have reasonably affected the verdict, we certify a question asking the supreme court to readdress its decision in State v. Lucas, 645 So.2d 425 (Fla. 1994).

Moore, 114 So.3d at 487-88.

The district court said:

Because we find this error was not waived, we are required to reverse pursuant to Lucas, which held the "failure to give a complete instruction on manslaughter during the original jury charge is fundamental error which is not subject to harmless-error analysis where the defendant has been convicted of ... a greater offense not more than one step removed" from manslaughter. 645 So.2d at 427. However, if we were not constrained by Lucas, we would find the error was not fundamental because there was no dispute in the trial as to whether the killing was justifiable or excusable homicide. (emphasis added)

114 So.3d at 493.

Here, the record reflects there was no dispute as to whether the killing was justifiable or excusable homicide. [Moore]'s theory of defense was identity. Therefore, that omission from the jury instruction was not pertinent or material to what the jury needed to consider in order to convict, and it cannot be said that the guilty verdict could not have been obtained without the omission. Further, because there was no dispute regarding justifiable or excusable homicide, to reverse in this case does not serve the ends of justice. Instead it wastes valuable time and resources due to an error that could not have possibly affected the jury's verdict. For these reasons, we ask the supreme court to reconsider its decision in Lucas and certify a question of great public importance. (emphasis added)

114 So.3d at 493.

The district court's ruling cannot be reconciled with this court's decision in Griffin. As this court reiterated in Griffin, a plea of not guilty puts every element in issue, except those which the defendant specifically concedes. Here, Moore did not concede any issue pertaining to intent, or to whether the homicide was justifiable or excusable. As in Griffin, he simply contested his identity as the perpetrator. This court said in Griffin:

other than the fact that Mills was shot, Griffin did not concede any other elements of the crime charged; he simply contested his identity as the perpetrator. The State's burden still remained to prove that the shooting was done with a depraved mind, but without intent to kill, as set forth in the standard jury instructions. Thus, we conclude that intent remained a matter that was pertinent or material to what the jury must consider in order to convict Griffin of the crime charged or a lesser included offense, notwithstanding his claim of misidentification.

Slip op. at 5.

The First District's reliance on its decisions in Joyner v. State, 41 So.3d 306 (Fla. 1st DCA 2010) and Calloway v. State, 37 So.3d 891 (Fla. 1st DCA 2010) has become so problematic that the state did not even cite them in its merit brief in this court. Although neither case has been expressly overruled, Joyner affirmed on the error which this court later found to be fundamental error in Haygood v. State, 109 So.3d 735 (Fla. 2013). It appears that Joyner now has no precedential value, the issue having been overruled in Haygood.

As for Calloway, it did not involve the jury instructions on manslaughter; it was an aggravated battery case. The issues were

not similar to this case, and it does not support the state's argument or the district court's ruling. Calloway argued he was convicted of one crime - aggravated battery by permanent disability - when he was charged with a different offense - aggravated battery by great bodily harm. He argued the jury instruction on the crime not charged was fundamental error. The district court held the information properly charged him, and the jury instruction was not fundamental error. It is not evident why Calloway even reached the issue of the jury instructions, since it had already rejected the premise for the instruction issue - that Calloway was charged with one crime but the jury instructed on another. In any event, this case is different, and Calloway provides no guidance.

As this court ruled in Griffin, contesting proof of identity does not mean the defendant has conceded all other elements of the crime. This misunderstanding of the law resulted in error in the First District's opinion. Here, Moore did not concede any element of intent, or the absence of justifiable or excusable homicide. Thus, as the district court conceded in its opinion, the error in the jury instruction was fundamental under Lucas, supra. Lucas remains an accurate statement of the law. As the district court held, Moore's conviction must be reversed for new trial.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court deny review or affirm the holding of the First District Court below.

Respectfully submitted,

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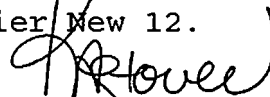
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail, by agreement of the parties, to Assistant Attorney General Jay Kubica, at criminalappealsintake@myfloridalegal.com, and by mail to Mr. Jimmy Moore, Jr., inmate no. N00284, Jefferson Correctional Institution, 1050 Big Joe Road, Monticello, FL 32344-0430, this day, April 13, 2015.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.



KATHLEEN STOVER