

IN THE SUPREME COURT OF FLORIDA

ANTONIO GARRETT,

Petitioner,

v.

CASE NO. SC14-2110

STATE OF FLORIDA,

First DCA No. 1D13-1074

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Garrett was convicted of first-degree murder and possession of a firearm by a convicted felon for killing Jerry Ford. Garrett and Ford attended a party in a neighbor's yard. The two men argued intermittently throughout the day. Garrett left the area and returned with a firearm. Accounts of the shooting differed. The state's theory was that Garrett stood on the sidewalk outside the front gate of Ford's residence and fired in Ford's direction. Gunshots struck Ford as he rose from a chair. A neighbor did not see anything in Ford's hands when he was shot and law enforcement did not find a firearm on his body. However, a rifle was discovered in the yard of Ford's duplex, supporting the defense theory that Ford was armed. Garrett told police that when he returned to the scene, Ford emerged from his residence with a .22-caliber long rifle. According to Garrett, Ford fired first, and Garrett returned fire with a .45-caliber semi-automatic pistol. Ford ran back toward the porch while trying to cock his rifle. "Garrett admitted continuing to shoot even after Ford dropped his rifle." Garrett v. State, 39 Fla. L. Weekly D1783 (Fla. 1st DCA Aug. 22, 2014).

Afterward, Garrett led police to a .45-caliber pistol. Four fired bullets at the scene matched the pistol. Officers found seven .45-caliber shell casings. Ford suffered three gunshot wounds to his backside. Id.

Garrett asserted that he justifiably used deadly force to defend himself or prevent a forcible felony. The parties stipulated that he had a prior felony conviction. The trial court instructed the jury on the justifiable use of deadly force, and on the effect of Garrett's illegal possession of a firearm on his right of self-defense:

If Antonio Garrett was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.

However, if you find that Antonio Garrett was engaging in unlawful activity then you must consider if Antonio Garrett had a duty to retreat.

Antonio Garrett cannot justify the use of force likely to cause death or great bodily harm unless he used every available means within his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that Antonio Garrett was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if, by retreating, he could have avoided the use of that force. However, if Antonio Garrett was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable.

39 Fla. L. Weekly at D1784. Defense counsel objected to the trial court's instruction that "[p]ossession of a firearm by a convicted felon constitutes unlawful activity." Id.

The First District Court of Appeal concluded that the trial court erred in including the language on unlawful activity. However, the court found that the error was not fundamental and therefore not reversible without objection. The court reasoned that “[t]here was ample evidence presented for the jury to find that from the beginning of the incident, Garrett did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him, especially after Ford dropped his rifle and Garrett continued to shoot.” Id. at D1785. The court did not address whether Garrett could have fired the four shots that did not strike Ford after Ford dropped his rifle.

The First District affirmed Garrett’s convictions. Garrett now seeks discretionary review on grounds that the decision expressly and directly conflicts with Rios v. State, 143 So. 3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 39 Fla. L. Weekly D2125 (Fla. 4th DCA Oct. 8, 2014). The Fourth DCA ruled in each case that an instruction imposing a duty to retreat on a defendant engaged in illegal activity constituted fundamental error requiring reversal of homicide convictions.

SUMMARY OF THE ARGUMENT

The First and Fourth District Courts of Appeal are in express and direct conflict on whether an instruction that a person engaged in illegal activity has a duty to retreat before using deadly force causes fundamental error. The Fourth DCA found fundamental error in Rios v. State, 143 So. 3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 39 Fla. L. Weekly D2125 (Fla. 4th DCA Oct. 8, 2014). In each case the court left to a correctly instructed jury the determination whether the defendant faced an imminent threat of death or great bodily harm. The First DCA made this determination itself in rejecting fundamental error. It concluded that although the evidence of a threat of imminent violence was sufficient to require a self-defense instruction, it was inadequate to create reasonable doubt on whether he faced such a threat. This decision directly conflicts with Rios and Dorsey, in which the threats of imminent harm were no greater than in this case.

The conflict bears on cases in which a defendant who was engaged in illegal conduct claims the defense of justifiable use of deadly force in trials for crimes occurring before the 2014 amendments to the Stand Your Ground laws.

ARGUMENT

This Court should resolve interdistrict conflict on whether fundamental error results from an erroneous instruction that a person engaged in illegal activity has a duty to retreat.

The First and Fourth District Courts of Appeal are in express and direct conflict on whether an instruction that a person engaged in illegal activity has a duty to retreat before using deadly force causes fundamental error. The conflict bears on cases arising before the 2014 amendments to the Stand Your Ground Laws.

As part of the changes to the self-defense laws enacted in 2005, section 776.012(1), Florida Statutes, provides that a person is justified in using deadly force if “[h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or to prevent the imminent commission of a forcible felony.” The provision remained in effect until amended effective June 20, 2014. See Ch. 2014-195, § 3, Laws of Fla. It applies to Garrett’s prosecution for a homicide committed on September 13, 2011.

Under section 776.013(3), Florida Statutes (2011), the right to stand one’s ground and meet force with force is reserved to those who are not engaged in illegal activity. In contrast, engaging in unlawful activity does not restrict the right to stand one’s ground under section 776.012(1), Florida Statutes (2011). The two provisions operate independently. As explained in Little v. State, 111 So. 3d 214

(Fla. 2d DCA 2013), and Hill v. State, 143 So. 3d 981 (Fla. 4th DCA 2014), a person engaged in illegal activity is entitled to stand his or her ground under section 776.012(1) without regard to section 776.013(3).

The First and Fourth DCAs apply Little and Hill differently to erroneous jury instructions on the duty to retreat. In Rios v. State, 143 So. 3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 39 Fla. L. Weekly D2125 (Fla. 4th DCA Oct. 8, 2014), and this case, trial courts erroneously instructed juries that defendants engaged in illegal activities when they used deadly force had a duty to retreat. The Fourth DCA held that the instruction caused fundamental error in Dorsey and Rios. The First DCA rejected a claim of fundamental error here. The holding in this case conflicts with the holdings in Dorsey and Rios.

Rios killed a man and injured two others in a shooting outside a bar. Rios had an opportunity to leave after an initial confrontation and before the shooting. Although members of the group confronting Rios allegedly ordered someone to get a gun, the opinion reflects that only Rios was armed. 143 So. 3d at 1168. The trial court concluded that Rios was engaged in illegal conduct and therefore instructed the jury on the pre-2005 right of self-defense. Rios' jury received the exact same instruction on duty to retreat as in this case. See Rios, 143 So. 3d at 1167; Garrett, 39 Fla. L. Weekly at D1784. That instruction required Rios to retreat from an attack, if possible, before justifiably using deadly force.

The Fourth DCA held that the instruction caused fundamental error by reimposing the duty to retreat discarded in 2005, “effectively eliminat[ing] Defendant’s sole affirmative defense.” 143 So. 3d at 1170. The evidence, instructions, and closing argument by the state made it “difficult to see how the jury, during its deliberations, would not have considered Defendant’s duty to leave with his friends” before the shooting that killed two men and injured a third. *Id.* at 1171.

Dorsey involved a retrial after an appellate reversal with facts “nearly identical” to the first trial. 39 Fla. L. Weekly at D2125. The evidence showed that several young men surrounded Dorsey at a keg party. One punched Dorsey in the face. Dorsey, who was already armed, pulled out his gun and shot two of the men dead. Dorsey v. State, 74 So. 3d 521 (Fla. 1st DCA 2011). The trial court gave the exact same instruction as in this case: that being a felon in possession of a firearm was unlawful activity, and that if the defendant was engaged in unlawful activity, “the jury had to consider his duty to retreat.” 39 Fla. L. Weekly at D2126.

Relying on Rios, the Fourth DCA found that the instruction constituted fundamental error requiring reversal of the two manslaughter convictions.

The First DCA held, contrary to Rios and Dorsey, that the error in instructing the jury on the duty to retreat had no effect on the verdict. The court concluded that under all the self-defense instructions given, the jury would have

had to find that Garrett faced a threat of imminent harm to acquit him. According to the First DCA, the evidence belied an imminent threat. 39 Fla. L. Weekly at D1785. The First District’s holding conflicts with Rios because there, as in this case, the defendant could have avoided a threat of imminent violence by permanently leaving the scene of the confrontation before the shooting. Rios was the sole armed combatant under the facts in the Fourth DCA opinion. 143 So. 3d at 1168. Here, both defendant and victim had guns. The erroneous instruction in each case required a threat of imminent violence to justify the defendant’s use of deadly force. The Fourth DCA ruled that the instruction caused fundamental error and left to a correctly instructed jury the determination whether Rios faced an imminent threat of death or great bodily harm. The First DCA made this determination itself. See 39 Fla. L. Weekly at D1785 (finding “ample evidence ... that from the beginning of the incident, Garrett did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him.”)

Similarly, the First DCA decision conflicts with Dorsey by conditioning fundamental error on whether, in the appellate court’s view, the defendant faced a threat of imminent violence sufficient to cause the jury to use the erroneous instruction to convict. As in Rios, the Fourth DCA in Dorsey left this assessment to the finder of fact. It focused instead on whether the instruction “effectively

eliminated the defendant's sole affirmative defense." 39 Fla. L. Weekly at D____ (citing Hill, 143 So. 3d at 1170).

The conflict between the First and Fourth Districts involves a frequently recurring scenario: a defendant presents evidence of justification but was acting illegally at the time of offense charged. The conflict affects cases arising before the 2014 amendments to section 775.012 that imposed a duty to retreat on those engaged in illegal activity. This Court should unify the law on whether, and under what circumstances, erroneously instructing the jury on the duty to retreat by a person engaged in illegal activity constitutes fundamental error. Deciding whether an instruction on an affirmative defense constitutes fundamental error is an appropriate exercise of this Court's conflict jurisdiction. See, e.g., Martinez v. State, 981 So. 2d 449, 451 (Fla. 2000) (erroneous forcible felony instruction); Holiday v. State, 753 So. 2d 1264, 1265 (Fla. 2000) (former entrapment instruction).

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, the petitioner requests that this Honorable Court accept this case for review and order briefing on the merits.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to Trisha Meggs Pate, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this 4th day of November, 2014. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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CASE NO. SC14-2110

STATE OF FLORIDA,

First DCA No. 1D13-1074

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_____ /

**APPENDIX TO
JURISDICTIONAL BRIEF OF PETITIONER**

Garrett v. State, 39 Fla. L. Weekly D1783
(Fla. 1st DCA August 22, 2014)

conflicted with the written judgment and sentence. The court stated:

[S]ince we have held that the oral pronouncement is, in effect, the controlling disposition, we also conclude that the oral imposition of sentence should at all times be considered a *necessary part of the official record if a transcript of the sentencing proceeding is in the court file or, alternatively, a petitioner attaches a certified copy of the sentencing transcript to the rule 3.800(a) motion. In this way the burden remains with the petitioner to demonstrate an entitlement to relief on the face of the record. If the sentencing transcript is neither in the file nor attached to the motion, the motion should be denied without prejudice to the filing of an amended motion properly attaching the sentencing transcript.*

Id. at 604-05 (emphasis added).

We can find no case which overrules *Williams* in this limited area. We, therefore, are bound by that decision. Thus, we reverse and remand with instructions that the court address the merits of appellant's argument following the dictates of *Williams v. State*, 957 So. 2d 600 (Fla. 2007). Specifically, we direct the court to address appellant's argument on the merits if the pertinent portions of the record, specifically the sentencing transcript, appear in the court file. If the transcript is not in the court file, the motion should be denied without prejudice for appellant to file an amended motion attaching the sentencing transcript.

REVERSED AND REMANDED. (PADOVANO and RAY, JJ., CONCUR.)

* * *

Criminal law—First degree murder—Possession of firearm by convicted felon—Self-defense—Jury instructions—Trial court improperly instructed jury that possession of firearm by convicted felon constituted unlawful activity, which triggered evaluation by jury of whether defendant had duty to retreat—Error was not preserved for review by objection—Error did not rise to level of fundamental error where, under complete set of instructions given, jury was not precluded from excusing defendant for his deadly act if it believed that the evidence supported his claim of self-defense, irrespective of whether defendant was engaged in unlawful activity at the time

ANTONIO GARRETT, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 1D13-1074. Opinion filed August 22, 2014. An appeal from the Circuit Court for Duval County. Kevin A. Blazs, Judge. Counsel: Nancy A. Daniels, Public Defender; and Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Pamela Jo Bondi, Attorney General; and Trisha Meggs Pate, Tallahassee Bureau Chief, Criminal Appeals, Tallahassee, for Appellee.

(RAY, J.) Antonio Garrett appeals his conviction and sentence for first-degree murder and possession of a firearm by a convicted felon. His sole defense at trial was the justifiable use of deadly force in self-defense when faced with an imminent threat of death or great bodily harm. On appeal, he argues that the trial court reversibly erred by instructing the jury that possession of a firearm by a convicted felon constitutes unlawful activity because the instruction triggered an evaluation by the jury of whether Garrett had a duty to retreat, when Garrett claims no such duty existed. While we agree that the trial court improperly instructed the jury on this point, we conclude that the error did not rise to the level of fundamental error. Under the complete set of instructions given, the jury was not precluded from excusing Garrett for his deadly act if it believed that the evidence supported his claim of self-defense. We affirm Garrett's conviction and sentence.

I.

The State's theory of the case was that the victim, Jerry Ford, was sitting on the front porch of his duplex late one night, unarmed and minding his own business. Earlier the same day, during Ford's intermittent arguments with Garrett, Garrett left the premises several times and then returned, with their disagreement renewed. When Ford's girlfriend tried to reduce the tensions, Ford told her to go inside. Shortly after midnight, Garrett completely lost patience and

was ready to put an end to the dispute. Holding a firearm behind his back, Garrett returned to the scene and, standing on the sidewalk outside the front gate of the residence, repeatedly fired the weapon in Ford's direction. As Ford rose from his porch chair to try to save himself, the gunshots took him to the ground. After the shooting, Garrett walked away with the gun in his hand and was heard to remark: "I told you about f---ing with me." Ford died several hours later. Garrett's identity as the shooter was not at issue. A neighbor who witnessed the events leading up to the episode did not see anything in Ford's hands, and law enforcement found no firearm on Ford's body.

The defense's theory was that Ford and Garrett had both consumed alcohol and attended a party in a neighbor's yard earlier that day, although they were not seen at the party at the same time. Ford was sitting on his front porch for much of the day and spent some of that time talking to Garrett. Garrett became increasingly annoyed by Ford's conduct as the night fell. During a confrontation, Ford was observed softly pushing Garrett. About thirty minutes later, gunshots were heard. The evidence indicated that Garrett discharged a .45-caliber semi-automatic pistol multiple times toward Ford's porch. Defense counsel argued, however, that Garrett was not the only person armed. A rifle was found in the yard of the duplex after the shooting.

After being read his rights, Garrett gave an interview to the police following the shooting. Garrett stated that Ford had kept "digging at" him and putting his hands in Garrett's face, despite Garrett's begging Ford to back off and leave him alone. Garrett admitted repeatedly leaving the scene of the bickering and walking around the corner, only to return each time.

Garrett described to the police the events that immediately preceded the firing of shots. Upon seeing Garrett return to the scene, Ford left his porch, went into his residence, grabbed a .22-caliber long rifle, and came back out with the rifle by his side. Garrett was standing on the sidewalk outside the gate. Garrett told the police that after Ford pointed his rifle at him, Garrett pulled out his own gun and fired multiple shots as Ford ran back toward the porch. As Ford was running, he was trying to cock his rifle at the same time. Garrett admitted continuing to shoot even after Ford dropped his rifle.

After his apprehension, Garrett led law enforcement to a site where he had hidden a .45-caliber semi-automatic pistol, which was operable and had two live rounds in the magazine. Four fired bullets found at the site of the shooting matched Garrett's pistol. Seven .45-caliber shell casings discovered at the site were fired from that pistol. Ford's autopsy revealed three gunshot wounds to the back side; the cause of death was multiple gunshot wounds. Garrett did not testify at the trial, but the jury heard his redacted police interview.

The theory of self-defense was that Garrett's actions constituted justifiable use of deadly force to prevent imminent death or great bodily harm, or the imminent commission of a forcible felony: attempted second-degree murder and/or aggravated battery. The parties stipulated that Garrett had a prior felony conviction. Without an objection, the trial court gave the following written instructions regarding the justifiable use of deadly force:

An issue in this case is whether Antonio Garrett acted in self-defense. It is a defense to the offense with which Antonio Garrett is charged and all lesser included offenses if the death of or injury to Jerry Ford resulted from the justifiable use of deadly force.

"Deadly force" means force likely to cause death or great bodily harm.

The use of deadly force is justifiable only if Antonio Garrett reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself while resisting another's attempt to commit Attempted Murder in the Second Degree and/or aggravated battery.

* * *

A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent:

1. imminent death or great bodily harm to himself or another, or
2. the imminent commission of Attempted Murder in the Second Degree and/or Aggravated Battery, against himself or another.

In deciding whether Antonio Garrett was justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing Antonio Garrett need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, Antonio Garrett must have actually believed that the danger was real.

If Antonio Garrett was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.

However, if you find that Antonio Garrett was engaging in unlawful activity then you must consider if Antonio Garrett had a duty to retreat.

Antonio Garrett cannot justify the use of force likely to cause death or great bodily harm unless he used every available means within his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that Antonio Garrett was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if, by retreating, he could have avoided the use of that force. However, if Antonio Garrett was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable.

Over objection, the court instructed the jury that “[p]ossession of a firearm by a convicted felon constitutes unlawful activity.”¹

The jury found Garrett guilty on both counts. He was sentenced to life in prison for first-degree murder, and to a concurrent fifteen-year term for possession of a firearm by a convicted felon.

II.

Garrett contends that the trial court reversibly erred by instructing the jury that “[p]ossession of a firearm by a convicted felon constitutes unlawful activity,” because it required the jury to consider whether Garrett had a duty to retreat. He argues that because he established that his use of deadly force was justified to prevent the imminent commission of a forcible felony, he did not have a duty to retreat, regardless of his unlawful possession of a firearm. In failing to raise this specific legal argument or ground at the charge conference or otherwise at trial, Garrett did not preserve it for appellate review. *Occhicone v. State*, 570 So. 2d 902, 905-06 (Fla. 1990); *Bertolotti v. Dugger*, 514 So. 2d 1095, 1096 (Fla. 1987). Accordingly, our review is for fundamental error. See § 924.051(3), Fla. Stat. (2011).

Fundamental error is error that 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.” *Maddox v. State*, 760 So. 2d 89, 96 (Fla. 2000). To determine whether fundamental error occurred in the court’s instruction to the jury, we must consider “the effect of the erroneous instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel.” *Smith v. State*, 76 So.3d 379, 383 (Fla. 1st DCA 2011). Where “the effect of that instruction is to negate the defendant’s only defense, it is fundamental error and highly prejudicial to the defendant.” *Carter v. State*, 469 So.2d 194, 196 (Fla. 2d DCA 1985).

A.

“[S]elf-defense is . . . an affirmative defense that has the effect of legally excusing the defendant from an act that would otherwise be a

criminal offense.” *Mosansky v. State*, 33 So. 3d 756, 758 (Fla. 1st DCA 2010). The law governing the justifiable use of deadly force in self-defense is contained in chapter 776, Florida Statutes (2011), certain provisions of which are colloquially known as the “Stand Your Ground” law. The following two sections of the law are arguably at play:

776.012 Use of force in defense of person.—A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other’s imminent use of unlawful force. However, a person is justified in the use of deadly force and *does not have a duty to retreat* if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or

(2) Under those circumstances permitted pursuant to s. 776.013.

(Emphasis added).

Section 776.013 is titled “Home protection; use of deadly force; presumption of fear of death or great bodily harm.” Subsection (3) of this provision states:

(3) *A person who is not engaged in an unlawful activity* and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

(Emphasis added).

Garrett argues that he established that his use of deadly force was justified under section 776.012(1) to prevent Ford’s imminent commission of a forcible felony (*i.e.*, attempted second-degree murder and/or aggravated battery against Garrett). Therefore, he submits, the court erred by instructing the jury regarding his unlawful activity because it required the jury to consider whether he had a duty to retreat in a situation where no such duty existed. Section 776.012(1) provides that a person using deadly force in circumstances in which the perceived threat of death or great bodily harm is imminent does not have a duty to retreat. While Garrett acknowledges that a “duty to retreat” analysis would be necessary under section 776.013(3) because of his unlawful activity, he contends that sections 776.012 and 776.013 provide separate and distinct bases under which the justifiable use of deadly force may be asserted, so that the “unlawful activity” preclusion in the latter is irrelevant to the operation of the former.

In support of his position, Garrett relies on *Little v. State*, 111 So. 3d 214 (Fla. 2d DCA 2013), which held that a person is not precluded from claiming immunity from criminal prosecution under the circumstances in section 776.012, even though the person was engaged in unlawful activity at the time. *Id.* at 221-22. The Court reasoned that section 776.032(1), Florida Statutes (2009), provides immunity from criminal prosecution for persons using force as permitted in section 776.012 or section 776.013, and the requirements of each are not identical. *Id.* Because Little had established by a preponderance of the evidence that his use of force was justified to prevent imminent death or great bodily harm as required in section 776.012(1), he was entitled to immunity, regardless of his status as a felon in illegal possession of a firearm. *Id.* at 222.

The arguments raised by State in *Little* are essentially the same as those raised in the instant case. The State maintains that the extraordinary self-defense privilege afforded by the “Stand Your Ground” law is reserved for law-abiding citizens only. It asserts that section 776.012(1) does not provide a basis for a person engaged in unlawful

activity to be excused from the use of deadly force in self-defense, for such an interpretation would directly contradict the express legislative intent of section 776.012 and render the “unlawful activity” preclusion of section 776.013(3) meaningless. For the reasons expressed by the Second District Court of Appeal in *Little*, and those recently articulated in the Fourth District Court of Appeal’s *en banc* decision in *Hill v. State*, 2014 WL 3434445 (Fla. 4th DCA July 16, 2014) [39 Fla. L. Weekly D1464b], we reject the State’s position.

Garrett’s affirmative defense of self-defense, like Little’s claim of immunity, was based on the language in section 776.012. Because Garrett presented some evidence to support his claim of justifiable use of deadly force to prevent imminent death or great bodily harm or the imminent commission of a forcible felony by Ford, Garrett was entitled to request and receive an instruction reflecting section 776.012(1). See *Smith v. State*, 424 So. 2d 726, 732 (Fla. 1982) (“[A] defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions.”). The fact that he was a convicted felon in unlawful possession of a firearm did not apply to the jury’s consideration of whether Garrett had a duty to retreat under section 776.012(1).² Therefore, it was error for the trial court to instruct the jury regarding Garrett’s unlawful conduct in relation to his claim of self-defense.

B.

Despite the improper instruction, we do not conclude that the error reached down into the validity of the trial so as to render Garrett’s trial fundamentally unfair. When the entirety of the jury instructions relating to Garrett’s claim of self-defense are considered, the jury was not precluded from considering Garrett’s affirmative defense, regardless of his unlawful activity.

According to Garrett’s version of events, Ford was armed with a .22-caliber long rifle and had just pointed it at Garrett. Garrett pulled out his own gun and fired it in Ford’s direction as Ford ran off while trying to cock his weapon. To prevail on his claim of self-defense, Garrett needed to establish that he had a reasonable belief that his use of deadly force was necessary to prevent the imminent danger presented by Ford. While the improper instruction required the jury to consider whether Garrett had a duty to retreat, the jury was also instructed that if Garrett “was placed in a position of *imminent* danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable.” (emphasis added).

Under the complete set of instructions given, the jury could have found that Garrett’s use of deadly force was justified and he had no duty to retreat because retreating would be futile given the “imminence” of the danger he faced. Although the challenged sentence in the instruction raised a “duty to retreat” question, in considering the effect of the instruction in the context of the other instructions given, along with the evidence adduced in the case, we find that the jury was sufficiently instructed on Garrett’s theory of self-defense. There was ample evidence presented for the jury to find that from the beginning of the incident, Garrett did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him, especially after Ford dropped his rifle and Garrett continued to shoot. That the jury ultimately rejected Garrett’s claim of self-defense does not mean that the challenged instruction constituted fundamental error.

Our reasoning is consistent with the analysis and holding in *Hardison v. State*, 138 So. 3d 1130 (Fla. 1st DCA 2014). *Hardison* appealed a conviction and sentence for second-degree murder, asserting it was fundamental error to give the standard instruction on the justifiable use of deadly force. Specifically, he contended that the instruction was inconsistent with applicable law, in that it effectively made the defense available only to persons not engaged in unlawful

activity. Like Garrett, *Hardison* was a convicted felon in possession of a firearm at the time of the incident. *Id.* And as in the instant case, the trial court in *Hardison* instructed the jury on justifiable use of deadly force, using the standard instruction that tracks section 776.012, combined with instructions relating to section 776.013: “[i]f the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground,” and “[p]ossession of a firearm by a convicted felon is an unlawful activity.” *Id.* at 1131-32.

At *Hardison*’s request, however, the judge also instructed the jury that “in certain circumstances, a convicted felon may lawfully possess a firearm.” One of those circumstances exists when the felon was in “present, imminent and impending peril of death or serious bodily injury, or reasonably believed himself or others to be in such danger.” *Id.* In concluding that no fundamental error occurred in *Hardison*, we determined that this additional instruction kept the jury from assessing *Hardison*’s defense based solely on his unlawful possession of a firearm. *Id.* at 1135.

[W]hen we consider the *complete* instruction on justifiable use of deadly force given in this case, we find the jury was sufficiently instructed that, absent a reasonable belief he was under threat of imminent death or great bodily harm, or imminent commission of a forcible felony, *Hardison*’s use of deadly force in self-defense was not justified. The evidence put before the jury could support a finding that, *Hardison*’s belief that the threat was imminent was unreasonable, whether or not he was engaged in unlawful activity.

Id. (emphasis in original).

Similarly, when viewing the jury instructions in the instant case as a whole, Garrett’s claim of self-defense turned on whether the evidence before the jury supported a reasonable belief that Garrett was under threat of imminent death or great bodily harm or the imminent commission of a forcible felony by Ford. The erroneous instruction did not affect the jury’s ultimate responsibility to determine whether the threat faced by Garrett was *imminent*, in which case retreat would be futile and his use of deadly force would be justified, irrespective of whether he was engaged in unlawful activity at the time. Finding no fundamental error, we affirm the conviction and sentence. (CLARK and WETHERELL, JJ., CONCUR.)

¹During the charge conference, defense counsel asked that this sentence, which the State requested based on *Dorsey v. State*, 74 So. 3d 521 (Fla. 2011), not be read. When asked for the legal basis for the objection, defense counsel stated that the case doesn’t require that the challenged language be included in the jury instruction.

²We note that section 776.012, Florida Statutes (2011), has since been amended to include the “unlawful activity” preclusion contained in 776.013(3). The relevant portion of section 776.012 now reads: “[A] person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.” (emphasis added). Ch. 2014-195, § 3, Laws of Fla. (effective date June 20, 2014).

* * *

Limitation of actions—Florida Enforcement of Foreign Judgments Act—Foreign judgment domesticated under FEFJA is subject to twenty-year statute of limitations—Because new action on judgment was filed before 20-year statute of limitations ran, trial court erred by granting motion to dismiss

DESERT PALACE, INC., Appellant, v. ROBERT G. WILEY, Appellee. 1st District. Case No. 1D13-4113. Opinion filed August 22, 2014. An appeal from the Circuit Court for Baker County. Phyllis M. Rosier, Judge. Counsel: Barry W. Kaufman of The Law Office of Barry W. Kaufman, P.L., Jacksonville, for Appellant. Alfred L. Frith and John S. Penton, Jr. of The Frith Law Group, P.A., Orlando, for Appellee.

(ROWE, J.) The appellant, Desert Palace, Inc., appeals an order dismissing its action on a judgment against Robert G. Wiley. The trial court dismissed the action based on its determination that the statute