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IN THE SUPREME COURT OF FLORIDA

ANTONIO GARRETT,

Petitioner,

v. Case No. SC14-2110

STATE OF FLORIDA,

Respondent.

_____________________________/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

In a first-degree murder case arising before 2014 amendment to the "Stand Your Ground" law, the lower court wrongly ruled that an erroneous instruction that the defendant had a duty to retreat because he was engaged in illegal activity did not constitute fundamental error. 1

CONCLUSION 9

CERTIFICATES OF SERVICE AND FONT SIZE 10

TABLE OF AUTHORITIES

CASES PAGE(S)

Dorsey v. State, 149 So. 3d 144 (Fla. 4th DCA 2014) 1, 2, 3

Garrett v. State, 148 So. 3d 466 (Fla. 4th DCA 2014) 4, 5

Martinez v. State, 981 So. 2d 449 (Fla. 2008) 4, 5, 6

McKenzie Check Advance of Fla., LLC v. Betts,
928 So. 2d 1204 (Fla. 2006)...7

Pean v. State, 154 So. 3d 1171 (Fla. 4th DCA 2015),
rev. pending, No. SC15-301 1

Rios v. State, 143 So. 3d 1167 (Fla. 4th DCA 2014) 1, 2

Williams v. State, 145 So. 3d 997 (Fla. 1st DCA 2014)..3

STATUTES PAGE(S)

§ 776.012, Florida Statutes (2011).. 2, 4, 6, 7

§ 776.013(3), Florida Statutes (2011) 6, 7

RULES PAGE(S)

Florida Rule of Appellate Procedure 9.200(f) 1

OTHER AUTHORITIES PAGE(S)

Chapter 2005-27, § 2, Laws of Florida 7

Chapter 2014-195, § 3, Laws of Florida 7

Florida House of Frepresentatives, Committee Substitute for House
Bill 89, Staff Analysis (June 27, 2014)..7

ARGUMENT

In a first-degree murder case arising before 2014 amendment to the "Stand Your Ground" law, the lower court wrongly ruled that an erroneous instruction that the defendant had a duty to retreat because he was engaged in illegal activity did not constitute fundamental error.

Jurisdiction: In an argument that reprises its jurisdictional brief, much of it word for word, the state again seeks denial of discretionary review. The respondent's only new wrinkle is its reliance on the Fourth DCA panel decision in Pean v. State, 154 So. 3d 1171 (Fla. 4th DCA 2015), rev. pending, No. SC15-301 (stayed pending decision in this case). Pean is a PCA with a parenthetical citation to the First DCA decision in this case. The Pean panel did not address either of the conflict cases, Rios v. State, 143 So. 3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 149 So. 3d 144 (Fla. 4th DCA 2014). The Fourth DCA has not receded from Rios and Dorsey. At trial, the prosecutor relied on Dorsey in requesting, and obtaining over objection, the instruction that possession of a firearm by a convicted felon constitutes unlawful activity. (R7.536-37)

Preservation: The state asks this Court to decide the case on a record not briefed by the parties below or relied upon by the First DCA. As noted by Garrett in opposing the record supplementation, the First DCA panel necessarily found the record adequate to decide the case. See Fla. R. App. P. 9.200(f) ("No proceeding

shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.") Appellee did not seek to supplement or reconstruct the record below.

In a trial that preceded the decisions in both Dorsey and Rios, defense counsel did not waive Garrett's argument in this Court by requesting an instruction on justifiable use of deadly force that included language on the duty to retreat. After the trial court in Rios ruled that the defendant was engaged in illegal activity, defense counsel agreed to an instruction on the duty to retreat. The instruction was subjective, i.e., specific to Rios:

> The fact that the Defendant was wrongly attacked cannot justify his use of force likely to cause death or great bodily harm if, by retreating, he could have avoided the need to use that force.

143 So. 3d at 1169. The instruction caused fundamental error because it conveyed that Rios' "sole affirmative defense would not be viable if he could have retreated without danger to himself," contrary to section 776.012(1). Id. at 1171.

In Dorsey, the trial court conditioned the duty to retreat on the defendant engaging in unlawful activity, then informed jurors that "a felon in possession of a firearm constitutes illegal activity." 149 So. 3d at 145. Here, as in Dorsey, the court gave instructions that premised the duty to retreat on a jury finding that

"Antonio Garrett was engaging in unlawful activity." This was part of the instruction requested by defense counsel.

Had the court gone no further, it might have avoided error. The parties could have argued to the jury whether the instruction applied to the evidence that Garrett was a convicted felon in possession of a firearm without the court pointing toward one conclusion over the other. However, when the court added, over defense objection, that "possession of a firearm by a convicted felon constitutes illegal activity," it went beyond the instruction requested by defense counsel. As in Dorsey, the court directed jurors to reject Garrett's defense of justification because he had a duty to retreat rather than stand his ground during a confrontation in which both combatants had guns. It is the combination of the instruction requested by defense counsel with the instruction given over defense objection that deprived Garrett of his sole defense of justification. Unknowing acquiescence to an erroneous instruction is not waiver. Williams v. State, 145 So. 3d 997, 1003 (Fla. 1st DCA 2014); Moore v. State, 114 So.3d 486, 493 (Fla. 1st DCA 2013). Had Garrett's trial counsel merely failed to object to the instruction equating his firearm possession with unlawful activity, this issue would not be waived. Counsel's objection places the matter beyond question.

Merits: Both the First DCA and the state have misapplied precedent on fundamental error in failing to acknowledge that whether Garrett had a viable self-

defense claim is for a correctly instructed jury, not an appellate court. The issue of justification, Garrett's only defense, was one the jury necessarily had to consider in order to reach a verdict, satisfying the test for fundamental error. See Griffin v. State, 160 So. 3d 63, 67 (Fla. 2015) (reaffirming that "for an unpreserved error in jury instruction to be found fundamental on appeal, the error must be pertinent or material to what the jury must consider in order to convict") (citation and internal quotation omitted). For offenses committed before June 20, 2014, all five district courts recognize that under section 776.012, Florida Statutes, engaging in unlawful activity does not restrict the right to stand one's ground and meet deadly force with deadly force. In telling jurors that engaging in unlawful activity creates a duty to retreat and that Garrett was involved in unlawful activity when he shot Jerry Ford, the trial court pre-empted jurors' evaluation of his claim of justification, which the DCA recognized was his only defense. Here, the First DCA acknowledged that justification was Garrett's only defense. Garrett v. State, 148 So. 3d 466, 468 (Fla. 4th DCA 2014).

The state relies heavily on Martinez v. State, 981 So. 2d 449 (Fla. 2008), but the comparison to this case is weak. First, this Court's primary reason in Martinez for rejecting the claim that giving the "forcible felony" instruction caused fundamental error was that Martinez also asserted lack of premeditation. Thus, the erroneous instruction did not go to his "sole, or even his primary, defense

strategy." Id. at 456. Here, the state does not contest the First DCA's conclusion that justification was Garrett's sole defense.

This Court next noted that Martinez' claim of self-defense was "extremely weak." Id. As argued in the initial brief, the First DCA departed from the correct test for fundamental error in rejecting fundamental error because there was "ample evidence" for the jury to reject Garret's defense of justification. Garrett, 148 So. 3d at 472. The First DCA did not rely on Martinez. Further, the defense was much weaker in Martinez than here. The victim, Martinez' girlfriend,

> was covered in blood and had multiple stab wounds and lacerations to her face, arm, and chest. Rijo had even been stabbed in the back, and this wound punctured her lung. Conversely, when the officers detained Martinez, the only injury suffered by Martinez was a 1/4–inch cut to his pinky finger, which required merely a bandage.

Id. To inflict multiple stab wounds, an attacker must perceive an ongoing threat or be engaged in mutual combat, a scenario belied by Martinez' lack of injuries. In contrast, Garrett confronted another armed man, a situation in which both the perception of a threat and the response thereto can occur rapidly—certainly faster than the time it takes to inflict multiple stab wounds. This is the flaw in the First DCA's reliance on Garrett's statement that Ford "drops the gun and I still fire." (R7.450) See Garrett, 148 So. 3d at 472 (finding that Garrett did not reasonably fear deadly force, "especially after Ford dropped his rifle and Garrett continued to

shoot”). As noted in the initial brief, Garrett may have been telling police that he fired as Ford dropped the gun, not afterward. Also, in light of evidence that some bullets struck the house and not Ford, Garrett may not have aimed the last four shots at Ford.

Finally, Martinez involved an erroneous instruction that a defendant committing a forcible felony has no right to use deadly force. In contrast to this case, in which the trial court functionally told the jury that Garrett was engaged in illegal activity and therefore had a duty to retreat, the judge in Martinez did not instruct the jury that the defendant was engaged in a forcible felony and therefore had no right to use deadly force. Had there been an independent forcible felony, an instruction thereon would have been proper. Thus, unlike the jury in this case, Martinez’ jury could have simply disregarded the erroneous “forcible felony” instruction and correctly applied the remainder of the instruction on justification.

Although all five of Florida’s district courts have found that a defendant engaged in unlawful activity retains his right to stand his ground under pre-2014-amendment section 776.012(1), (Init. brf. at 10-11), the state argues that the instruction to the contrary in this case was proper. It relies on the 2014 amendment eliminating the distinction between sections 776.012(1) and 776.013(3) as a clarification of legislative intent. (Ans. brf. at 26).

The contention that section 776.012 could be "clarified" nine years after its enactment to control cases arising in the interim is without merit. See, e.g., McKenzie Check Advance of Fla., LLC v. Betts, 928 So. 2d 1204, 1210 (Fla. 2006) (concluding that seven years is "too long" to view an amendment as "merely a clarification of legislative intent"). The language at issue was enacted in 2005. Ch. 2005-27, § 2, Laws of Fla. The purported "clarifying" amendment came in 2014. Ch. 2014-195, § 3, Laws of Fla. Aided by term limits of eight years, the membership of both the House and Senate turned over completely in the interim. Governor Bush, who signed the 2005 law, gave way to Governor Crist, who gave way to Governor Scott, who signed the 2014 revision. None of the players who brought us Chapter 2014-195 could possibly clarify the intent of those who brought us Chapter 2005-27. Nor did legislative staff describe the amendment as a clarification. Instead, staff posited that the revision resolved "statutory inconsistencies." Fla. H.R. CS for HB 89, Staff Analysis 5-7 (June 27, 2014) (available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0089z1.CRJS.DOCX&DocumentType=Analysis&BillNumber=0089&Session=2014).

If sections 776.012(1) and 776.013(3) were inconsistent, their contradictions have now been reconciled. But in the meantime, the courts' construction of section

776.012 to give effect to the statutory language and avoid rendering it superfluous controls. Under that construction, the trial court erred by instructing the jury that as a convicted felon in possession of a firearm, Garrett had a duty to retreat from his fatal confrontation with another armed man. Counsel's objection to the instruction that possession of a firearm by a convicted felon constitutes unlawful activity negates the state's contention that in requesting the remainder of the instruction on duty to retreat, counsel affirmatively waived the error. Because this was Garrett's sole defense, fundamental error occurred, necessitating a new trial.

CONCLUSION

Perhaps on retrial, a new jury will conclude that despite the firearms found at the scene and Garrett's assertion of a confrontation between two armed men, he was not faced with deadly force when he shot at Jerry Ford. But that is a determination for six of Garrett's Duval County peers after correct instruction on the applicable law, not three appellate judges in Tallahassee engaging in 20-20 hindsight on the effect of an incorrect instruction on Garrett's first jury.

Based on the arguments and authorities contained in his briefs, Garrett requests that this Court quash the First District decision affirming his conviction of first-degree, premeditated murder and remand with directions to reverse the conviction and order a new trial.

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 Kathryn Lane, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, this 12th day of January, 2016. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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