IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ROBERT FRANKLIN FLOYD,

Respondent.

CASE NO. SC14-2162

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Robert Franklin Floyd, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or by his proper name.

The record on appeal consists of thirty-four volumes filed in the First District Court below, accompanied by briefs of the parties, separately indexed, per this Court's Order. The volumes will be referenced according to the respective number designated in the Index to the Record on Appeal below, followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Floyd was charged in Santa Rosa County, Florida, with Second Degree Murder and Shooting into an Occupied Vehicle relating to the death of Getyron Lopez Benjamin on February 26, 2010. (R6, 1147). Appellant was tried by jury between May 2, 2011 and May 11, 2011.

The jury was instructed, without defense objection, utilizing the Florida Standard Jury Instruction 3.6(f), Justifiable Use of Deadly Force, as follows:

> An issue in this case is whether the defendant acted in self-defense. It is a defense to all of the offenses with which ROBERT FRANKLIN FLOYD is charged if the death

of GETYRON LOPEZ BENJAMIN resulted from the justifiable use of deadly force.

The use of deadly force is justifiable only if the defendant reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself or another while resisting:

1. another's attempt to murder him or another, or

2. any attempt to commit Aggravated Battery or Aggravated Assault upon him or another.

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

A person is justified in using deadly force only 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 Aggravated Battery or Aggravated Assault against himself or another.

"Aggravated Battery" is defined as:

1. an intentional touching or striking of another person against that person's will or the intentional causing of bodily harm to another; and

2. in the commission of this touching or striking, did intentionally or knowingly cause great bodily harm, permanent disability or permanent disfigurement to another or used a deadly weapon.

A weapon is a "deadly weapon" if it is used or threatened to be used in a way likely to produce death or great bodily harm.

"Aggravated Assault" is defined as:

1. An intentional and unlawful threat either by word or act to do violence to another, and

2. at the time the perpetrator appeared to have the ability to carry out the threat, and

3. the act of the perpetrator created in the mind of the person assaulted a wellfounded fear that the violence was about to take place, and

4. The assault was made with a deadly weapon.

However, the use of deadly force is not justifiable if you find:

1 ROBERT FRANKLIN FLOYD initially provoked the use of force against himself, unless:

a. The force asserted toward the defendant was so great that he reasonably believed that he was in imminent danger of death or great bodily harm and had exhausted every reasonable means to escape the danger, other than using deadly force, or

b. In good faith, the defendant withdrew from physical contact with another person and clearly indicated to that person that he wanted to withdraw and stop the use of deadly force, but that person continued or resumed the use of force.

> In deciding whether defendant 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 the defendant 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, the defendant must have actually believed that the danger was real.
>
> If 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 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 another or to prevent the commission of a forcible felony.
>
> In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of the defendant and his alleged attacker(s).
>
> If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether the defendant was justified in the use of deadly force, you should find the defendant not guilty.
>
> However, if from the evidence you are convinced that the defendant was not justified in the use of deadly force, you should find him guilty if all the elements of the crimes charged or any lesser included offense have been proved.
>
> (R11, 2286-88; T14, 1842-44).

Floyd was found guilty as charged as to both offenses. (R11, 2269-70; T14, 1868-69).

On appeal to the First District Court of Appeal, Floyd asserted that the trial court committed fundamental error by utilizing the standard instruction. He argued that because the instruction told the jury, on one hand, that he had no duty to retreat, but on the other hand, also told the jury he had to exhaust every reasonable means to escape the danger, the instruction negated his "stand your ground" defense. (Respondent's Initial Brief, 1D11-4465, page 40).

The First District Court agreed, entering its original opinion, reversing Floyd's convictions and sentences on January 3, 2014. Following denial of the State's Motion for Rehearing, the substituted opinion appearing as Floyd v. State, 151 So.3d 452 (Fla. 1st DCA 2014) was entered.

Thereafter, the lower court, on October 17, 2014, granted the State's Motion and certified as a Question of Great Public Importance the following:

> DOES FLORIDA STANDARD JURY INSTRUCTION (CRIMINAL) 3.6(F) PROVIDE CONFLICTING INSTRUCTIONS AS TO THE DUTY TO RETREAT?

This Court accepted jurisdiction. State v. Floyd, 2014 WL 7251662 (Fla. December 16, 2014) and the instant appeal follows.

STATEMENT OF THE FACTS

The night of the shooting, Floyd was giving a party at his family's property which was attended by many people. A friend of Floyd's, Brittany Hammac, unbeknownst to him, invited Gerald Banton, Gus Benjamin, Tiffani Pate, and Justin Smith to come to the party. (1; 151-52). Mr. Banton and Mr. Benjamin were the only African-Americans at the party. (1; 154-56, 7; 894). When they arrived at the party, Mx. Hammac told Floyd she had invited the men and Floyd responded, "that's fine." (1, 154-56).

Within ten minutes of their arrival, Floyd's close friend, T.J. Cassidy, told Ms. Hammac that the two men had to leave because they were black. (1; 158-59, 4; 502). Cassidy approached the men, and began yelling and cursing at them, telling them they had ten

seconds to leave, counting down the time. (1; 158-59, 3;, 359, 360, 422, 4; 490, 525, 562, 584-85, 601--2, 5; 818-19, 7; 890). Neither the victim, Gus Benjamin, or Gerald Banton acted aggressively toward anyone at the party, nor did they swing at anyone or say anything offensive to anyone. (1; 82-83, 3; 361, 409, 4; 502, 526). Nevertheless, Floyd approached and shoved Mr. Banton. (1; 82, 126-29, 167; 3; 359, 361, 409, 423-24; 4; 502, 526-27, 584-85, 604-05; 6, 821; 7; 894, 933). By that time, Mr. Benjamin and Mr. Banton were surrounded by a number of the large males who were attending the party. (4; 404-05, 9; 1330, 11; 1449, 1477-78). Mr. Banton lifted his shirt, showing the gun, for which he had a concealed weapons permit, only because he was in fear for his life and that of Mr. Benjamin. (3; 361-62, 408-09, 365-66). The gun was not pointed at anyone and no one was threatened with it. (1; 126-29, 4; 604-05, 6; 821-22, 7; 926)

After Mr. Banton was pushed, he and Mr. Benjamin ran to their car which was parked in a field. (1; 85, 129-31; 3; 362). Floyd ran back to where his truck was parked, retrieved his high powered pump action rifle, and ran back to the driveway in pursuit of the vehicle.[1] (1; 85-86, 87-90, 134-35, 162-64, 3; 362, 424).

As the car containing Mr. Benjamin, Mr. Banton, Tiffani Pate and Justin Smith was leaving the property, Floyd fired first, into the

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[1] The distances from County Mill Road to the rifle shell casings was 80 yards. The distance from the casing to the brown truck was 60 yards. The distance from the brown truck to Floyd's red truck where his rifle was collected was 50.7 yards. (2, 270-71).

rear of the vehicle, after which Mr. Banton fired into the air. (1; 91-94, 137, 139; 3; 372-74, 431, 433; 4; 495, 534-38, 568-71, 587; 6; 825; 7; 870, 872, 896, 901, 911, 929-30, 930, 933, 972). After Floyd's second shot, Mr. Benjamin said he had been hit. 3; 372). He was fatally shot in the back. (1; 193).

Floyd did not call and report the shooting until after he and others at the party learned that Mr. Benjamin had died. The shooting was discussed with Floyd's family and friends prior to the time the 911 call was made, approximately one hour after the shooting. (1; 95, 3; 322-31, 5; 781, 784, 6; 829, 8; 1126-27, 9; 1223-24, 1259, 1332).

Floyd admitted that he shoved Mr. Banton in the chest, telling him "come on, let's do it," meaning he wanted to fight Mr. Banton. (11, 1484-85). The evidence showed that Floyd shot into the trunk of the retreating car[2] from the rear, fatally injuring the left passenger, Mr. Benjamin, in the back. (1, 193; 2, 235, 237). Ballistics evidence also showed a second rifle strike through the left rear passenger door which also came from the rear. (5, 684-85).

[2] Floyd admitted to his father that he shot into the trunk of the car, aiming through the scope of his rifle. (10, 1368).

SUMMARY OF ARGUMENT

ISSUE I.

Floyd asserted the standard jury instruction on the duty to retreat is contradictory because it provides on the one hand that a defendant has a duty to retreat, but on the other hand also provides that he has a duty to retreat. As a result, he argues it is fundamental error to give this instruction. The First District Court of Appeal agreed.

The State submits the instruction correctly informs the jury that a defendant who is not an aggressor has no duty to retreat whereas a defendant who is an initial aggressor has a duty to retreat. In other words, sometimes a defendant has a duty to retreat under Florida law, and at others, he does not and it is the jury's role to decide whether the defendant was the initial aggressor, and whether that particular defendant had a duty to retreat or not. Because the instruction accurately reflects Florida law, pursuant to the applicable statutes it tracks, it is not error at all, let alone fundamental error. In fact, because it is a jury question as to who is the initial aggressor, it would be error for the judge **not** to give both instructions to ensure the jury is adequately instructed on the law.

ARGUMENT

ISSUE I

DOES FLORIDA STANDARD JURY INSTRUCTION (CRIMINAL) 3.6(F) PROVIDE CONFLICTING INSTRUCTIONS AS TO THE DUTY TO RETREAT AND IF SO, DOES THE INSTRUCTION CONSTITUTE FUNDAMENTAL ERROR? (RESTATED)

Floyd asserts that the standard jury instruction on the duty to retreat is contradictory and it is fundamental error to give the instruction. The District Court agreed. The instruction, however, correctly informs the jury that a defendant who is not an initial aggressor has no duty to retreat whereas a defendant who is an initial aggressor has a duty to retreat. In other words, sometimes a defendant has a duty to retreat under Florida law and at others he does not and it is the jury's role to decide whether the defendant was the initial aggressor, and whether that particular defendant had a duty to retreat or not. Because the instruction accurately reflects Florida law, pursuant to the applicable statutes, it is not error at all, let alone fundamental error.

Standard of Review

The standard of review for fundamental error is *de novo*. Williams v. State, 145 So.3d 997, 1002 (Fla. 1st DCA 204), citing, Elliot v. State, 49 So.3d 269, 270 (Fla. 1st DCA 2010). Furthermore, the standard of review for whether a jury instruction is a correct statement of law is also *de novo* which is the real issue in this case. United States v. Hill, 643 F.3d 807, 850 (11th Cir. 2011),

citing United States v. Chandler, 996 F.2d 1073, 1085 (11th Cir. 1993).

Burden of Persuasion

In a direct appeal or collateral proceeding, the party challenging the decision below has the burden of demonstrating that a prejudicial error occurred. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court. Section 924.051(7), Fla. Stat. (2001).

Preservation

Jury instructions are subject to the contemporaneous objection rule. Floyd failed to object to the instruction at any time, let alone, at the time the instruction was read to the jury. Absent an objection at trial, the issue can be raised on appeal only if fundamental error occurred. Westerheide v. State, 831 So.2d 93, 107 n. 19 (Fla. 2002); State v. Delva, 575 So.2d 643, 644 (Fla. 1991). However, fundamental error regarding a jury instruction is waived when defense counsel requests an erroneous instruction or affirmatively agrees to an improper instruction. Falwell v. State, 88 So. 3d 970 (Fla. 5th DCA 2012).

Here, Floyd was asked if the instruction on Justifiable Use of Deadly Force had been looked at and was agreed to. Floyd informed the trial court, "Yes, Your Honor." (12, 1620). With regard to the language in the standard instruction , "however, the use of deadly force is not justifiable if..." Floyd agreed to "and had exhausted every reasonable means to escape the danger other than using deadly force," skipping identifying who, to avoid any issue of transferred

intent. (12, 1626-27). Floyd affirmatively agreed to the remainder of that instruction. (!2, 1629-30). Floyd also informed the trial court he had no objection to the instructions provided to the jury in the court's final instructions prior to submitting the cause to the jury. (14, 1855).

The State asserts that Floyd waived complaint because "[f]undamental error is also waived where defense counsel affirmatively agrees to an improper instruction." (citations omitted) State v. Lucas, 645 So.2d 425, 427 (Fla. 1994); Falwell v. State, 88 So.3d 970, 972 (Fla. 5th DCA 2012). In such instances, the error may not be addressed using a fundamental error analysis and "the matter cannot be raised on direct appeal." Id., 88 So.3d at 973; Oliver v. State, 2015 WL 376213 (Fla. 1st DCA January 29, 2015) ("He contends that the jury instructions on his sole defense -justifiable use of deadly force -were fundamentally erroneous for the reasons stated in *Floyd v. State*. We affirm, because, at the charge conference, Appellant's counsel affirmatively requested and specifically agreed to the applicable parts of the justifiable use of deadly force instructions that were to be included, thereby waiving any claim of fundamental error in the instruction.") (Internal citation omitted). The First District Court of Appeal's decision in the instant case was wrong for this reason and should be reversed.

Merits

The State submits that resolution of this issue is of great public importance because the jury instructions at issue are

prevalent in criminal cases where self-defense is the most common defense asserted in violent crime prosecutions. Often, who was the initial aggressor is the most hotly-contested fact in issue. In other words, these instructions are among the most ubiquitous standard jury instructions in criminal trials.

Furthermore, while the panel's opinion below refers only to the standard jury instructions as being in conflict and negating each other, because these jury instruction track the language of the applicable statutes on which they are based, the First District Court's opinion in actuality finds the two statutes irreconcilable, not merely the jury instructions which reflect them.

The issue has become even more pressing in view of the fact that different panels of the First District Court have reached contrary conclusions, finding that while the instructions were error, they were not fundamental error, a position adopted by other District Courts of Appeal. Uniformity of decision is preferable.

The State contends the instruction is not error. The instruction at issue results from the interplay of two statues. The first applicable statute, § 776.013(3), Florida Statutes (2013), use of deadly force, provides:

> 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.

See Fla. Std. Jury Instr. (Crim.) 3.6(f)(explaining there is no duty to retreat where the defendant was not engaged in any unlawful

activity citing § 776.013(3) and Novak v. State, 974 So. 2d 520 (Fla. 4th DCA 2008), and instructing the judge to read this instruction in all cases involving self-defense).[3] The second applicable statute is the use-of-force-by-aggressor statute, § 776.041, Florida Statutes (2013), which provides:

> The justification described in the preceding sections of this chapter is not available to a person who:
>
> (1) Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or
>
> (2) Initially provokes the use of force against himself or herself, unless:
>
> (a) Such force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she ***has exhausted every reasonable means to escape*** such danger other than the use of force which is likely to cause death or great bodily harm to the assailant; or
>
> (b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

See Fla. Std. Jury Instr. (Crim.) 3.6(f)(instructing that the use of deadly force is not justified if the jury finds that the defendant was the aggressor citing § 776.041, Fla. Stat.).

The first statute, § 776.013(3), Florida Statutes (2013), states the general rule that a person who is not the initial aggressor has

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[3] The standard jury instructions in criminal cases are available online at the Florida Supreme Court's website at http://www.floridasupremecourt.org/jury_instructions/chapters/entireversion/onlinejurryinstructions.pdf The first instruction is at page 69 and the second instruction is at page 68-69

no duty to retreat. However, the second statute, § 776.041, Florida Statutes (2013), provides an initial aggressor does have a duty to retreat. In this case, the State presented evidence that Floyd, without provocation, "shoved" Mr. Banton first which made him the initial aggressor. Floyd v. State, 151 So.3d 452 (Fla. 1st DCA 2014) (Stating "[a]ccording to the State's evidence, Floyd then shoved one of the individuals, who in turn displayed a pistol and who then retreated to his vehicle with a companion." In fact, during testimony in his case-in-chief, Floyd admitted that he shoved Mr. Banton in the chest, telling him "come on, let's do it," meaning he wanted to fight. (11, 1484-85). Floyd was not only the initial aggressor by committing the battery, he was also the initial aggressor by shooting at and into the retreating vehicle and/or unlawfully displaying and discharging his firearm pursuant to Florida Statute 790.10 (1991) and Florida Statute 790.19 (1974).

If the jury decided that Floyd was "engaged in an unlawful activity" by committing battery by shoving Mr. Banton or shooting into the vehicle or unlawfully displaying his rifle, then the first statute with no duty to retreat did not apply because the first sentence of the use-of-force-by-aggressor statute, § 776.041, Florida Statutes (2013), is that the justification described in the preceding sections of this chapter is not available if he is the initial aggressor. Thus, the second statute controlled and Floyd was required to exhaust every reasonable means to escape, *i.e.*, he had a duty to retreat.

Despite this fact, a judge is required to give this instruction, even if a defendant seems to be the initial aggressor, because it is the jury, not the judge, who determines who the initial aggressor is. Hunter v. State, 687 So.2d 277 (Fla. 5th DCA 1997). While the State's evidence was that Floyd was the initial aggressor by shoving Mr. Banton without provocation, the jury was required to decide whether Floyd, in fact, shoved first and whether that shove was enough to warrant classifying him as the initial aggressor.

The panel stated that "if the use of deadly force is necessary to prevent imminent death or great bodily harm to oneself or others, then deadly force is justified without regard to any effort to retreat..." Floyd v. State, 151 So.3d at 454. The State respectfully submits that this is incorrect statement of the law regarding the duty to retreat. If a defendant is the initial aggressor, he has a duty to exhaust all reasonable means to escape such danger including retreat other than the use of force likely to cause death or great bodily injury. If the jury found that Floyd was the initial aggressor because he shoved one of the victims first, Floyd had a duty to retreat. The panel seems to ignore this provision of § 776.041(2), Florida Statutes (2013).

The State submits the two applicable statute and the standard instructions which track them, do not conflict. A defendant who is not the initial aggressor has no duty to retreat but a defendant who is the initial aggressor does have a duty to retreat. The duty to retreat depends on the jury's findings regarding who is the

initial aggressor. Thus the two statutes and their corresponding standard jury instructions are perfectly harmonious with one another.

The panel simply did not understand that the duty to retreat is, in essence, a toggle pursuant to Florida's statutes. A defendant who is NOT the initial aggressor has no duty to retreat but a defendant who IS the initial aggressor has a duty to retreat. The duty to retreat depends on the jury's findings regarding who is the initial provoker. And it is the jury that decides the toggle. The jury **must** decide if the defendant is the initial aggressor and therefore, it must be given guidance covering both situations (i.e., non-aggressor versus initial aggressor). Because there was a conflict in the evidence as to who was the initial aggressor, and the duty to retreat was dependent upon the jury's resolution of that dispute, "it was necessary and proper for the court to inform the jury" that he had a duty to retreat if he was the initial aggressor and no duty to retreat if he was not the initial aggressor. No error, fundamental or otherwise occurred. Sims v. State, 140 So.3d 1000, 1003, Fn.3 (Fla. 1st DCA 2014).

Because these standard jury instructions accurately reflect the applicable statutes, they are correct statements of the law. The jury instructions were not error, much less fundamental error. In fact, because it is a jury question as to who is the initial aggressor, it would be error for the judge **not** to give both instructions to ensure the jury is adequately instructed on the law.

The State submits that the First District Court also erred in finding the instructions constituted fundamental error. Reviewing courts should find the existence of fundamental error only in those rare cases wherein the interests of justice warrant reversal. See Smith v. State, 521 So. 2d 106, 108 (Fla. 1988), citing Ray v. State, 403 So. 2d 956 (Fla. 1981). ("The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application."). A truly rare occurrence, fundamental error only happens when a judicial mistake or omission completely corrupts the fairness and impartiality of the proceeding, thereby resulting in a miscarriage of justice. See Sparks v. State, 740 So. 2d 33, 35 (Fla. 1st DCA 1999) ("Fundamental error has been defined as error that goes to the essence of a fair and impartial trial, error so fundamentally unfair as to amount to a denial of due process."); see also Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994) (Fundamental error is "error which goes to the foundation of the case or goes to the merits of the case of action."); Hendricks v. State, 34 So. 3d 819, 830 (Fla. 1st DCA 2010), quoting Martinez v. State, 933 So. 2d 1155, 1159 (Fla. 3d DCA 2006), approved, 981 So. 2d 449 (Fla. 2008) ("Moreover, error is fundamental only if it 'goes to the very heart of the judicial process' and 'extinguishes a party's right to a fair trial,' such that it results in a miscarriage of justice."). In other words, an appellant must satisfy a "very high threshold" in order to demonstrate the existence of truly fundamental error.

See Nicholson v. State, 33 So. 3d 107, 111 (Fla. 1st DCA 2010) ("The use of such instructions, however, does not necessarily meet the very high threshold for fundamental error.") (Emphasis added).

Therefore, in order to satisfy that "very high threshold", an appellant must demonstrate that the State could not have obtained the conviction but for the assistance of the purported error. See F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003), quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960) ("We have stated that 'in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach 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.'"). As the United States Supreme Court has observed, there is good reason for the preservation requirement. Puckett v. United States, 556 U.S. 129, 134, 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266 (2009). In the Court's words, "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." Id.

"The failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial." Barker v. State, 518 So. 2d 450, 452 (Fla. 2d DCA 1988), citing Ray v. State, 403 So. 2d 956 (Fla. 1981)). Further, speculative claims cannot satisfy the sine qua non requirement necessary to demonstrate the

"very high threshold" of fundamental error. See e.g. Robinson v. State, 943 So. 2d 860, 861 (Fla. 4th DCA 2006):

> No court has ever held that this type of defect in Miranda warnings is fundamental error which should be corrected at any time. Appellant has not demonstrated that the defect in the warnings was even harmful in his case, much less fundamental. Appellant's claim that his request for counsel would probably have affected the outcome of his case is unsupported and **speculative**.

(Emphasis added). Thus, in the absence of a clear showing that a truly fundamental error eviscerated the integrity of the judicial proceedings, the reviewing court must affirm the judgment and sentence rendered below. See Hightower v. State, 592 So. 2d 689, 690 (Fla. 3d DCA 1991) ("It is clear that, in the absence of showing of fundamental error, the convictions and sentences entered below must be affirmed in view of the fact that the error was not preserved in the trial court.").

If indeed the instruction was error, any error was not fundamental because the duty to retreat was not the critical issue in the case. Although the First District Court of Appeal is correct that Floyd's defense was self-defense, the critical issue was whether Floyd had a right to fire his rifle at the retreating victims as they drove away from the party. In other words, the issue was the reasonableness of the threat, not whether he had a duty to retreat or escape. It was what he did with his hands that was the critical issue, not what he did with his feet. It is the stand-your-ground law, not the fire-at-will law. Both statutes require imminent peril and there was none at the point in time Floyd shot the victim. The home protection statute authorizes

deadly force only if the person reasonably believes that deadly force is necessary to prevent death or great bodily harm, § 776.013(3), Fla. Stat. (2013), and the use-of-force-by-aggressor statute authorize deadly force only if the person "reasonably believes that he or she is in imminent danger of death or great bodily harm." § 776.041(2)(a), Fla. Stat. (2013).

Floyd was not in imminent peril when he shot the victim. The victims had retreated to their vehicle and were about to leave the property and turn onto the roadway, when Floyd fired at them, using a high-powered rifle with a scope, shooting into the rear of the retreating vehicle. Mr. Banton fired into the air using a handgun, which appellant had already seen, with limited range. It was this fact, not the jury instructions regarding the duty to retreat, that "negated" Floyd's defense. To be fundamental error the jury instruction on self-defense would have to have misstated the defendant's right to use deadly force when he was in imminent peril because that was the critical issue.

The State's assertion that the lower court improperly found fundamental error is supported by the fact that the court reached a cursory conclusion rather than conducting an appropriate analysis. In determining whether fundamental error occurred, the court is required to consider "the 'totality of the record at trial,' Garzon, 980 So.2d. at 1041, including 'the other jury instructions, the attorneys' arguments, and the evidence in the case.' Garzon v. State, 939 So.2d 278, 283 (Fla. 4th DCA 2006)." Schepman v. State, 146 So.3d 1278, 1283 (Fla. 5th DCA 2014). The

State submits the First District Court of Appeal failed to conduct this in-depth analysis.

Here, Mr. Benjamin and Mr. Banton, were the only two African Americans at the party and were significantly smaller in size than the white males who surrounded them. They did not know anyone at the party, other than Floyd's friend, Brittany Hammac, who invited them. (1, 151-52; 3, 360, 408-09; 4, 529; 7, 894). Ms. Hammac informed Floyd, on their arrival, that she had invited the men and Floyd told her that "that's fine." Floyd's friend Cassidy confronted her and told her they had to leave because of their race. Cassidy then angrily confronted the men, cursed them, told them to leave, and started counting down the time they had in which to do so. (1, 81-82, 120-22, 158-59; 3, 359, 422; 4, 490, 525, 562, 601-02; 5, 818-19; 7, 890

While all of the people who witnessed the event were long term, close friends of Floyd's, the majority admitted the victims did nothing to antagonize anyone and that Floyd pushed Mr. Banton without provocation. (1, 82-83, 106, 109, 149, 167; 3, 359-61, 409, (someone 423-24); 4, 502, 526-27, 529, 556-57, 579, 584-85, 598, 604-05; 5, 821; 7, 993). Appellant himself admitted that he was the initial aggressor and that he pushed Mr. Banton telling him, "come on let's do it," meaning, Floyd wanted to fight. (8, 1011-13; 11, 1284-85).

While a few individuals testified they could not tell who fired first, including appellant's cousin, (7, 896; 9, 1298, 1338; 10, 1417, 1428), many testified that appellant fired first, (1, 92-93,

137, 139; 3, 372, 431, 433; 4, 495, 534-36, 568-71, 587; 6, 825; 7, 870, 872, 929-30, 933, 972). Additional testimony from Mr. Banton and other witnesses was that gunfire from the vehicle was either into the air or from the passenger side of the vehicle (3, 373-74; 7, 901, 911; 9, 1214-23; 10, 1399-1400). No bullet strikes from the revolver were found in vehicles in the handgun's line of fire alleged by Floyd. (5, 723).

Floyd admitted to his father that he fired into the trunk of the vehicle aiming through the scope of his rifle. (10, 1368). The evidence showed that the rifle was fired into the trunk of the retreating vehicle from the rear and Mr. Benjamin, who was seated in the rear passenger seat, was fatally wounded by a shot to the back. (1, 193; 2, 235, 237). A second rifle shot, to the left rear passenger door of the vehicle, also came from the rear. (5, 684-85).

During appellant's case in chief, some witnesses, who were all long time friends and family members, claimed the handgun was fired first, as the car was leaving and appellant was in pursuit of it. (8, 1053, 1068-69, 1102, 1129-30, 1145, 1195, 1188-90; 9, 126-67, 1306; 10, 1360, 1364). However, this conflict in the evidence went to the reasonableness of the threat or danger; it did not relate to the question of who had a duty to retreat.

In closing argument, Floyd argued that Mr. Banton was the initial aggressor of deadly force by displaying the handgun, this despite the fact it was not pointed at anyone, no one was threatened with it, and it was displayed only after Banton was

shoved by Floyd, the two victims were surrounded by a greater number of larger men, and they were threatened to leave. The State on the other hand argued that Floyd was the initial aggressor both in shoving Mr. Banton and in firing first. Most importantly, the State also conceded that had Mr. Banton used deadly force against Floyd, Floyd would have been justified in using deadly force against Mr. Banton. (13, 1780). Accordingly, the critical issue in this case was whether Floyd's fear of the fleeing victims was reasonable, not whether or not he had a duty to retreat.

A review of the evidence, all of the instructions presented to the jury, and argument of counsel reveals that any alleged error in the instruction did not alter the verdict. The jury was fully entitled to view the act of Floyd shoving Mr. Banton as the act which commenced the entire sequence of events and the events as one continuing act. Alternatively, the jury was also entitled to find Floyd fired first. That being the case, Floyd was the initial aggressor in either instance and the jury was entitled to so find.

Furthermore, Floyd was not precluded from arguing his claim of self-defense. Under his version of the facts, Floyd claimed that a threat of violence from the two men in the form of their discussion and gestures which precipitated the shove, and the display of the weapon was the use of deadly force which made the men the initial aggressors, removing any duty to retreat on his part and entitling him to meet deadly force with deadly force. (13, 1728-35). While the jury was instructed to consider whether Floyd had a duty to retreat, it was also instructed that it must consider the

reasonableness of his belief that imminent danger of death or great bodily harm existed. Under the circumstances, no such finding of reasonableness was possible. Again, any alleged error in the instruction did not alter the result.

CONCLUSION

In conclusion, the State avers that the standard jury instruction on the duty to retreat accurately reflects Florida law, pursuant to the applicable statutes, and is not error at all, let alone fundamental error. In fact, because it is a jury question as to who is the initial aggressor, it would be error for the judge **not** to give both portions of the instruction to ensure the jury is adequately instructed on the law. Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 151 So.3d 452 should be disapproved, and the judgment and sentence entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Michael R. Ufferman, Esquire, Counsel for Respondent, by E-Mail to, ufferman@uffermanlaw.com on February 25th, 2015.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ROBERT FRANKLIN FLOYD,

Respondent.

CASE NO. SC14-2162

APPENDIX TO PETITIONER'S INITIAL BRIEF

Floyd v. State, 151 So.3d 452 (Fla. 1st DCA 2014)

151 So.3d 452, 39 Fla. L. Weekly D1800

Briefs and Other Related Documents
Judges and Attorneys

District Court of Appeal of Florida,
First District.
Robert Franklin FLOYD, Appellant,
v.
STATE of Florida, Appellee.

No. 1D11–4465.
Aug. 26, 2014.
Rehearing Denied Aug. 26, 2014.

Background: Defendant was convicted in the Circuit Court, Santa Rosa County, Gary L. Bergosh, J., of second-degree murder and shooting into an occupied vehicle. Defendant appealed.

Holding: The District Court of Appeal, Van Nortwick, J., held that conflicting jury instructions as to defendant's duty to retreat before using deadly force against victims was fundamental error.

Reversed and remanded.

West Headnotes

[1] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instructions
110k1038.1(4) k. Elements of offense and defenses. Most Cited Cases

203 Homicide KeyCite Citing References for this Headnote
203XII Instructions
203XII(E) Excuses and Justifications
203k1471 Self-Defense
203k1485 k. Duty to retreat or avoid danger. Most Cited Cases

Conflicting jury instructions as to defendant's duty to retreat before using deadly force against victims was fundamental error at trial that resulted in convictions for second-degree murder and shooting into an occupied vehicle; jury was instructed both that defendant had no duty to retreat if he was attacked in any place where he had the right to be and that the justifiable use of deadly force was dependent, in part, on the degree to which defendant made an effort to escape the threat, and conflicting instructions negated each other in their effect, and negated their possible application to defendant's defense of self-defense, which was his only defense to the charges. West's F.S.A. § 776.012.

[2] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(2) k. Plain or fundamental error. Most Cited Cases

In determining whether jury instructions constituted fundamental error, District Court of Appeal 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.

[3] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(2) k. Plain or fundamental error. Most Cited Cases

Where a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant.

***452** Michael Ufferman, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Giselle Denise Lylen, Assistant Attorney General, Tallahassee, for Appellee.

REVISED OPINION

VAN NORTWICK, J.

Robert Franklin Floyd challenges his convictions for second degree murder and ***453** shooting into an occupied vehicle. Floyd raises six issues on appeal, but we need only address one. Because the trial court's conflicting instructions to the jury amounted to fundamental error, we reverse and remand for a new trial.

On February 27, 2010, Floyd was hosting a party at his residence. During that party, a dispute arose among some of those in attendance. According to the State's evidence, Floyd then shoved one of the individuals, who in turn displayed a pistol and who then retreated to his vehicle with a companion. Floyd meanwhile retrieved a rifle from his vehicle. The State further contended at trial that Floyd was the first to fire his weapon. Floyd, however, maintained that the other two individuals first opened fire from their vehicle and only then did he return fire. A bullet struck the passenger of the vehicle in his back, causing his death. At trial, Floyd claimed self-defense pursuant to the "stand your ground" law.

Before jury deliberations commenced, the jury was instructed in pertinent part:

> An issue in this case is whether the defendant acted in self-defense. It is a defense to all of the offenses with which **Robert Franklin Floyd** is charged if the death of Gretyron Lopez Benjamin resulted from the justifiable use of deadly force.
>
> The use of deadly force is justifiable only if the defendant reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself or another while resisting:
>
> 1. Another's attempt to murder him or another. Or.

2. Any attempt to commit aggravated battery or aggravated assault upon him or another.

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

A person is justified in using deadly force only 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 aggravated battery or aggravated assault against himself or another.

Aggravated battery is defined as: ...

Aggravated assault is defined as: ....

However, **the use of deadly force is not justifiable if you find:**

1. **Robert Franklin Floyd initially provoked the use of force against himself, unless** [:]

A. The force asserted toward the defendant was so great that he reasonably believed that he was in imminent danger of death or great bodily harm **and had exhausted every reasonable means to escape the danger other than using deadly force.** Or.

B. In good faith the defendant withdrew from physical contact with another person and clearly indicated to that person that he wanted to withdraw and stop the use of deadly force. But that person continued or resumed the use of force.

In deciding whether a defendant 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 the defendant 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 the danger could only be avoided through the use of that force.

Based upon appearances the defendant must have actually believed that the danger was real.

***454** If the defendant was not engaged in any 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 another, or to prevent the commission of a forceable [sic] felony.

(Emphasis added).

[1] On appeal, Floyd argues that one part of the instruction negated the other, such that while the jury was told that Floyd had no duty to retreat, the jury was also told that Floyd had to exhaust every reasonable means of escaping danger. The State maintains that, when read as a whole, the jury instructions are not so confusing as to constitute fundamental error. We disagree.

[2] In determining whether the jury instructions constituted fundamental error, 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). As indicated above, the jury was instructed that if the use of deadly force is necessary *to prevent imminent death or great bodily harm* to oneself or others, then deadly force is justified *without regard to any effort to retreat* so long as the defendant is not engaged in unlawful activity. A defendant may not use deadly force if the defendant provoked another showing force; however, if the defendant provoked another, who then *uses force so great as to put*

the defendant in fear of death or great bodily harm, then the defendant may use deadly force, *but only if the defendant has first exhausted every means of escape.* In effect, the jury instruction here provided that Floyd did not have to retreat before meeting deadly force with deadly force if in fear of death or great bodily harm *and* did have a duty to try to retreat before using deadly force if in fear of death or great bodily harm.

[3] As noted, Floyd's only defense at trial was that he had used deadly force to defend himself and others. The conflicting jury instructions negated each other in their effect, and therefore negated their possible application to Floyd's only defense. As the court in *Carter v. State,* 469 So.2d 194, 196 (Fla. 2d DCA 1985), explained:

> [W]here, as here, a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant.

See also *Richards v. State,* 39 So.3d 431 (Fla. 2d DCA 2010) (holding that the erroneous use of an outdated jury instruction on the justifiable use of deadly force requiring the defendant to retreat if possible negated defendant's claim of self-defense and rose to the level of fundamental error); *Grier v. State,* 928 So.2d 368 (Fla. 3d DCA 2006) (explaining that fundamental error exists when incorrect jury instructions negate defendant's sole defense).

We therefore reverse Floyd's convictions, vacate his sentences, and remand for a new trial on both counts. On remand, the trial court is reminded that discretionary costs must be orally pronounced at sentencing before such may be imposed in a written sentence. *See* *Nix v. State,* 84 So.3d 424, 426 (Fla. 1st DCA 2012).

WOLF, AND CLARK, JJ., concur.

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