IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ROBERT FRANKLIN FLOYD,

Respondent.

CASE NO. SC14-2162

PETITIONER'S REPLY BRIEF

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0045489

GISELLE DENISE LYLEN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0508012

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

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 AND FACTS

The State adopts its statement of the case and facts as set forth in its initial brief in its entirety.

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?

The First District Court of Appeal erred in finding that Floyd did not waive complaint in this case and in holding that the trial court fundamentally erred in instructing the jury pursuant to Florida Standard Jury Instruction 3.6(f) because it provided conflicting instruction on the duty to retreat.

Preservation

The First District Court reversibly erred in rejecting the State's argument on preservation. In addition to its prior argument on preservation, which it adopts herein in its entirety, the State asserts Floyd affirmatively agreed to the giving of the Standard Instruction 3.6(f), telling the judge during the conference, he had "**no objection** to instruction [up] to 7.1 Justifiable Homicide." Floyd also stated, "we **agree** with jury instruction pursuant to any modification that we talked about." (12, 1630). No modification of Standard Instruction 3.6(f) was discussed or requested by him. Therefore, he affirmatively agreed to the giving of the instruction. Ray v. State, 403 So.2d 956, 960 (Fla. 1981); Armstrong v. State, 579 So.2d 734, 735 (Fla. 1991); Waters v. State, --- So.3d ----, 2015 WL 4111656 (Fla. 1st DCA 2015).

Also of great significance is Floyd's argument in support of his motion to dismiss on the basis of immunity from prosecution heard at the close of the State's case in chief. Floyd relied upon both

§ 776.012, Florida Statute and § 776.031, Florida Statute in support of his claim of immunity. (12, 1524). The State indicated that § 776.013(3), Florida Statute was also implicated. Floyd **agreed** that "an additional element there...the Defense has to prove by a preponderance of the evidence that Robby Floyd was **not engaged in unlawful activity** at the time he was attacked on the property he was legally allowed to be on..." (12, 1526-27). The defense then went on to argue, as it does before this Court that Floyd felt threatened at the time he shoved Mr. Banton and that Mr. Banton became the aggressor and "initially displayed deadly force" by showing the handgun. (12, 1527-28). Floyd also agreed he had to establish that his fear of imminent death or great bodily harm was reasonable under the circumstances. (12, 1533-38).

Clearly, Floyd's argument during the hearing was the catalyst for the instruction that was ultimately agreed to by Floyd and read to the jury. Floyd requested the instruction, waiving complaint. State v. Lucas, 645 So.2d 425, 426-27 (Fla. 1994). At the very least, if the instruction was error, his conduct invited the error and he should not be permitted to profit from having done so. Czubak v. State, 570 So.2d 925, 928 (Fla. 1990).

Merits

The State submits that use of the standard instruction was not error. Ironically, other panels of the First District Court have reached that same conclusion relying upon the State's argument in this case i.e., where there is a dispute as to who is the initial aggressor the trial court is legally required to give both

instructions to avoid misleading the jury.. In Sims v. State, 140 So.3d 1000, 1003 n. 3 (Fla. 1st DCA 2014), the court stated:

> The portion of the instruction omitted from this block-quote contains the same language that this court recently found to be fundamentally erroneous in the standard jury instruction for justifiable use of deadly force. See Floyd v. State, --- So.3d ----, 2014 WL 30573 (Fla. 1st DCA Jan. 3, 2014) (observing that the trial court "instructed the jurors that Floyd both did and did not have a duty to retreat") (emphasis in original). Appellant does not challenge this portion of the instruction on appeal, and under the circumstances of this case, **no error—fundamental or otherwise—resulted from this instruction because there was a factual dispute as to who was the initial aggressor and Appellant's legal duty to retreat or not depended on the jury's resolution of that dispute**. Accordingly, in this case, it was necessary and proper for the court to inform the jury that Appellant both did (if he was the found to be the initial aggressor) and did not (if Perkins was found to be the initial aggressor) have a duty to retreat. Compare § 776.041(2)(a), Fla. Stat. with §§ 776.012, 776.013(3), Fla. Stat. (emphasis added).

Similarly, the Fourth District Court of Appeal, in Cruz v. State, --- So.3d ----, 2015 WL 2393281, 8 (Fla. 4th DCA 2015), The Cruz Court held:

> The instructions in this case are virtually identical to the ones given in Floyd. And even though there was a factual dispute in this case as to who was the initial aggressor, our determination that the trial court did not err in giving the standard instructions is not based on Floyd; we conclude that Floyd was incorrectly decided.
>
> The standard instruction on the justifiable use of deadly force, given both in Floyd and in this case, is not internally inconsistent. The Stand Your Ground portion of the instruction stands for the general proposition that a defendant who is not engaged in any unlawful activity and is attacked in a place where he has the right to be has no duty to retreat, while the "aggressor" part of the instruction provides an exception to this general proposition for a defendant who provokes the use of force against himself (without withdrawing from physical contact in good faith). Both parts of the instruction are a correct statement of the law. Indeed,

> the relevant language of the instruction comes directly from the applicable provisions of Chapter 776. See § 776.013(3), Fla. Stat. (2008) (stating that "[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 ...."); § 776.041(2), Fla. Stat. (2008) ("The justification described in the preceding sections of this chapter is not available to a person who: ... (2) Initially provokes the use of force against himself or herself,....").
>
> Because the standard instruction on the justifiable use of deadly force is a correct statement of the law, appellant has not shown error in the jury instructions, let alone fundamental error.

The State respectfully submit this Court should adopt the well-reasoned opinion in Sims and Cruz and find that no error in the instruction whatsoever exists. See also: In Re: Standard Jury Instructions Criminal Cases Report 2014-06, Post-Publication Comments[1] page 15.

Even if this Court were to find the instruction error, it should decline to find it fundamental error. District Courts of Appeal in this State, have declined to follow Floyd and find fundamental error where there was a factual dispute as to who was the initial aggressor. See Woodsmall v. State, --- So.3d ----, 2015 WL 1609941,

[1] "Mr. Cavanagh highlighted the opinion of *Floyd v. State*...a case that generated a lot of discussion for the Committee... The Committee was not in agreement with the *Floyd* decision. The Committee instead concluded that the aggressor statute (s. 776.041(2), Fla. Stat.) does not conflict with the other self-defense statutes because the general rule is that there is no duty to retreat if the defendant was not engaged in criminal activity. But the general rule does not apply if the jury determines that the defendant was the initial aggressor."

40 Fla. L. Weekly D864 (Fla. 5th DCA Apr. 10, 2015). There, the Woodsmall Court, relying upon Sims, while reversing on other grounds, held:

> We reject Woodsmall's claim that Floyd v. State, 151 So.3d 452 (Fla. 1st DCA 2014) (holding conflicting language on the duty to retreat contained within the standard jury instruction on the justifiable use of deadly force was fundamentally erroneous), rev. granted, 2014 WL 7251662 (Fla. Dec. 16, 2014), requires reversal of both count one and count two. Although the justifiable use of deadly force instruction given in this case was similar to the instruction found to be fundamentally flawed in Floyd, under the circumstances of this case, no error resulted from the instruction. Since there was a dispute over who the initial aggressor was at the time the victim in count one was stabbed, Woodsmall's duty to retreat was dependent upon the jury's resolution of that dispute. See Sims v. State, 140 So.3d 1000, 1003 n. 3 (Fla. 1st DCA 2014) ("[N]o error-fundamental or otherwise-resulted from this instruction because there was a factual dispute as to who was the initial aggressor and Appellant's legal duty to retreat or not depended on the jury's resolution of that dispute. Accordingly, in this case, it was necessary and proper for the court to inform the jury that Appellant both did (if he was the found to be the initial aggressor) and did not (if Perkins was found to be the initial aggressor) have a duty to retreat.").

Again, the key factor was the need to instruct to allow for resolution of who was the initial aggressor.

Floyd argues that prior to 2014 a defendant could claim entitlement to immunity under § 776.012 because the statute, at that time, had no unlawful activity exception. Floyd concedes that the statute was amended to include the exception effective June 20, 2014 to grant immunity only to persons not engaged in criminal activity, but asserts the change does not apply to him. As previously argued, Floyd agreed and argued that it did.

Even if that were not the case, it is apparent the legislature, in amending Chapter 776 to include the threat of use of force, as well as, the unlawful activity exemption did so to clarify its intent that the exception not apply to persons involved in an unlawful activity and therefore should be treated as such. See: Finley v. Scott, 707 So.2d 1112, 1116 (Fla. 1998) (explaining that "[a]lthough the 1993 statute applies to this case, we accept the addition of this sentence to the statute as clarifying legislative intent...."); Ivey v. Chicago Ins. Co., 410 So.2d 494, 497 (Fla. 1982) (quoting Gay v. Canada Dry Bottling Co. of Florida, 59 So.2d 788, 790 (Fla. 1952)) ("The rule seems to be well established the interpretation of a statute by the legislative department goes far to remove doubt as to the meaning of the law. The court has the right and the duty, in arriving at the correct meaning of a prior statute to consider subsequent legislation.").

This interpretation makes sections 776.012-776.031 consistent with the illegal activity element of § 776.041. It is also inherently logical. An individual who is acting illegally should not get the benefit of immunity that should by right afforded to the individual the Chapter sought to protect, the person lawfully defending him or herself or another.

The instruction did not deprive Floyd of his only defense because the jury was not precluded from considering his affirmative defense, regardless of his unlawful activity. The jury could have found that his 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, or, alternatively, there was "ample" evidence from which the jury could have found he did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him. "That the jury ultimately rejected Garrett's claim of self-defense does not mean that the challenged instruction constituted fundamental error." Garrett v. State, 148 So.3d 466, 471, 472 (Fla. 1st DCA 2014). Alternatively, Floyd testified that he felt threatened at the time he shoved Mr. Banton and that Mr. Banton became the aggressor and "initially displayed deadly force" by showing the handgun. As in Waters v. State, --- So.3d ----, 2015 WL 4111656 (Fla. 1st DCA 2015) Floyd alternatively argued that Mr. Banton had thwarted his every effort to flee the escalating violence, leaving him no option but to use deadly force because the force asserted against him by the victim "was so great that he reasonably believed he was in imminent danger of death or great bodily harm." In this regard, the instructions as given would not have precluded the jury from finding, under the evidence presented, that his use of deadly force was justifiable, had it believed retreat was futile and Floyd or other were in imminent danger of death or great bodily harm.

Floyd's argument ignores pivotal facts which fully support the State's case. Mr. Banton and Mr. Benjamin knew three people at the party, the three people they came with: Ms. Pate, Mr. Smith, and Ms. Hammac a friend of Floyd's who invited them to the party. Every other attendee was unknown to them, knew one or both marginally and knew Floyd much better or was a long term friend or a relative of

Floyd's. Nevertheless, the testimony of the vast majority of those persons, which went unimpeached and uncontradicted, established that within ten minutes of their arrival, Cassidy approached the victim and Mr. Banton, and began yelling and cursing at them, telling them they had ten seconds to leave,[2] because of their race, while counting down the time in which they had to do so. (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[3] 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 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. He did so without pointing it at anyone, or threatening anyone with it and did so only because he was in fear for his life

---

[2] The statement about 'wanting to do it' was either in reference to one of the men asking the other if he really wanted to leave, (1, 125-26), or possibly one of the men asking the other what their response was to Floyd's statement as he shoved Mr. Banton, "Come on, let's do it" meaning let's fight was. (12, 1487).

[3] While Floyd cites to Holloway's testimony that the men gave an aggressive manner that they were not going to leave, he immediately also responded that they had not caused any trouble before that and denied seeing the gun pointed at anyone. (9, 1199, 1202).

and that of Mr. Benjamin. (1; 126-29; 3; 361-62, 408-09, 365-66; 6, 821-22, 7; 926).

The State argued and the jury appears to have agreed that Mr. Banton was not the initial aggressor, Cassady and Floyd were by threatening them by counting down and surrounding them in a threatening manner. This initial use of deadly force was not justified in view of the fact Floyd initially told Ms. Hammac the men were welcome, (1, 154-56), the fact that the men did nothing to cause them to be unwelcome, and Cassady had no authority to order them off the properly. Then Floyd initiated physical force by shoving Mr. Banton.

However, bBelow, Floyd argued that he used non-deadly force when he pushed Mr. Banton, but that Mr. Banton became the aggressor by displaying the gun which was a use of deadly force. Floyd then argued that Mr. Banton's use of deadly force entitled him to respond with deadly force by running and retrieving his high power scope rifle and firing into the rear of the retreating vehicle. (12, 1527-28). Floyd, of course contends he was fired upon first. The weight of the evidence contradicts that claim, but the fact that Floyd and several other witnesses testified that the Mr. Banton fired first, created the conflict in the evidence as to who was the initial aggressor. **Once a factual dispute as to who was the initial aggressor existed, Floyd's legal duty to retreat or not depended on the jury's resolution of that dispute**. The resolution of the case was totally dependent upon full and complete

instruction of every aspect of the self-defense laws and could not be accomplished without it.

Moreover, the State also contends that Floyd's perception of the imminent threat of death or great bodily harm was unreasonable as reflected by the jury's verdict. Mr. Banton did not respond with deadly force when Floyd pushed him. The mere display of a gun is not deadly force as a matter of law. Cunningham v. State, 159 So.3d 275, 277 (Fla. 4th DCA 2015), citing, Carter v. State, 115 So.3d 1031, 1037 n. 3 (Fla. 4th DCA 2013); also see staff report In Re: Standard Jury Instructions Criminal Cases Report 2014-06, page 2, in which the committee voted unanimously to "add the idea from *Hosnedl v. State*, 126 So.3d 400 (Fla. 4th DCA 2013) that only the discharge of a firearm, whether accidental or not, has been deemed to be the use of deadly force as a matter of law."

Additionally, Mr. Banton and Mr. Benjamin ran for the car and were in the process of leaving the party and were not a "reasonable" danger to anyone at that point in time. (1, 90, 131; 2, 362, 370-71, 431; 7, 870; 8, 1091, 1111). Floyd had to run back to his truck which was parked by the family home, 50 yards, then ran 60 yards to where the casings were located. (2, 246-47, 268-70). The distance from the end of the drive and where it intersected the road to the shell casing was 80 yards. (2, 286-87). Floyd ran after the vehicle, asking people where the car had gone. (1, 85, 88, 134-36, 160; 3, 424, 431; 4, 495, 533, 609-10; 7, 868; 8, 1091, 1112). Floyd testified the car was speeding off when he first saw it. (11, 1498). Significantly, Floyd's cousin testified

that the car was just getting ready to go around the curve in the driveway and go out of sight when he first heard gunfire.[4] (13, 1394). The weight of the evidence supported the jury verdict Floyd fired first, into the 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). The ballistics evidence showed that no bullets from the handgun were retrieved from vehicles in the area from which appellant fired, which surely would have been hit had Mr. Banton fired at appellant from the moving vehicle. (2, 286-87).

It is undisputed that no gunfire took place until Floyd ran up with the rifle; had he not done so, no exchange of fire would have taken place and the car would have left the property. Floyd perception of danger was unreasonable. Because there was some dispute as to who was the initial aggressor, all instructions were required. The State therefore respectfully aks this Court to find that the instructions are not error, let alone fundamental error, and reverse the decision of the First District Court of Appeal below.

[4] Even Floyd admitted the car was 3/4 of the way down his drive. (8, 1016).

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits the certified question should be answered in the negative, disapprove the decision of the District Court of Appeal, and affirm the conviction and sentence entered in the trial court.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Michael Ufferman, Esquire, Counsel for Appellee, by E-Mail to ufferman@uffermanlaw.com on July 16th, 2015.

Respectfully submitted and served,

PAMELA JO BONDI
ATTORNEY GENERAL

TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

// Giselle D. Lylen
GISELLE DENISE LYLEN
Assistant Attorney General
Florida Bar No. 0508012

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L14-1-35149]

CERTIFICATE OF COMPLIANCE

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

// Giselle D. Lylen
Giselle Denise Lylen
Attorney for State of Florida

[C:\USERS\CRIMINAL\PLEADING\14135149\Floyd-BR.WPD --- 7/16/15,10:34 am]