IN THE FLORIDA SUPREME COURT

THOMAS DAUGHERTY,

Petitioner,

v.

CASE NO. SC14-860
DCA NO. 4D08-4624
TRIAL NO. 06-878CF01B

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

REPLY BRIEF OF APPELLANT ON THE MERITS

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PRELIMINARY STATEMENT

Mr. Daugherty relies on the preliminary statement found in his Initial Brief. In addition, any reference to the State's Answer Brief will be by (SAB) followed by the page number. Any reference to Mr. Daugherty's Initial Brief will be (IB) followed by the page number.

ARGUMENT

ISSUE ONE: THE FOURTH DISTRICT FAILED TO ACCURATELY PREDICT THIS COURT'S DECISION IN HAYGOOD V. STATE AS IT RELATES TO THE INSTRUCTION TO THE JURY ON MANSLAUGHTER BY INTENTIONAL ACT

The State first argues that there is no conflict between the Fourth District's opinion in this case and this Court's decision of Haygood v. State, 109 So.3rd 735 (Fla. 2013) The State says that the Fourth District decision could not conflict with Haygood because it never cited to Haygood. (SAB - pages 6-9) This is precisely Mr. Daugherty's point. The Fourth District attempted to predict how Haygood would be decided and their prognostication was wrong. It is the fact that the Fourth's District reasoning and its resulting decision in that case is inconsistent with Haygood that provides this Court with jurisdiction to decide this case.

The State next argues that the faulty instruction given in this case is not fundamental error because the faulty instruction was two steps removed from the crime of conviction. (SAB - pages 9-13) Mr. Daugherty has already shown why this reasoning is faulty in his Initial Brief. The one step removed analysis the Fourth District and the State rely on is based on the belief that a jury instruction error can only be harmful if it implicates the jury's pardon power. Haygood put that notion to rest. See also State v. Montgomery, 39 So.3rd 252 (Fla. 2010) The relevant rule of law pertains to the

accuracy of the instruction coupled with a dispute about a material fact related to that instruction.

The State, parroting the Fourth District, says that "it is clear that the evidence supported a second degree murder conviction, **as well as a third degree murder conviction.**" (SAB - page 12) (Emphasis supplied) The Fourth District said as much. In explaining why the jury could have exercised its pardon power to find Mr. Daughtery guilty of a lesser offense that was between second degree murder and manslaughter, the Fourth District said "If the jury had been inclined to exercise its pardon power, it could have returned a verdict of third-degree felony murder, which was the next lower crime on the verdict form; the evidence in this case would have supported a conviction for third-degree felony murder."

Daugherty v. State, 96 So.3rd 1076 (Fla. 4th DCA 2012)

Of course, whether the evidence supported a conviction for second degree murder is irrelevant to decide this legal issue. Neither the State nor the Fourth District set out what the evidence was that a jury could have returned a verdict for third degree murder. Mr. Daughtery disputes these conclusory statements.

Third degree murder is an odd crime. Section 782.04(4), Florida Statutes defines the crime as a murder that results from the commission of some felony that is not already included in first-degree felony murder. See Moore v. State, 983 So.2d 691 (Fla.

1st DCA 2008). No felony crime that fits this universe was identified by the State or the Fourth District.

Neither is there an applicable felony contained in the evidence from this case. In Moore, above, Moore and a co-defendant were tried on first degree murder and robbery charges. The jury convicted him of the robbery and third-degree murder. Moore filed a motion to set aside the conviction for third-degree murder because it was premised on the robbery conviction. The First District held that third degree murder, "by the statute's express terms, there is no alternative means to finding someone guilty of third-degree felony murder other than by establishing that the underlying felony is not one of the enumerated felonies." As in Moore, there was no evidence of some other felony from which a jury could have found Mr. Daughtery guilty of third degree murder.

This view is supported by this Court in Mahaun v. State, 377 So.2d 1158 (Fla. 1979) "Third-degree murder, as set forth in section 782.04(4), Florida Statutes (1977), is defined as an unlawful killing committed by a person engaged in the perpetration of any felony other than those identified as the underlying felony in second-degree murder when there is no premeditated design to effect the death of the victim. There is no alternative means to find a person guilty of third-degree murder other than by establishing that there was an appropriate underlying felony and that a homicide occurred in its

perpetration."

What an applicable felony might be is totally speculative but at least in one case, it was determined that aggravated assault would be one. Peterson v. State, 643 So.2d 9 (Fla. 2nd DCA 1994) There are obviously others but none that fall within the facts as presented in this appeal where Mr. Gaynor died from blunt force trauma to the head caused by multiple blows from a baseball bat.

Finally, the State takes up some time with explaining that the evidence supported a verdict of culpable negligence, which would distinguish it from Haygood. The Fourth District expressly disavowed any reliance on this legal theory. It stated its decision was "not dependent upon the fact that the culpable negligence instruction was given." The Fourth District also recognized that the parties disagreed as to whether the evidence supported giving the instruction on culpable negligence.

The State goes to great lengths to find evidence in support of giving the culpable negligence instruction. (SAB - pages 13-18) At the end of it, the State recognizes the Fourth District took no position and says "it appears that this Court would have to remand for the Fourth District to expressly consider the facts" in support of Mr. Daugherty's argument. (SAB - page 19) Mr. Daugherty continues to dispute that the evidence would have supported giving this instruction.

ISSUE TWO: THE FOURTH DISTRICT'S OPINION IS INCONSISTENT WITH THIS COURT'S DECISION IN WILLIAMS V. STATE AS IT RELATES TO INSTRUCTING THE JURY ON ATTEMPTED MANSLAUGHTER

The State's position on this Issue appears to be that the giving of an instruction on aggravated battery alleviates the erroneous instruction given on the attempted manslaughter charges. (SAB - page 19-23) The State concedes the instruction was wrong. (SAB - page 20) Both of their arguments do not support this conclusion.

First, the State says that because the aggravated battery crime is both a more serve felony and higher on the criminal punishment code ladder, any error becomes harmless. This is not pertinent to the rule of law in this case because the jury did know this fact. The jury was told to decide the case in descending order, starting with attempted first degree murder. The next choice for the jury was attempted second degree murder and then attempted manslaughter. Only then was aggravated battery given.

So, this error is fundamental because it falls within the one step removed analysis the State argues is relevant as the first argument in this appeal. It is by definition fundamental error, regardless of what other choices the jury had.

This Court has already spoken to this point. In Sanders v. State, 944 So.2d 203 (Fla. 2006), the Second District certified a question of great public importance. "In order for an offense to

be a lesser-included offense, must it necessarily result in a lesser penalty than either the penalty for the main offense or the next greater offense on the verdict form?" This Court answered no. Sanders was charged with attempted first degree murder. The use of the firearm meant any penalty could include a mandatory sentence under Section 775.087, Florida Statutes, the 10/20/Life statute.

The parties struggled with what were appropriate lesser offenses. One was aggravated battery; another was attempted second-degree murder. Still another was attempted manslaughter. The judge did not give the instruction for aggravated battery because it could result in the exact sentence as another lesser included offense.

The jury found Sanders guilty of the lesser offense of attempted second degree murder and then found that he discharged a firearm and caused great bodily harm. The judge sentenced him to life in prison based on these findings under the 10/20/Life statute. Sanders appealed because the lesser offense for which he was convicted allowed a penalty that was equal to the potential sentence for the main charge.

The district court affirmed the sentence, finding that the application of a potential enhancement was not a reason to reorder the lesser offenses. This Court agreed. The law does not require lesser offenses to be "lesser both in degree and in penalty."

The State then says that the error was not fundamental because "the crimes of attempted manslaughter and aggravated battery cannot be distinguished" because the factual basis for each crime is the same. In making this argument, the State wants to relitigate State v. Montgomery, 39 So.3rd 252 (Fla. 2010) This Court has announced it will not. Williams v. State, 123 So.3rd 23 (Fla. 2013) "We also decline the State's invitation in this case to revisit our Montgomery decision. We have reconfirmed the holding in Montgomery in subsequent cases, such as Bonilla v. State, 75 So.3rd 233 (Fla. 2011) . . . ."

Actually, the crimes are different. Aggravated battery specifically eschews any intent to commit death. The statute says that an aggravated battery is a battery either when the batterer knowingly causes "great bodily harm, permanent disability, or permanent disfigurement or uses a deadly weapon." Attempted manslaughter is that a death would have resulted from the conduct but for some intervening event. It does not need a deadly weapon. The jury in this case was asked to decide which of these crimes the evidence supported beyond a reasonable doubt.

The State relies on Richards v. State, 128 So.3rd 959 (Fla. 2nd DCA 2013) (Although the State's Table of Cases said it is cited on page 26, it is really on page 22). Richards was charged and convicted of attempted second-degree murder. His defense to the charge was

self-defense. According to the Second District, intent was not at issue. The jury was instructed on the erroneous attempted manslaughter instruction. The jury was instructed on aggravated battery before it was instructed on attempted manslaughter. This fact alone distinguishes Richards from this case because the Second District relied on the pardon power explanation to find the error harmless. Another discriminating factor is the Second District found that Richards waived the error; Mr. Daugherty did not.

The Second District also found that the issue of intent was not in dispute. "Accordingly, where the trial court fails to correctly instruct on an element of the crime over which there is a dispute, and that element is both pertinent and material to what the jury must consider in order to decide if the defendant is guilty of the crime charged or any of its lesser included offenses, fundamental error occurs." The Second District found that Richards' intent was not disputed at trial because his sole defense was self-defense. This has no pertinence to Mr. Daugherty; his defense centered on his intent.

This Court's decision in Griffin v. State, 40 Fla. L. Weekly S135 (Fla. March 12, 2015) calls into question the Second District's reliance on intent not being an issue in a self-defense case. Review was sought in Griffin v. State, 128 So.3rd 88 (Fla. 2nd DCA 2013) because it conflicted with State v. Montgomery, 39 So.3rd 252 (Fla.

2010) Griffin's sole defense at trial was that he was misidentified as the killer. He was charged with second-degree murder. He presented evidence at the trial that while he was present when the killing occurred, he did not fire the shot.

The jury was instructed on manslaughter, as a lesser included offense. The instruction was wrong. There was no objection to the instruction even though this Court had already decided Montgomery. The Second District recognized that the instruction was erroneous but held it was not fundamental error because "the intent element was not disputed at trial." Because Richards only defense was that he was not identified correctly as the shooter, the Second District concluded the error was not fundamental. This Court reversed that decision.

"The district court's analysis and conclusion overlook the fact that Griffin did not have an obligation to argue that the manner of the shooting did not establish the requisite intent, or to expressly dispute any other elements of the crime. Without dispute, Mills was killed by a gunshot through the window of the vehicle in which he was sitting. This simple fact, standing alone, does not establish the intent, or lack of intent, by which the shooting occurred—and thus it does not establish what degree of homicide may have been committed. It must be remembered, as we said long ago, that "[t]he plea of not guilty puts in issue every material element of the crime

charged in the information, and before a jury is warranted in returning a general verdict of guilty against an accused every material element of the crime charged must be proved to their satisfaction beyond all reasonable doubt. Licata v. State, 81 Fla. 649, 88 So. 621, 622 (1921)."

So it not likely, at least for this point of law, that Richards has any value in this case. Mr. Daugherty did not concede the intent issue; in fact, it was the cornerstone of his defense. "When the question before the jury is whether an unlawful homicide occurred, and the jury finds that the killing was not justifiable or excusable, the jury must then determine the degree of the offense based upon the intent, if any, that the State proves existed at the time of the homicide. A homicide found to be unlawful is not automatically just one offense, but will be one of several possible homicide offenses depending upon the nature of the intent or the lack of any intent at the time of the homicide." Griffin v. State, 40 Fla. L. Weekly S135 (Fla. March 12, 2015).

Finally, the State says Mr. Daughtery "makes much of the fact that the Fourth District granted habeas relief in co-defendant Brian Hooks case." In addition, the State says that Mr. Daughtery "fails to mention that the Fourth District has stayed their decision . . . pending the outcome of" this case. (SAB - page 26).

The Fourth District's order staying the habeas case was decided

on January 6, 2015, only six days before the Initial Brief was filed in this case.

More importantly, the significance of the Fourth District's grant of relief (it did not change its mind about the result) was the recognition that it could not rely on its formulation of the rule of law it decided in Williams v. State, 40 So.3rd 72 (Fla. 4th DCA 2010) The Fourth District now understands that this Court's decision in Williams v. State, 123 So.3rd 23 (Fla. 2013) completely altered how the case would be decided. The stay of the mandate does not change this.

CONCLUSION

Based on the foregoing arguments and authorities, the Petitioner respectfully requests this Court answer both questions in the affirmative and quash the decision of the Fourth District.

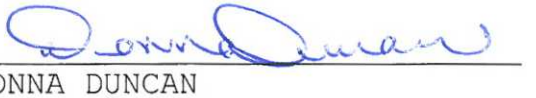
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by U.S. Mail/Email to: Jeanine Germanowicz, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, CrimAppWPB@myfloridalegal.com, dated this 27th day of April, 2015.

CERTIFICATION OF FONT SIZE

I HEREBY CERTIFY that this document was generated by computer using Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully Submitted,



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