

IN THE SUPREME COURT OF FLORIDA

DENEAL O. BROWN,

Petitioner,

v.

Case No. SC16-1031

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM  
THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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### **PRELIMINARY STATEMENT**

This brief will refer to petitioner as such, defendant, or by proper name, e.g., "Deneal Brown." Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, or the State.

As noted in petitioner's Preliminary Statement, the record on appeal in case no. 2D09-1849, was submitted as part of an appendix attached to the original petition alleging ineffective assistance of appellate counsel in the Second District Court of Appeal. Citations to the record on appeal will be to the applicable appendix letter, "A-H," followed by the page number as shown on the document.

### **STATEMENT OF THE CASE AND FACTS**

The Second District Court of Appeal set forth the salient facts in *Brown v. State*, 197 So. 3d 69 (Fla. 2d DCA 2016), as follows:

We reconsider Deneal Brown's petition alleging ineffective assistance of appellate counsel in light of the subsequent decision in *Griffin v. State*, 160 So. 3d 63 (Fla. 2015). Our conclusion that Mr. Brown is entitled to no relief is unchanged.

Mr. Brown was charged with second-degree murder. His counsel told the jury in his opening statement: "I believe that the evidence is going to show that this was self-defense, that what turned into a verbal confrontation then turned into gun play, ... but the person who shot [the victim] was just quicker than he was." Mr. Brown testified at trial that as he was driving out of the victim's apartment complex, the victim engaged him in a verbal altercation. Mr. Brown started to drive away but returned when the victim challenged him and his friend, who was a passenger in the car, to a fight. Mr.

Brown testified that his friend shot the victim when the victim reached for his gun. Nevertheless, Mr. Brown's counsel argued in closing, "I told you this was a case about self-defense, and I told you that's what the evidence is going to show. This is a case of self-defense."

The State disputed the presence of Mr. Brown's friend and Mr. Brown's argument that the shooting was in self-defense, arguing that Mr. Brown's acts of driving back to the victim and then shooting him in the torso demonstrated a depraved mind without regard for human life. The jury found Mr. Brown guilty as charged, and the trial court sentenced him to life in prison with a twenty-five-year mandatory minimum term in accordance with the jury's findings that Mr. Brown discharged a firearm during the commission of the offense and that the discharge caused the victim's death.

*Id.* at 69-70.

**SUMMARY OF ARGUMENT**

The Second District Court of Appeal correctly concluded that the jury instruction given in this case, while erroneous under *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010), did not entitle petitioner to relief under a theory of fundamental error and that *Griffin v. State*, 160 So. 3d 63 (Fla. 2015), does not require a different result.

**ARGUMENT**

**ISSUE**

**THE SECOND DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE MANSLAUGHTER JURY INSTRUCTION GIVEN IN PETITIONER'S CASE DID NOT CONSTITUTE FUNDAMENTAL ERROR.**

The issue before this court is narrow: Is the Second District's decision in *Brown v. State*, 197 So. 3d 69 (Fla. 2d DCA 2016), in conflict with this court's decision in *Griffin v. State*, 160 So. 3d 63 (Fla. 2015). The answer is, no. The Second District held in *Brown* that the manslaughter by act instruction that this court held to be erroneous in *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010), "was not fundamental error in Mr. Brown's case because it did not prevent the jury from considering whether the evidence fit the elements of manslaughter." *Brown v. State*, 197 So. 3d at 70. Because the instruction was not fundamental error in Brown's case, appellate counsel was not constitutionally ineffective in failing to file supplemental briefing raising the faulty manslaughter by act jury instruction on direct appeal of Brown's conviction and sentence. See *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) (If a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.).



In *Brown*, entered on remand from this court,<sup>1</sup> the Second District explained why the faulty manslaughter by act instruction did not result in fundamental error in Brown's case wherein he had raised self-defense:

"Claims of self defense and defense of another involve 'an admission and avoidance'." *Keyes v. State*, 804 So. 2d 373, 375 (Fla. 4th DCA 2001) (quoting *Williams v. State*, 588 So. 2d 44, 45 (Fla. 1st DCA 1991)). By arguing without qualification that he or his friend acted in self-defense, Mr. Brown necessarily conceded that either intentionally caused the victim's death. "[A] defective instruction in a criminal case can only constitute fundamental error if the error pertains to a material element that is disputed at trial." *Daniels v. State*, 121 So. 3d 409, 418 (Fla. 2013). Thus, the manslaughter by act instruction that the supreme court held to be erroneous in *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010), was not fundamental error in Mr. Brown's case because it did not prevent the jury from considering whether the evidence fit the elements of manslaughter. *Cf. Daniels*, 121 So. 3d at 418-19 (holding the faulty manslaughter by act instruction was fundamental error because the defendant admitted to shooting the gun to scare someone but insisted he did not aim at anyone and did not intend to kill); *Horne v. State*, 128 So. 3d 953, 956-57 (Fla. 2d DCA 2013) (holding that because the defendant testified that he felt his life was threatened and that he intended to shoot the victim in the leg but did not intend to kill the victim, the faulty instruction was fundamental error).

*Id.* at 70.

*Griffin* does not involve a claim of self-defense. It involves the sole defense of misidentification. This court found that raising misidentification did not concede the element of intent to

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<sup>1</sup> "We reconsider Deneal Brown's petition alleging ineffective assistance of appellate counsel in light of the subsequent decision in *Griffin v. State*, 160 So. 3d 63 (Fla. 2015)." *Id.* at 69.

the shooting. This court concluded then that the intent underlying the unlawful homicide remained pertinent or material to what the jury had to consider and therefore Griffin was entitled to an accurate manslaughter instruction.

By stark contrast, Brown argued "without qualification" that he or his "passenger" acted in self-defense. 197 So. 3d at 70. The faulty manslaughter instruction erroneously required proof of intent to kill instead of properly requiring an intentional act that could have resulted in death. Thus, a material element at issue in a manslaughter case, intentional action, was the sole error in the instruction. Brown's defense strategy prevents him from relying on this fact to support a claim for relief based on fundamental error.

Brown testified at trial that the victim was shot in self-defense. And, as noted by the Second District, defense counsel argued self-defense in opening statement and in closing argument. *Id.* at 69-70. During trial, Brown testified that he and the victim got into a verbal altercation and he was "fixing" to leave when the victim started calling "them" out. He backed up his car a little bit at which point the victim pulled up his shirt and showed Brown that he had a gun (Appendix G; T 624). Brown testified, "Then he reached for it. He went for it." (*Id.*; T 626) Brown testified, "My friend, he jumped across me, popped him, shoot him." (*Id.*; T 626) Brown then fled the scene (*Id.*; T 627-628). Brown

testified, "I see him -- I can see him falling, but I'm leaving at the same time." (*Id.*; T 627)

The Second District found that the State had disputed the presence of Brown's passenger and Brown's argument that the shooting was in self-defense. *Id.* at 70. Significantly, the Second District also found that the State had argued that Brown's acts of driving back to the victim and then shooting him in the torso demonstrated a depraved mind without regard for human life. *Id.* Thus, the State maintained and met its burden to prove all elements of the charged offense of second degree murder.

As set forth in *Brown*, "Claims of self defense and defense of another involve an admission and avoidance." *Id.* In other words, a claim of self-defense both admits and seeks to excuse criminal action. *Martinez v. State*, 981 So. 2d 449 (Fla. 2008); *Bolin v. State*, 297 So. 2d 317 (Fla. 3d DCA 1974). By claiming self-defense, Brown conceded the only intent relevant in a *manslaughter* case - the commission of an intentional act. See e.g., *Lamb v. State*, 18 So. 3d 734, 735 (Fla. 1st DCA 2009) ("attempted manslaughter by act required only an intentional unlawful act.").

Brown's defense reflects that he [or his passenger] intentionally shot the victim in the torso with deadly force to defend against the victim's alleged attack. As this court stated in *Griffin*, the only question of intent which arises in regard to the crime of voluntary manslaughter is the existence of an

intentional act which resulted in the victim's death. *Griffin v. State*, 160 So. 3d at 69. Since voluntary manslaughter does not require proof of an intent to kill, Brown's concession of committing an intentional act removed the question of intent from the "pertinent and material" matters to be considered by the jury in assessing the manslaughter charge.

The Second District found that by pursuing this defense, without qualification, Brown admitted the elements of manslaughter. 197 So. 3d at 70 ("By arguing without qualification that he or his friend acted in self-defense, Mr. Brown necessarily conceded that either intentionally caused the victim's death."). The Second District concluded that the question of intent was not a material issue as it pertained to the erroneous jury instruction on review.

This court noted in *Daniels v. State*, 121 So. 3d 409, 418 (Fla. 2013), and reaffirmed in *Griffin*, that a defective instruction in a criminal case can only constitute fundamental error if the error pertains to a material element that is disputed at trial. Brown conceded that either he or his passenger intentionally caused the victim's death. Consequently, the faulty manslaughter by act instruction read at Brown's trial was not fundamental error in Brown's case because it did not prevent the jury from considering whether the evidence fit the elements of manslaughter.

Brown's argument that an intent to shoot in self-defense does not by itself demonstrate an intent to kill and that not every shot intentionally made is a shot intended to kill, is unavailing on the facts of this case. The Second District found that Brown argued "without qualification" that he or his friend acted in self-defense in shooting the victim in the torso thereby necessarily conceding that either intentionally "caused the victim's death." *Id.* at 70. The Second District cited two cases for comparison where the faulty manslaughter instruction was found to be fundamental error because the defendants in those cases qualified their actions in admitting to shooting the victims. *See id.*, citing *Daniels v. State*, 121 So. 3d 409, 418-419 (Fla. 2013); *Horne v. State*, 128 So. 3d 953 (Fla. 2d DCA 2013). Unlike *Daniels* and *Horne*, Brown never argued that he did not intend to kill. He argued self-defense without qualification. Moreover, the State did not have to prove an intent to kill.

Although Brown also raised what he categorizes as a misidentification defense, that does not alter the fundamental error analysis. Unlike Mr. Griffin, whose sole defense was misidentification, Brown testified and defense counsel argued that the shooting was in self-defense. Intent was not disputed at trial and Brown never claimed that he did not intend to kill the victim. *Cf. Daniels v. State*, 121 So. 3d 409, 418-419 (Fla. 2013) (holding the faulty manslaughter by act instruction was fundamental error

because the defendant admitted to shooting the gun to scare someone but insisted he did not aim at anyone and did not intent to kill). Brown testified that his friend shot the victim when the victim reached for his gun. Nevertheless, Brown's trial counsel argued in closing, "I told you this was a case about self-defense, and I told you that's what the evidence is going to show. This is a case of self-defense." (Appendix H; T 721)

Additionally, Brown arguably did not raise a true misidentification defense as did Mr. Griffin. Brown argued that his passenger, who died before trial, was the shooter, so identity of the purported shooter was known. The State disputed this claim at trial. Demetriel Oliver testified he saw Brown shoot his brother and Mr. Alawadi testified Brown was the only person in the vehicle (Appendix E; T 298, 361). Brown was not apprehended until well over a year later, having left the area after the shooting.

This fundamental error analysis should not alter based on an argument that intent was still at issue because Brown's self-defense claim did not concede the state of mind relevant to the crime of second degree murder. Brown does not challenge the second degree murder instruction given in this case. Thus, the fundamental error analysis is limited to the challenged instruction and the "material elements" at issue in **that** instruction. Given that a self-defense claim admits intentional action, the self-defense claim lodged in this case conceded a

material issue in dispute on a ***manslaughter*** charge. Contrary to Brown's assertion in the merits brief at page 26, the Second District did not find that "a defendant raising a claim of self-defense in the context of a charge of second degree murder necessarily conceded he acted with a depraved mind." That assertion is inaccurate and the associated analysis should be rejected.

Concession to committing an intentional act in defense of self is not a concession that the killing was done with a depraved mind, as that term is defined. See *Griffin v. State*, 160 So. 3d at 68-69 ("In the present case, other than the fact that Mills was shot, Griffin did not concede any other element of the crime charged; he simply contested his identity as the perpetrator. The State's burden still remained to prove that the shooting was done with a depraved mind, but without intent to kill, as set forth in the standard jury instruction."). Moreover, the concession inherent in a self-defense claim is not withdrawn when a jury rejects that defense. The admission at the heart of that defense carries forward as the jury evaluates the charged and lesser included offenses and the conceded element is counted against the defendant on each offense. Thus, while a jury which "finds that the killing was not justified or excusable, [] 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," the jury must include the concession in doing so. *Griffin v. State*, 160 So. 3d

at 69 ("Certainly, where a defendant expressly concedes one or more elements of a crime, those elements [are] no longer in dispute for purposes of a fundamental error analysis."), citing e.g., *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982) (holding that failure to instruct on element of intent to permanently deprive another of property in robbery prosecution was not fundamental error where the defendant "admitted that he stole personal property from the victim"); *Morton v. State*, 459 So. 2d 322 (Fla. 3d DCA 1984) (element of intent to permanently deprive not in dispute where defendant conceded robbery occurred). See also *State v. Delva*, 575 So. 2d 643, 645 (Fla. 1991) ("Because knowledge that the substance in the package was cocaine was not at issue as a defense, the failure to instruct the jury on that element of the crime could not be fundamental error and could only be preserved for appeal by a proper objection.").

Taken in its totality, *Griffin* does not support application of the fundamental error doctrine to Brown's case. First, *Griffin* involved a defense distinct from the one asserted by Brown. In *Griffin*, the State charged the defendant with second degree murder for the shooting death of the victim. The defense argued misidentification, not self-defense. Griffin admitted to being present and interacting with the victim but denied any responsibility for the shooting. This court determined that Griffin only admitted the manner of the death, by gunshot, not the



underlying intent. 160 So. 3d at 68. This court concluded that a mere denial of identity and "remaining silent on the remaining element of the crimes" did not relieve the State of its burden of proof. 160 So. 3d at 68. Accordingly, the jury needed to consider intent as to every charged and lesser included homicide offense in reaching its verdict.

In contrast, Brown argued that he acted in self-defense. Such a defense admits the criminal act and seeks to excuse it. *Martinez v. State*, 981 So. 2d at 453 ("Thus, when a defendant asserts a claim of self-defense, he admits the commission of the criminal act with which he was charged but contends that the act was justifiable."). Moreover, with an offense such as manslaughter, such an admission admits the intent element of the offense; namely, an intentional act. Any attempt to apply *Griffin's* intent analysis must be tempered by the critical differences in affirmative defenses asserted by the two defendants.

Finally, the question presented in *Griffin* should be limited to the narrow issue decided in that case. The issue presented in *Griffin* was whether the defense of misidentification removed the question of intent from being at issue, such that fundamental error relief was unavailable. The decisions on review, *Wimberly v. State* and *Griffin v. State*, specifically addressed the intent element as it related to the erroneous instruction. See *Wimberly v. State*, 162 So. 3d 73, 75 (Fla. 4th DCA 2014) ("Petitioner was charged with

attempted first-degree murder but convicted of a lesser offense. Intent was a disputed issue at trial, and the erroneous instruction was pertinent to an issue that the jury had to consider in order to convict.”); *Griffin v. State*, 128 So. 3d 88, 90 (Fla. 2d DCA 2013), *decision quashed*, 160 So. 3d 63 (Fla. 2015) (“There is no dispute regarding the elements of an offense when the manner of the crime is conceded and the sole defense is mistaken identity. [ ] Because there was no dispute regarding the element of intent, the erroneous jury instruction on the intent element of the lesser included offense of manslaughter did not constitute fundamental error.”).

*Griffin's* intent analysis applies to the narrow question of misidentification defenses, and its language regarding other material elements in unchallenged homicide instructions should be limited to that context. This conclusion is supported by the opinion's opening affirmation, which makes clear that a fundamental error analysis should focus on the erroneous instruction:

We begin by reaffirming that our precedent requires 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.”

*Griffin*, 160 So. 3d at 67-68 (internal citations omitted).

Having found that the defense of misidentification did not prevent the issue of intent from being a disputed issue at trial,

the *Griffin* court concluded that the question of intent must be considered in regards to each of the applicable homicide offenses, be they the primary charge or a lesser offense. By arguing self-defense, Brown conceded the issue of intent as to the erroneous instruction and the court need not consider the question of intent as it relates to offenses with non-challenged instructions.

"[A] defective instruction in a criminal case can only constitute fundamental error if the error pertains to a material element that is disputed at trial." *Daniels v. State*, 121 So. 3d 409, 418 (Fla. 2013). Here, Brown did more than dispute a single material element of the offense. He admitted the elements of the manslaughter offense and sought to excuse his actions by claiming that he acted in self-defense. Based on this concession, the error in the manslaughter instruction "did not prevent the jury from considering whether the evidence fit the elements of manslaughter." *Brown v. State*, 197 So. 2d at 70 (internal citations omitted). And, had the jury believed Brown's self-defense claim, it would have returned with a not guilty verdict.

Whether a fact is a material element in dispute for purposes of a fundamental error analysis is not the same question as whether the State has met its burden of proof. The State does not suggest that the concession as to one element relieves the State of its burden of proving an offense. The State did successfully prove the elements of second degree murder and the jury properly convicted

Brown on that charge.

What the State is arguing is that a defendant who chooses to assert a defense is bound by his admissions. The concession of intent inherent in Brown's self-defense claim meant that the issue of intent was no longer in dispute as it related to the erroneous instruction. Further, admissions made in pursuit of a self-defense claim applied to any and all charges against Brown. Accordingly, no basis for fundamental error relief exists. The Second District properly determined that the erroneous instruction did not address a material issue in dispute and, therefore, did not support relief under the principle of fundamental error.

This court's recent review and ultimate discharge of jurisdiction in *Richards v. State*, 237 So. 3d 935 (Fla. 2018), should be considered in this case. In *Richards*, the defendant was charged with attempted second degree murder. His jury was instructed with the standard attempted manslaughter instruction which erroneously required the jury to find intent to kill. The Second District found that the instruction was not fundamental error in that case for two reasons. First, the attempted manslaughter instruction was two steps removed on the verdict form from the charged offense of attempted second degree murder. Second, and more significant for purposes of Brown's case, the defendant's intent was not disputed at trial because his sole defense was self-defense. After the defendant sought review in

this court, jurisdiction was granted and this court ordered merits briefing. Per order dated September 22, 2016, this court stayed the proceedings in Brown's case pending disposition in *Richards*. On March 1, 2018, the stay was lifted and, this court entered its *per curiam* opinion upon consideration of the "Second District's opinion and the briefs of the parties," and exercised its discretion to discharge jurisdiction. *Id.* at 936. Thus, this court having been presented with briefing on the merits of this issue, declined to disturb the present state of the law. *Richards*, then, is controlling authority for the Second District's decision in *Brown*.

**CONCLUSION**

The Second District properly concluded that the erroneous manslaughter instruction given in this case did not constitute fundamental error. The Second District's conclusion is consistent with this court's decision in *Griffin*. The Second District's ruling should therefore be affirmed.

**CERTIFICATE OF SERVICE**

I certify that a copy of this brief was served electronically via the Florida Courts e-filing portal on May 23rd, 2018 to: Dane K. Chase, Esq., at dane@chaselawfloridapa.com, counsel for petitioner, 111 2nd Ave NE, Suite 334, St. Petersburg, FL 33701.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief was computer generated using Courier New 12 point font.

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