IN THE SUPREME COURT OF FLORIDA

DENEAL O. BROWN

Petitioner,

Case Number: SC16-1031
L.T. Case Numbers: 2D14-1166

v.

STATE OF FLORIDA

Respondent.

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

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

In this Petition, the Petitioner, DENEAL O. BROWN, will be referred to by name. The respondent, The State of Florida, will be referred to as the state.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision below. *See*, (Appendix A).

SUMMARY OF THE ARGUMENT

The Second District's decision in Mr. Brown's case directly and expressly conflicts with the decisions in *Stinson v. State*, 69 So. 3d 291 (Fla. 1st DCA 2009), *Ward v. State*, 12 So. 3d 920 (Fla. 1st DCA 2009), *Dowe v. State*, 162 So. 3d 35 (Fla. 4th DCA 2014), *Griffin v. State*, 160 So. 3d 63 (Fla. 2015), *State v. Montgomery*, 39 So.3d 252 (Fla. 2010), and *Haygood v. State*, 109 So. 3d 735 (Fla. 2013), as to the issue of whether the giving of the jury instruction on manslaughter by act, which this Court found to be fundamentally erroneous in *Montgomery*, constitutes fundamental error where the defendant is convicted of second degree murder, notwithstanding a claim that the shooting was done in self-defense. Furthermore, this Court should accept jurisdiction as the issue is already pending review in this Court, *see*, *Richards v. State*, 128 So. 3d 959, 962 (Fla. 2d DCA 2013), review granted, No. SC14-184 (Fla. May 26, 2016).

ARGUMENT AND CITATION TO AUTHORITY

I. THIS COURT SHOULD ACCEPT JURISDICTION AS THE ISSUE IS ALREADY PENDING REVIEW IN THIS COURT, AND BECAUSE THE SECOND DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FIRST AND FOURTH DISTRICTS, AS WELL AS THE DECISIONS OF THIS COURT.

This Court should accept jurisdiction as the issue is already pending review in this Court, *see*, *Richards v. State*, 128 So. 3d 959, 962 (Fla. 2d DCA 2013), review granted, No. SC14-184 (Fla. May 26, 2016), and because the Second District's decision conflicts with the decisions of the First and Fourth Districts in in *Stinson v. State*, 69 So. 3d 291 (Fla. 1st DCA 2009), *Ward v. State*, 12 So. 3d 920 (Fla. 1st DCA 2009), and *Dowe v. State*, 162 So. 3d 35 (Fla. 4th DCA 2014), as well as the decisions of this Court in *Griffin v. State*, 160 So. 3d 63 (Fla. 2015), *State v. Montgomery*, 39 So.3d 252 (Fla. 2010), and *Haygood v. State*, 109 So. 3d 735 (Fla. 2013), thereby bringing the decision within this Court's jurisdiction. *See*, art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv); *Jollie v. State*, 405 So.2d 418 (Fla.1981).

Mr. Brown filed a petition alleging ineffective assistance of appellate counsel pursuant to Fla. R. App. P. 9.141(d) in the Second District Court of Appeal arguing that his appellate attorney should have challenged, as fundamental error, the trial court's use of the then standard jury instruction for manslaughter by act on the basis of this Court's holdings in *State v. Montgomery*, 39 So. 3d 252 (Fla.

2010) and *Haygood v. State*, 109 So. 3d 735 (Fla. 2013). In *Montgomery*, this Court found that use of the then standard jury instruction on manslaughter by act – which was the instruction utilized in Mr. Brown's case - requiring that in order to convict for that lesser offense the jury must find that the defendant intended to cause the death of the victim, was fundamental error where the defendant was convicted of a crime no more than one step removed from manslaughter. *Montgomery*, 39 So.3d at 259. Recognizing that the instruction at issue was in fact erroneous, the Second District proceeded directly to a fundamental error analysis and held as follows:

> Mr. Brown's intent was not at issue during trial because his intent was not disputed at trial, the only disputed issues the jury had to consider in deciding whether to find Mr. Brown guilty of second-degree murder or manslaughter were whether his friend shot the victim or, if not, whether Mr. Brown's actions were justified as self-defense. Based on the reasoning of *Richards v. State*, 128 So.3d 959, 963–64 (Fla. 2d DCA 2013), we conclude that Mr. Brown is not entitled to relief.

Brown v. State, 145 So. 3d 883 (Fla. 2d DCA 2014). Mr. Brown then Petitioned this Court for review, and this Court ultimately accepted jurisdiction, quashed the Second District's decision, and remanded for reconsideration upon application of this Court's decision in *Griffin v. State*, 160 So. 3d 63 (Fla. 2015). *See*, *Brown v. State*, 177 So. 3d 1263 (Fla. 2015).

Thereafter, the Second District again denied relief, finding that "[b]y arguing without qualification that he or his friend acted in self-defense, Mr. Brown necessarily conceded that either intentionally caused the victim's death," and that the erroneous manslaughter by act instruction utilized in his case therefore did not constitute fundamental error, "because it did not prevent the jury from considering whether the evidence fit the elements of manslaughter." *Brown v. State*, 41 Fla. L. Weekly D788 (Fla. 2d DCA Mar. 30, 2016). The court's finding that Mr. Brown necessarily conceded that he or his friend intentionally caused the victim's death by arguing his friend shot the victim in self-defense is wholly erroneous.

In *Griffin*, the defendant was charged with second degree murder and admitted the victim was shot, but claimed he had been misidentified as the shooter. The erroneous manslaughter by act jury instruction was provided to the jury, but the Second District found that the error was not fundamental, concluding that by raising a claim of misidentification the defendant admitted all of the elements of second degree murder, other than identity, and as such, the element of intent was not pertinent and material to what the jury had to consider in order to convict the defendant. *Griffin*, 160 So. 3d at 66-67. This Court quashed the Second District's decision, finding that "it defies logic to conclude that expressly disputing the identity of the perpetrator and remaining silent on the remaining elements of the crime would concede all the elements but identity." *Griffin*, 160 So. 3d at 68. "The

State's burden of proof does not change simply because the defendant speaks up and contests one element, such as his identity as the perpetrator." *Id*. "[O]nce the jury determined that the homicide was not justifiable or excusable, the intent underlying the unlawful homicide was pertinent or material to what the jury had to consider in order to convict Griffin of second-degree murder or the lesser offense of manslaughter by intentional act." *Id*. at 69. "Griffin's claim of misidentification did not concede the element of intent as to the shooting, and he was entitled to an accurate instruction as to manslaughter, which he did not receive." *Id*.

Additionally, the First and Fourth Districts Court of Appeals have found that the giving of the erroneous manslaughter by act jury instruction utilized in Mr. Brown's case constitutes fundamental error despite the defendants' reliance on a claim of self-defense. *See*, *Stinson v. State*, 69 So. 3d 291 (Fla. 1st DCA 2009); *Ward v. State*, 12 So. 3d 920 (Fla. 1st DCA 2009); *Dowe v. State*, 162 So. 3d 35 (Fla. 4th DCA 2014) (*See*, *Dowe v. State*, 39 So. 3d 407, 408 (Fla. 4th DCA 2010) *review granted*, *decision quashed*, 139 So. 3d 885 (Fla. 2014), for facts).

The Second District's finding that Mr. Brown necessarily conceded that he or his friend intentionally caused the victim's death by arguing his friend shot the victim in self-defense is illogical, as the court mistakenly treats the concession of an intent to shoot as *ipso facto* an intent to kill. However, an intent to shoot, *i.e.*, intention to shoot in self-defense, does not by itself demonstrate an intent to kill.

Not every shot intentionally made is a shot intended to kill. In fact, the Second District itself has recognized that an intentional shooting can be done with the intent to incapacitate rather than to kill. *See*, *e.g.*, *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). Simply put, a defendant can intend to shoot someone in self-defense, *i.e.*, with the intent to incapacitate, without likewise intending to kill them. Accordingly, a concession that the victim was intentionally shot, is not a concession that the victim was intentionally killed.

Furthermore, instead of acting as a concession of intent, a claim of self-defense necessarily puts the element of intent at issue. A defendant claiming self-defense is claiming that he was not acting with premeditation or with a depraved mind, and is instead claiming that he acted with the intent to defend himself. If, as the Second District has found, 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, thus removing the issue of intent from the jury's consideration, no defendant could ever be acquitted on self-defense grounds, as a problem of circularity would arise, to wit: if the defendant raising a claim of self-defense is admitting he acted with a depraved mind, then he is admitting he did not act from a

reasonable belief that the force was necessary to prevent imminent death or great bodily harm as required to support a claim of the justifiable use of deadly force. *See*, Fla. Std. Jury Insr. 3.6(f). Accordingly, the raising of a claim of self-defense in a trial on the charge of second degree murder does not concede the element of intent, but, instead, necessarily places the element in dispute.

In fact, the Second District's own precedent reflects that the raising of a claim of self-defense does not concede the element of intent. *See*, *Poole v. State*, 30 So. 3d 696 (Fla. 2d DCA 2010) (Defendant raised a claim of self-defense and was found guilty of second degree murder, despite the raising of a claim of self-defense, the Court reversed the second-degree murder conviction and remanded for the entry of a conviction for manslaughter, thus recognizing the raising of a claim of self-defense does not *ipso facto* concede the issue of intent). Simply put, the only element at issue in the context of a defendant claiming self-defense is in fact the element of intent. Accordingly, the erroneous manslaughter jury instruction utilized in Mr. Brown's case constituted fundamental error as it removed the element of intent from the jury's deliberations.

In the words of *Griffin*, "[b]y convicting [Mr. Brown] of second-degree murder, the jury necessarily found that he possessed no intent to kill—and the State conceded as much by charging second-degree murder." *Griffin* , 160 So. 3d at 69-70. "In addition, the jury was instructed that '[i]n order to convict of Second

Degree Murder, it is not necessary for the State to prove the defendant had an intent to cause death.'" *Id*. at 70. "Because the manslaughter instruction given to the jury erroneously required that to convict for the lesser included offense of manslaughter by act, the jury must find [Mr. Brown] committed an act intended to cause [the victim's] death, the jury was essentially foreclosed from finding Mr. Brown guilty of that lesser offense when they found he had no intent to kill." *Id*. "Because [Mr. Brown] was convicted of second-degree murder, an offense only one step removed from manslaughter, and because he did not concede the intent by which the homicide was committed, [the burden of] proof of that issue remained on the State, and remained in dispute notwithstanding [Mr. Brown's] defense of misidentification [and self-defense]." *Id*. Consequently, as the issue of intent remained pertinent and material to what the jury had to consider in order to convict, and the erroneous manslaughter jury instruction utilized in Mr. Brown's case removed the element of intent from the jury's deliberations, the giving of said instruction constituted fundamental error, and Mr. Brown is thereby entitled to relief. *See*, *Id*.

Simply put, for the reasons set forth above, under *Griffin v. State*, 160 So. 3d 63 (Fla. 2015), *State v. Montgomery*, 39 So.3d 252 (Fla. 2010), *Haygood v. State*, 109 So. 3d 735 (Fla. 2013), *Stinson v. State*, 69 So. 3d 291 (Fla. 1st DCA 2009), *Ward v. State*, 12 So. 3d 920 (Fla. 1st DCA 2009), and *Dowe v. State*, 162 So. 3d

35 (Fla. 4th DCA 2014) (*See, Dowe v. State*, 39 So. 3d 407, 408 (Fla. 4th DCA 2010), the giving of the erroneous manslaughter by act jury instruction utilized in Mr. Brown's case constitutes fundamental error and, as such, the Second District's decision in Mr. Brown's case expressly and directly conflicts with the decisions in each of those cases. Accordingly, this Court has jurisdiction to review Mr. Brown's case, and should exercise that jurisdiction. *See*, Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). Furthermore, as this Court has granted review on the same issue in *Richards v. State*, 128 So. 3d 959, 962 (Fla. 2d DCA 2013), review granted, No. SC14-184 (Fla. May 26, 2016), this Court has jurisdiction and should exercise that jurisdiction. *See, Jollie v. State*, 405 So.2d 418 (Fla.1981).

CONCLUSION

Based on the argument and citation to authority set forth above, this Court has jurisdiction over Mr. Brown's case and should exercise that jurisdiction to review his case and quash the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Brief was emailed via the Florida Courts eFiling portal to the Attorney General's Office at crimapptpa@myfloridalegal.com on this 15th day of June, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Attorney for the Petitioner

APPENDIX

1. *Brown v. State*, 41 Fla. L. Weekly D788 (Fla. 2d DCA Mar. 30, 2016).

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DENEAL BROWN, Petitioner, v. STATE OF FLORIDA, Respondent.	)	Case No. 2D14-1166

Opinion filed March 30, 2016.

Petition Alleging Ineffective Assistance of Appellate Counsel. Pinellas County; Joseph A. Bulone, Judge.

Dane K. Chase of Chase Law Firm, for Petitioner.

Pamela Jo Bondi, Attorney General, Tallahassee, and Gillian N. Leytham, Assistant Attorney General, Tampa, for Appellee.

ON REMAND FROM THE SUPREME COURT OF FLORIDA

KELLY, Judge.

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.[1] 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.

"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

[1]Mr. Brown testified that his friend was killed shortly after this homicide occurred.

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).

Petition denied.

ALTENBERND and WALLACE, JJ., Concur.