

IN THE SUPREME COURT OF FLORIDA

DENEAL O. BROWN

Petitioner,

Case Number: SC16-1031

L.T. Case Number: 2D14-1166

v.

STATE OF FLORIDA

Respondent.

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

PETITIONER'S REPLY BRIEF

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ARGUMENT AND CITATION TO AUTHORITY

I. MR. BROWN WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS APPELLATE COUNSEL'S FAILURE TO ARGUE ON APPEAL THAT THE TRIAL COURT FUNDAMENTALLY ERRED BY GIVING THE THEN STANDARD JURY INSTRUCTION ON MANSLAUGHTER BY ACT, WHICH WAS FOUND TO BE FUNDAMENTALLY FLAWED BY THIS COURT, AND, AS SUCH, THE SECOND DISTRICT'S OPINION SHOULD BE QUASHED.

In its Answer Brief, the state remarkably, although unwittingly, concedes the use of the fundamentally flawed manslaughter by act jury instruction utilized in Mr. Brown's case entitles him to relief. Accordingly, for the reasons set forth in Mr. Brown's Initial Brief, as well as argued by the state, the Second District's decision should be quashed.

More specifically, the state argues "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.")" (Answer Brief, at 11). Mr. Brown could not agree more, and, as such, the issue of intent remained in dispute notwithstanding Mr. Brown's argument that a third party shot the victim in self-defense, and the giving of the flawed

instruction therefore constituted fundamental error. *See, Griffin v. State*, 160 So.3d 63 (Fla.2015).

The state further argues that “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.”).” (Answer Brief, at 7). Again, this is precisely why fundamental error occurred in Mr. Brown’s case. By the state’s own argument, at most, Mr. Brown’s defense conceded the intent element of manslaughter, *i.e.*, intentional act, but did not concede the intent element of second degree murder, *i.e.*, depraved mind. Accordingly, even if Mr. Brown conceded the intent element of manslaughter – which he did not, as his defense was that a third party shot the victim in self-defense, and he admitted nothing with respect to his own actions - the issue of intent remained pertinent and material to what the jury had to consider in order to convict, as the jury had to consider whether Mr. Brown acted with a depraved mind or simply committed an intentional act without an intent to kill. Furthermore, the issue of intent remained in dispute, as the state’s position was that Mr. Brown did not merely commit an intentional act that resulted in death, but rather, acted with a depraved mind, and, as argued by the state, Mr. Brown did not concede he acted with a depraved mind. *See, Griffin*, 160 So. 3d at 68-69 (Answer Brief, at 11). Accordingly, because the faulty instruction removed

the issue of intent from the jury's consideration by requiring an intentional *killing*, not simply an intentional *act*, and the issue of intent was pertinent and material to what the jury had to consider in order to convict, and concerned a disputed issue, the giving of the flawed jury instruction constituted fundamental error, which entitles Mr. Brown to relief. *See, Id.*

The state also argues that by raising a claim of self-defense “without qualification” Mr. Brown necessarily admitted an intent to kill, and that “Brown never argued that he did not intend to kill.” (Answer Brief, at 9). First, by the state's own argument, a claim of self-defense admits, at most, an intentional *act*, not an intentional *killing, i.e.*, the victim was intentionally shot, but that does not mean he was intentionally killed. As explained in Mr. Brown's Initial Brief, an individual can shoot another individual in self-defense, *i.e.* to thwart an attack, without also intending to kill them. Accordingly, Mr. Brown did not admit he intentionally killed the victim by raising a claim of self-defense, and, as the state has conceded, certainly did not admit he killed the victim with a depraved mind. (Answer Brief, at 11).

Furthermore, under *Griffin*, Mr. Brown did not have a duty to “qualify” his defense. *See, Griffin*, 160 So. 3d at 68 (“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.”). Instead, by proceeding to trial Mr. Brown put every element of the offense of second degree murder at issue, and, as conceded

by the state, because a claim of self-defense does not act as a concession of the intent element of second degree murder, the element of intent remained at issue. *See, Id.* Further still, even if a claim of self-defense did somehow concede the issue of intent, because Mr. Brown's defense was that *a third party* shot the victim in self-defense, he admitted nothing with respect to *his* own actions and thus the issue of intent remained pertinent and material to what the jury had to consider in order to convict. *See, Id.* Accordingly, the second district erred by finding that Mr. Brown was required to expressly dispute intent, *i.e.*, "qualify" his defense, as said finding conflicts with this Court's opinion in *Griffin*, where the Court explained that a defendant is not required to expressly dispute an element of a crime for the element to remain pertinent and material to what the jury must consider in order to convict. In short, Mr. Brown's defense did not concede the intent with which the victim was killed, and the issue of intent remained pertinent and material to what the jury had to consider regardless of whether it was "expressly disputed" or whether Mr. Brown "qualified" his defense, because, as the state conceded, "an intentional act in defense of self is not a concession that the killing was done with a depraved mind." (Answer Brief, at 11); *See, Griffin*, 160 So. 3d at 68.

For the reasons explained above, and in Mr. Brown's Initial Brief, this Court should reaffirm its decision in *State v. Montgomery*, 39 So.3d 252 (Fla. 2010), approve the conflict decisions 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), and find that in a murder trial the issue of intent remains pertinent and material to what the jury must consider in order to convict notwithstanding the raising of a claim of self-defense, and, as such, the giving of the flawed manslaughter instruction constitutes fundamental error, unless the issue of intent is otherwise expressly conceded by the defendant. This Court should further reaffirm *Griffin*, and find that a defendant is not required to expressly dispute an element of a crime for the element to remain pertinent and material to what the jury must consider in order to convict. Furthermore, this Court should find the Second District's decision to be in conflict with *Montgomery*, *Stinson*, *Ward*, *Dowe*, and *Griffin*, quash the Second District's decision, and remand Mr. Brown's case with directions that the Second District grant his Petition for Writ of Habeas Corpus, vacate the affirmance of his Direct Appeal, and remand his case to the circuit court for a new trial. *See, Griffin*, 160 So. 3d at 68-69.

CONCLUSION

Based upon the argument and citation to authority presented above and in Mr. Brown's Initial Brief, this Court should approve the decisions in *Montgomery*, *Stinson*, *Ward*, *Dowe*, and *Griffin*, quash the Second District's decision, and remand Mr. Brown's case with directions that the Second District grant his Petition for Writ of Habeas Corpus, vacate the affirmance of his Direct Appeal, and remand his case to the circuit court for a new trial.

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 crimaptpa@myfloridalegal.com on this 25th day of May, 2018.

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CERTIFICATION OF COMPLIANCE

I hereby certify that this document was generated by computer using Microsoft Word with Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

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