IN THE SUPREME COURT OF FLORIDA

MALIK JIMER WILLIAMS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.
_____/

Case No. SC16-2170

L.T. Nos. 2D14-1732
292013CF003404000AHC

On Appeal from the Second District Court of Appeal

PETITIONER'S REPLY BRIEF ON THE MERITS

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I. Motions for Judgment of Acquittal

WHETHER DENIAL OF THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE CHARGES OF MURDER AND ATTEMPTED MURDER WAS REVERSIBLE ERROR.

The State first argued that the Defendant's motion of judgment of acquittal was properly denied. Answer Brief at 8-9. The State quoted the trial court's ruling that "the State's case in chief at this juncture sufficiently rebuts the suggestion of self-defense" and asserted that the trial court correctly ruled that the merits of the Defendant's defense of self-defense were properly resolved by the jury. The Initial Brief contains no citation to the record for that ruling by the trial court, which appears at T.1304, line 24 - T.1305, line 3.

The State then argued that the testimony of Symone Watts "sufficiently rebutted" the Defendant's self-defense claim:

> she observed the bikes all stop, because one of them "pushed the other and everyone fell in the street; then one person got up really fast and pulled a gun out." She explained that when the person with the gun stood up, everyone else was still on the ground and no one else had their hand on the gun. She then observed the muzzle flash.

Answer Brief at 10. No citation to the record on appeal appears in the Answer Brief for that quotation of Ms. Watts testimony, which appears at T.372, line 20 - T.373, line 5.

The State failed to mention that on cross examination Ms. Watts completely and thoroughly contradicted herself on that point of fact. She testified that she never actually saw who pulled the gun out and she never saw the gun before she saw the first muzzle flash and heard the shot. T.384, line 25 - T.385, line 10. She agreed that she did not know where the gun came from. T.385, lines 11-13. The first time she realized that a gun was involved was when she heard the first shot and saw the muzzle flash. T.386, lines 2-5. Ms. Watts affirmatively agreed that "to this day" she "would not be able to tell the jury or anyone how that gun got there or whose it was". T.386, lines 6-9.

Taken as a whole, Ms. Watts' testimony did not clearly establish or rebut anything. Her testimony on cross examination was irreconcilably inconsistent with her testimony on direct examination. Ms. Watts' clear contradiction on cross examination of her own testimony on direct examination affirms the venerable maxim that cross examination is the "greatest legal engine ever invented for the discovery of truth". California v. Green, 399 U.S. 149, 158 (1970).

The law is well established that a jury issue is not created by a witness' bald repudiation of her own previous testimony, especially when no attempt is made to excuse or explain the discrepancy. In Ellison v. Anderson, 74 So. 2d 680 (Fla. 1954), a passenger who was injured in a bus accident sued for personal injuries. She gave a deposition "in which she practically absolved the bus driver of

negligence." Id. at 680. When the opposing party moved for summary judgment, the injured passenger produced an affidavit, in which she "sought to repudiate a portion of her previous deposition, by alleging that the bus driver did nothing to avoid the accident." Id. at 680-81. This Court held that a party "should not be permitted by his own affidavit, or by that of another, to baldly repudiate his previous deposition so as to create a jury issue, especially when no attempt is made to excuse or explain the discrepancy."

Here the State seeks to do exactly what this Court held was improper in Ellison. Ms. Watts initially asserted that she saw who brought the gun to the fight: "one of them pushed the other and everyone fell in the street; then one person got up really fast and pulled a gun out." T.372, lines 19-22. Then Ms. Watts testified several times that she did not see who brought the gun to the scene and stated twice that she never saw the gun before she heard the first shot and saw the muzzle flash. T.384, line 22 - T.386, line 9. Like the conflicting statements of the bus passenger in Ellison, Ms. Watts' inconsistent testimony does not allow creation of a jury issue. Ms. Watts also testified that she was "unable to distinguish one boy from another" and testified at trial that she "still can't". T.383, lines 22-24. Thus her identification of the Defendant as the person with the gun was not credible.

An exception to the rule in Ellison exists "where there is a 'credible explanation by the affiant as to the reason for the discrepancy between his earlier

and later opinions.'" Cary v. Keene Corp., 472 So. 2d 851, 853 (Fla. 1st DCA 1985), quoting Croft v. York, 244 So. 2d 161, 165 (Fla. 1st DCA 1971), cert. denied, 246 So. 2d 787 (Fla. 1971); see also Futch v. Wal-Mart Stores, 988 So. 2d 687, 691 (Fla. 1st DCA 2008). However in the instant case no explanation at all for Ms. Watts' inconsistent testimony appears in the record on appeal.

Here the Defendant raised the defense of self-defense. The State had the burden to refute that defense beyond a reasonable doubt. Under the rule in Ellison the conflicted testimony of Ms. Watts would not create even a material dispute of fact, much less clearly rebut the defense of self-defense. The requisite burden and measure of proof are addressed in the Initial Brief and are further addressed infra.

The State then argued that Johnson, who was the companion of Brown (the decedent), testified that the Defendant and Felton "were essentially trying to take one of the bikes." Answer Brief at 10-11. In fact Johnson testified that when he approached the Defendant, he and Brown were each on their own bicycle; the Defendant and Felton were on one bicycle. T.496, lines 13-23; T.550, lines 10-14. It was undisputed that the Defendant was riding the bicycle; Felton was seated on the handlebars. T.550, lines 15-17; T.1312, lines 6-11. Johnson testified that the two persons on the one bicycle "were touching up" with Brown. T.497, lines 6-9. Johnson claimed that he heard the person on the handlebars of the bicycle say "give it up" to Brown. T.497, lines 11-25. Then Brown, the Defendant, and Felton

fell off the bicycles. T.498, lines 3-8. Johnson saw Brown and the Defendant fighting. T.499, line 8 - T.500, line 18. Johnson then began fighting with Felton. T.503, line 13 - T.505, line 6.

Johnson also testified that he and Brown could "maneuver better" and "go faster" than the Defendant and Felton. T.550, lines 18-24. Johnson agreed that on the video recording which was admitted to evidence he could see three bicycles, he and Brown were catching up to the other bicycle, and were starting to pass it. T.554, lines 5-17. Johnson agreed that he and Brown were going in the same direction and faster than the Defendant and Felton. T.556, lines 7-9. Johnson agreed that he and Brown "in fact caught up to them". T.556, lines 10-11. Johnson agreed that at that time he and Brown "were going in the opposite direction from where [they] were supposed to be going" to reach their intended destination. T.557, lines 11-14.

If Johnson and Brown could "maneuver better" and "go faster" than the Defendant and Felton, then they could easily have avoided the Defendant and Felton altogether. However they did not; Johnson testified that he and Brown "caught up to" the Defendant and Felton. T.556, lines 10-11. When Johnson and Brown did so they "were going in the opposite direction from where [they] were supposed to be going" to reach their intended destination. T.557, lines 11-14. Thus it is clear, ***from the testimony of Johnson***, that the Defendant and Felton did

not approach Johnson and Brown. Johnson and Brown made a conscious choice to engage the Defendant and Felton. Johnson and Brown could as easily have continued in the opposite direction and gone "where [they] were supposed to be going". T.557, line 12.

If, as the State seeks to assert, the Defendant and Felton "were essentially trying to take one of the bikes", that might have happened only after Johnson and Brown chose to approach and engage them. Johnson agreed that he and Brown were going in the same direction and faster than the Defendant and Felton, and that he and Brown "in fact caught up to them". T.556, lines 7-11. Therefore the State's argument is simply not supported by the facts in the record, and is refuted by the testimony of Johnson, a State's witness.

The State then argued that "Johnson repeatedly testified that he did not have the gun and neither did Brown", the decedent. Answer Brief at 10. The State provided no record references for that testimony.

No witness ever claimed that Johnson had a gun at any relevant time. The Defendant first saw the gun when Brown (the decedent) had it in his hand. He believed that Brown was about to shoot him. T.1323, lines 7-14. Johnson affirmatively testified that he, Johnson, was not himself carrying a gun. T.493, lines 14-16. However neither Johnson nor anyone else testified that Brown did not have a gun. The prosecutor only asked Johnson whether he saw Brown with a

gun, which Johnson denied. T.493, lines 17-23. The gun in this case, a Kahr model P40, could easily have been carried in a pocket, out of the sight of others.

The State then argued that the Defendant shot Brown twice. Answer Brief at 11. That is not disputed. The Defendant shot Brown in self-defense. The argument is set out at length in the Initial Brief and need not be repeated here.

The State then asserted that "Johnson's version of events was also corroborated by Venda Hayward...." Answer Brief at 11. Again the State provided no record reference for that testimony. The State conceded that Ms. Hayward "arrived at the scene after the shots were fired...." Answer brief at 11.

The testimony of Ms. Hayward neither supports or contradicts the defense of self-defense. Ms. Hayward arrived at the scene after the relevant events had already occurred. T.404, line 10 - T.406, line 8. She stated: "When I get down there I see a burgundy car and I see the victim on the ground and the other victim screaming and hollering [sic]." T.406, lines 15-17.

Ms. Hayward testified that she did not recognize either of the people she saw at the scene. T.406, lines 20-22. She admitted that she was not able to identify anybody when the police showed her photographs. T.407, lines 11-15. Ms. Hayward also testified that the person "who got shot in the hand" (i.e. Johnson) had tried to "clothesline" one of the others. T.408, lines 18-19. She described "clothesline" as "stick his hand out and like knock him off the bicycle."

T.408, lines 1-5. If Ms. Hayward did not arrive at the scene until after Brown was already shot and "on the ground", she could not have seen how the fight started.

The State then argued that Sneed v. State, 580 So. 2d 169, 170 (Fla. 4th DCA 1991), Hernandez Ramos v. State, 496 So. 2d 837, 838-39 (Fla. 2d DCA 1986), and Jenkins v. State, 942 So. 2d 910 (Fla. 2d DCA 2006), are distinguishable. The State asserted that therefore the Defendant's reliance on those cases is misplaced. Answer brief at 11-13.

In his motion for judgment of acquittal the Defendant argued that the State did not rebut beyond a reasonable doubt that the Defendant used force in lawful self-defense. T.1291, lines 17-22. The Defendant asserted that the cross-examination of State's witness Reginald Johnson affirmatively demonstrated that the Defendant acted in self-defense. T.1291, line 23 - T.1292, line 6. The Defendant also asserted that the video recording which was admitted to evidence as State's Exhibit 1 demonstrated that the Defendant and Kito Felton, who were on the same bicycle, were overtaken and set upon by the alleged victims, who were on two different bicycles. T.1292, lines 7-10.

After considering the motion for judgment of acquittal, the trial court made, in relevant part, the following findings with respect to the charge of murder:

> Based on the testimony and the law with respect to the first count, that is first-degree murder premeditated, there is evidence in the record from which this jury could

> conclude beyond a reasonable doubt that the defendant intentionally discharged a firearm at the deceased from a distance and obviously that was with the intent to kill him, and the jury can make that decision.

T.1303, lines 3-11. The court denied the motion T.1304, lines 1-2.

Section 776.012 Florida Statutes (2012) provides that "a person is justified in the use of deadly force and does not have a duty to retreat if... [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another...." When a defendant asserts the defense of self-defense, the defendant bears the initial burden of presenting a prima facie case of self-defense. Once the defendant does so, the burden shifts to the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. See Leasure v. State, 105 So. 3d 5, 13 (Fla. 2d DCA 2012), citing Stieh v. State, 67 So. 3d 275, 278 (Fla. 2d DCA 2011). The Stieh panel quoted Behanna v. State, 985 So. 2d 550 (Fla. 2d DCA 2007), rev. den. 988 So. 2d 622 (Fla. 2008), for the rule that "[w]hen the defense presents a prima facie case of self-defense, the State has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense." Stieh at 278, quoting Behanna at 555.

When the trial court ruled on the Defendant's motion for judgment of acquittal, the trial court failed to hold the State to the correct measure of proof. Here the trial court held that "there is evidence in the record from which this jury

could conclude beyond a reasonable doubt that the defendant intentionally discharged a firearm at the deceased from a distance and obviously that was with the intent to kill him...." T.1303, lines 5-10.

However the State had the burden of proving guilt beyond a reasonable doubt, which included proving beyond a reasonable doubt that the Defendant did ***not*** act in self-defense. Stieh at 278; Behanna at 555. The trial court did not hold the State to the correct standard; the trial court only required that there be some "evidence in the record" to refute the defense of self-defense. T.1303, lines 5-6.

However even by that incorrect standard the State's evidence was legally insufficient to prove guilt beyond a reasonable doubt, because ***the State failed to present any competent substantial evidence at all to rebut the Defendant's direct testimony that he acted in self-defense***. The argument is explained at length in the initial brief and need not be repeated here. In addition, as explained supra, some of the State's evidence corroborated the Defendant's testimony of self-defense. See Diaz v. State, 387 So. 2d 978, 980 (Fla. 3d DCA 1980). Therefore the trial court was "duty bound to grant a judgment of acquittal in favor of the defendant". State v. Rivera, 719 So. 2d 335, 337 (Fla. 5th DCA 1998); E.L.F. v. State, 33 So. 3d 760, 763 (Fla. 4th DCA 2010), rev. den., 49 So. 3d 747 (Fla. 2010). Thus denial of the Defendant's motion for judgment of acquittal was reversible error by the trial court.

II. Sentencing

WHETHER A SENTENCE IMPOSED ON A JUVENILE, WHICH DOES NOT PROVIDE A MEANINGFUL OPPORTUNITY FOR EARLY RELEASE AND WHICH IS LONGER THAN HIS LIFE EXPECTANCY, MAY BE IMPOSED NOTWITHSTANDING CH. 2014-220, LAWS OF FLORIDA.

The State argued that the Defendant "was found guilty of murder and attempted murder, consequently cases involving only nonhomicides in violation of Graham[v. Florida, 560 U.S. 48 (2010)] do not apply here." Answer Brief at 16. The State is mistaken. In Gridine v. State, 175 So. 3d 672, 673 (Fla. 2015), cert. denied, 136 S.Ct. 1387 (2016), Gridine was convicted as an adult with attempted first-degree murder when he was fourteen years old. The trial court imposed a prison term of seventy years for the attempted first-degree murder conviction, and twenty-five years for a concurrent armed robbery conviction. Id. This Court held: "Because attempted first-degree murder is a nonhomicide offense, we find that Graham is applicable to this case." Id. at 674. The same is true in the instant case.

The State then argued that this Court has not clearly stated what sentences must be reviewed under Miller v. Alabama, 132 S.Ct. 2455, 2469 (2012) and Graham. Answer Brief at 16-17. The State asserted:

> In this case, Petitioner was sentenced to 35-years with a minimum mandatory of 25-years for first degree murder

> with a finding that he possessed and discharged a firearm. Petitioner was also sentenced consecutively to 25-years with a minimum mandatory of 25-years for attempted murder with a finding that he possessed and discharged a firearm. Petitioner was not sentenced to life, mandatory life or de facto life in violation of Graham and Miller.

Answer Brief at 17. The State argued that therefore the sentences imposed in this case were proper. Answer brief at 17-18.

The question of what sentences are subject to review under the rule in Graham was addressed in Kelsey v. State, 206 So. 3d 5 (Fla. 2016). Kelsey was convicted of two counts of armed sexual battery, armed burglary, and armed robbery committed when he was fifteen years old. Id. at 6. Under the rule in Graham, he was re-sentenced to concurrent sentences of forty-five years. Id. at 7.

In Kelsey this Court considered both Miller (homicide) and Graham (nonhomicide) sentences. "Miller held that 'the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,' even for juveniles convicted of homicide crimes. Miller, 132 S.Ct. at 2469." Kelsey at 10. This Court held:

> The United States Supreme Court's decision in Graham held that Florida's practice of sentencing juvenile offenders to life in prison for nonhomicide crimes violated the Eighth Amendment to the United States Constitution. For a period of nearly four years, the Florida Legislature left the trial courts and district courts of appeal to determine how to legally sentence juvenile

> nonhomicide offenders. In 2014, the Legislature passed chapter 2014-220, Laws of Florida, which provided judicial review for juvenile offenders who were tried as adults and received more than twenty years of incarceration, with exceptions. Following that, this Court, in a unanimous decision, decided that ***juveniles who receive sentences that do not provide a meaningful opportunity for release are entitled to be resentenced pursuant to chapter 2014-220, Laws of Florida***. As we discuss further below, we conclude that our decision in Henry v. State, 175 So.3d 675 (Fla. 2015), requires that ***all juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014-220, a sentence longer than twenty years, are entitled to judicial review***. We therefore hold that ***all juveniles who have sentences that violate Graham are entitled to resentencing*** pursuant to chapter 2014-220, Laws of Florida, codified in sections 775.082, 921.1401 and 921.1402, Florida Statutes (2014).

Kelsey at 8 (emphasis added).

In Kelsey this Court did not distinguish between life sentences, de facto life sentences, and sentences for terms of years. This Court unequivocally held that all juveniles who receive sentences longer than twenty years are entitled to resentencing under §§ 775.082, 921.1401 and 921.1402 Florida Statutes (2014). Kelsey at 8. Whatever else one might say about the sentences in the instant case, each was longer than twenty years. Therefore the Defendant is entitled to be resentenced pursuant to the rule in Kelsey.

The State finally conceded that the Defendant is entitled to the judicial review required by § 921.1402(2)(a) Florida Statutes (2014). Answer Brief at 19.

However the State argued that resentencing in this case is not necessary because "entitlement to review under Florida Statutes section 921.1402, can be added to an existing sentence, as a ministerial act." Answer Brief at 19. In support the State cited Jordan v. State, 143 So. 3d 335, 338 (Fla. 2014).

The citation to Jordan is, at best, a citation to dictum. The Jordan Court held that "[o]ne of a criminal defendant's most basic constitutional rights is the right to be present in the courtroom at every critical stage in the proceedings." 143 So. 3d at 338, quoting Jackson v. State, 767 So. 2d 1156, 1159 (Fla. 2000). The Jordan Court cited Griffin v. State, 517 So. 2d 669, 670 (Fla. 1987), for the rule that the presence of a defendant is necessary at resentencing so that the defendant has the opportunity to submit evidence relevant to the sentence, if warranted. 143 So. 3d at 338. The Jordan Court cited State v. Scott, 439 So. 2d 219, 221 (Fla. 1983), for the rule that a defendant is entitled to be present at a sentencing correction in the same manner and to the same degree as when the defendant was originally sentenced. 143 So. 3d at 338. The Jordan Court concluded that resentencing Jordan in his absence was error because he was entitled to be present. However, the error was harmless because Jordan was serving a concurrent, true life sentence on another count. Therefore there were no practical consequences. 143 So. 3d at 340. However the rule in Jordan has no application where, as here, the State is subject to de novo sentencing. Here the

Defendant is entitled to be present when he is resentenced as required by this Court in Jordan, Scott, and Griffin.

CONCLUSION

The Defendant asserted the defense of self-defense to the charges of murder and attempted murder. The State offered no competent substantial evidence to directly rebut the Defendant's direct testimony that he acted in self-defense. Therefore the denial of the Defendant's motion for judgment of acquittal by the trial court was error, and this Court should remand the case with instructions to grant that motion and discharge the Defendant.

The Defendant objected to the sentences imposed because the trial court failed to sentence him as required by the rules in Miller v. Alabama and Graham v. Florida. The trial court failed to make the determinations required by Miller, which were later codified in the Florida Statutes.

WHEREFORE the Defendant requests this Honorable Court to reverse his convictions and remand this case for discharge, or if this Court is not inclined to follow the well established law regarding self-defense, to require that he be resentenced in compliance with the rule in Graham, the rule in Miller, the aforesaid opinions of this Court, and the applicable Florida statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by email through the Florida Courts E-Filing Portal as provided by Fla. R. Jud. Admin. 2.516(b)(1) to the Attorney General of Florida (at CrimAppTPA@myfloridalegal.com), on this 21st day of July, 2017.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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