IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

RASHAD MOHAMMED,

Appellant,

v. Case No. 5D19-1341

STATE OF FLORIDA,

Appellee.

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Opinion filed December 11, 2020

Appeal from the Circuit Court
for Lake County,
Lawrence J. Semento, Judge.

Michelle Medina, of The Baez Law Firm, Miami, and Michelle R. Walsh, of Law Offices of Michelle R. Walsh, P.A., Miami, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

TRAVER, J.

Rashad Mohammed appeals his judgment and sentence for the attempted second-degree murder of Samantha Klein. We affirm without prejudice for Mohammed to pursue relief under Florida Rule of Criminal Procedure 3.850.

I. Background

Mohammed and Alicia Klein are the unmarried parents of a two-year-old girl. He and Alicia quarreled, and she ended their engagement. Alicia and her sister, Samantha, subsequently went to Mohammed's house to retrieve Alicia's belongings. Mohammed answered the front door and then walked back to the house's small kitchen, where he was eating. Although Mohammed and Alicia had argued the evening before, his demeanor was calm. Alicia entered the kitchen with the couple's daughter and noticed a shotgun next to the refrigerator. She asked Mohammed to disassemble it. By this time, Samantha had entered the kitchen and stood next to Alicia.

Alicia testified that rather than disassemble the shotgun, Mohammed picked it up and pointed it at her and their daughter. She heard him say, "This is how it has to be." Alicia stepped forward and pushed the gun away. The gun discharged, hitting Samantha in the face and shoulder. Alicia moved forward with her hand on the gun's barrel so Mohammed would not raise it again. He backed away, eventually leaving the house with the shotgun and speeding off.

When apprehended, Mohammed waived his right to remain silent and informed law enforcement that he had been trying to comply with Alicia's request to disassemble the shotgun when it discharged. He explained he held the gun at a forty-five-degree angle to clear it by pressing a release located near the trigger and racking the action to eject the shells. Mohammed also told law enforcement that when he tried to eject the ammunition, Alicia and Samantha ran toward him. Mohammed insisted he did not intend

to shoot anyone, and the gun discharged because Alicia pushed it. Mohammed's defense at trial was that the shooting was accidental.

The trial court delivered the standard instruction for attempted second-degree murder, but failed to read the standard instruction "Introduction to Attempted Homicide," which defines both excusable and justifiable homicide. Fla. Std. Jury Instr. (Crim.) 6.1. Mohammed never requested the introductory instruction and lodged no objection following the incomplete charge.[1]

The jury found Mohammed guilty of attempted second-degree murder, finding he had discharged a firearm and caused Samantha great bodily harm. The jury also found Mohammed guilty of aggravated assault with a firearm and child abuse, convictions that are not at issue here. The trial court sentenced Mohammed to twenty-five years in prison, the minimum-mandatory sentence.

II. Jury Instructions and Fundamental Error

"Jury instruction errors are subject to the contemporaneous objection rule." *Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019) (first citing *State v. Weaver*, 957 So. 2d 586, 588 (Fla. 2007); and then citing *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991)). If, as here, there is no contemporaneous objection at trial, a defendant is entitled to relief only if fundamental error occurred. *See id*. Fundamental error "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id.* (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)).

[1] Mohammed's appellate counsel did not represent him during trial.

A trial court's failure to instruct the jury on an element of the offense of conviction is fundamental error only if the defendant disputes the element at trial. *See Delva*, 575 So. 2d at 645. If the instructional error involves a defense, the existence of fundamental error depends on whether the trial court issued an incorrect instruction or issued no instruction. *Fields v. State*, 988 So. 2d 1185, 1189 n.4 (Fla. 5th DCA 2008). If the trial court issues an incorrect defense instruction, "fundamental error only occurs where the instruction is so flawed as to deprive the defendant claiming the defense of a fair trial." *Woods v. State*, 95 So. 3d 925, 927 (Fla. 5th DCA 2012) (citing *Smith v. State,* 76 So. 3d 379, 385 (Fla. 1st DCA 2011)). If the trial court issues no instruction, no fundamental error occurs because "[f]ailure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error." *Sochor v. State*, 619 So. 2d 285, 290 (Fla. 1993); *see also Gregory v. State*, 211 So. 3d 292, 293 (Fla. 4th DCA 2017) (finding no fundamental error when defendant did not request, and trial court did not issue, a self-defense instruction); *Bridges v. State*, 878 So. 2d 483, 484 (Fla. 4th DCA 2004) (same); *Muteei v. State*, 708 So. 2d 626, 628–29 (Fla. 3d DCA 1998) (same).

In *Knight*, the Florida Supreme Court announced a new test to determine fundamental error in jury instructions:

> Properly understood, the fundamental error test for jury instructions cannot be met where, as in this case, there was no error in the jury instruction for the offense of conviction and there is no claim that the evidence at trial was insufficient to support that conviction. In such circumstances, one cannot plausibly claim that the conviction 'could not have been obtained' without the erroneous lesser included offense instruction or that the error vitiated the basic validity of the trial.

286 So. 3d at 151; *see Roberts v. State*, 299 So. 3d 9, 12 (Fla. 4th DCA 2020) (describing the *Knight* test as a "new rule of law").

In *Knight*'s wake, we must now determine whether it is fundamental error not to issue the Introduction to Attempted Homicide instruction when the jury returns a conviction for attempted second-degree murder. We begin by observing that Florida's standard criminal jury instructions direct trial courts to deliver the standard instruction for Introduction to Attempted Homicide in *all* cases involving attempted murder and attempted manslaughter. Fla. Std. Jury Instr. (Crim.) 6.1 ("Read in all attempted murder and attempted manslaughter by act cases."); Fla. Std. Jury Instr. (Crim.) 6.4 ("In the absence of an express concession that the attempted homicide was not excusable or justified, the trial judge must also read Instruction 6.1, Introduction to Attempted Homicide."). The instruction defines both excusable and justifiable homicide. Fla. Std. Jury Instr. (Crim.) 6.1; *see also* §§ 782.02 (defining justifiable homicide), 782.03 (defining excusable homicide), Fla. Stat. (2019).

We have recently observed, though, that failing to issue the parallel "Introduction to Homicide" standard instruction is not always fundamental error. *See Melendez v. State*, 45 Fla. L. Weekly D1281 (Fla. 5th DCA May 29, 2020). Like Mohammed, Melendez relied on a Florida Supreme Court case finding fundamental error when a trial court issued a manslaughter instruction that did not reference excusable and justifiable homicide. *See id*. (citing *State v. Spencer*, 216 So. 3d 481, 486 (Fla. 2017)). We determined that the Florida Supreme Court grounded *Spencer* and cases like it in the jury pardon doctrine and those decisions were now obsolete because of *Knight*. *See id.* (citing *Spencer*, 216 So. 3d at 486; *State v. Lucas*, 645 So. 2d 425, 427 (Fla. 1994)). We concluded that we must apply *Knight* to determine whether fundamental error exists. *See id*. (citing *Knight*, 286 So. 3d at 151).

In *Melendez*, a second-degree murder case, the evidence supported the conviction, and the trial court delivered a correct instruction on second-degree murder. *Id*. We noted the missing instruction was not supported by the facts of the case; Melendez denied shooting the victim and blamed a third party. *Id*. We held that in this circumstance, a trial court's failure to define justifiable and excusable homicide was not fundamental error. *Id*.

Mohammed did not reference *Melendez* in written or oral argument. Rather, he relies on a line of cases we issued long before *Knight* and *Melendez*, in which we crafted a rule mandating automatic reversal when a trial court did not issue the Introduction to (Attempted) Homicide instruction. *See, e.g.*, *Blandon v. State*, 657 So. 2d 1198, 1199 (Fla. 5th DCA 1995). But if *Blandon* and the cases relying upon it[2] stood for the proposition that a failure to issue the Introduction to (Attempted) Homicide instruction is always fundamental error, the Florida Supreme Court has already held otherwise. *See Pena v. State*, 901 So. 2d 781, 787 (Fla. 2005) (holding that no fundamental error occurred when the trial court failed to define excusable and justifiable homicide because the jury found the defendant guilty of an offense more than two degrees removed from manslaughter and the facts did not support the missing instruction).

Knight and *Melendez* have further altered *Blandon*'s already-outdated, automatic-reversal rule. Specifically, *Knight* instructs that an error in a lesser-included offense

[2] *See Hall v. State*, 677 So. 2d 1353, 1354 (Fla. 5th DCA 1996); *Ortiz v. State*, 682 So. 2d 217, 218 (Fla. 5th DCA 1996); *McNeal v. State*, 662 So. 2d 373, 373–74 (Fla. 5th DCA 1995); *Beckham v. State*, 884 So. 2d 973, 973–74 (Fla. 1st DCA 2004); *Fletcher v. State*, 828 So. 2d 460, 462 (Fla. 5th DCA 2002); *Richardson v. State*, 818 So. 2d 679, 680 (Fla. 3d DCA 2002); *Smith v. State*, 773 So. 2d 1278, 1279–80 (Fla. 5th DCA 2000); *Thurston v. State*, 762 So. 2d 558, 559 (Fla. 4th DCA 2000); *Van Loan v. State*, 736 So. 2d 803, 804 (Fla. 2d DCA 1999).

instruction is not automatically fundamental error. 286 So. 3d at 151. *Knight* now dictates that the existence of fundamental error does not depend on how many degrees removed the incorrect instruction sits from the offense of conviction. *See id*. at 151–53. Rather, we must address whether there is an instructional error in the offense of conviction and whether the evidence supports the conviction. *Id*. at 151. In *Melendez*, we applied *Knight* to the Introduction to Homicide instruction, concluding that no fundamental error occurred and that the missing instruction was not supported by the evidence adduced at trial. 45 Fla. L. Weekly at D1281 (citing *Knight*, 286 So. 3d at 151).

III. This Case

With this background, we turn to Mohammed's case. He suggests the trial court committed fundamental error when it failed to issue the Introduction to Attempted Homicide instruction because his primary defense was excusable homicide, and the facts of his case supported the defense.[3] This argument requires us to assess whether the Introduction to Attempted Homicide instruction is an element or defense to a charge of attempted second-degree murder. In this context, we conclude that the instruction is not an element, but is instead in the nature of a defense for purposes of an attempted second-degree murder charge. Therefore, *Sochor* controls this case, and the trial court could not fundamentally err by failing to instruct the jury on an unrequested defense instruction. *See Sochor*, 619 So. 2d at 290 ("Failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error."); *Muteei*, 708 So. 2d at 628.

[3] The remaining five issues Mohammed raises have no merit.

In dicta, the Florida Supreme Court has classified excusable and justifiable homicide as defenses to second-degree murder. *See State v. Smith*, 573 So. 2d 306, 310 (Fla. 1990) ("There was evidence at the trial that would have supported a defense of excusable homicide [to second-degree murder]."); *see also Spencer*, 216 So. 3d at 496 (Canady, J., dissenting) ("Indeed, justifiable and excusable homicide are defenses to any charge of unlawful homicide, including second-degree murder."). Our sister court has similarly concluded that excusable and justifiable homicide are not elements of second-degree murder; "rather, they have the effect of legally excusing the defendant from the act that would otherwise be a criminal offense." *Elliot v. State*, 49 So. 3d 269, 270 (Fla. 1st DCA 2010).

We believe that this approach is well-reasoned, and in the context of attempted second-degree murder, the introductory instruction is in the nature of a defense. A jury's guilty verdict on a charge of attempted second-degree murder must conclude that a defendant committed an act "imminently dangerous to another" with "a depraved mind." *See* § 782.04(2), Fla. Stat.; Fla. Std. Jury Instr. (Crim.) 6.4. The Introduction to Homicide instruction is in the nature of a defense because it is wholly inconsistent with a jury's finding that a defendant acted with a "depraved mind." *See Garcia v. State*, 535 So. 2d 290, 292 (Fla. 3d DCA 1988), *quashed by* 552 So. 2d 202 (Fla. 1989).[4]

[4] Mohammed concedes excusable homicide is a defense to attempted second-degree murder. By contrast, he contends it is an element of attempted manslaughter. *Knight* obviates our need to opine whether a trial court's failure to issue the Introduction to Attempted Homicide instruction in an attempted manslaughter case is fundamental error. It would appear, however, that if attempted manslaughter is the charged offense, a failure to issue it could result in fundamental error. *Hedges v. State*, 172 So. 2d 824, 826 (Fla. 1965). It also seems that a failure to deliver the introductory instruction could cause an analogous issue in any attempted murder case if the jury returned a verdict for the lesser-included charge of attempted manslaughter. For these reasons, trial courts

Mohammed nevertheless insists that the trial court fundamentally erred by failing to issue the introductory instruction because the facts supported it. Indeed, one definition of attempted excusable homicide encapsulated Mohammed's theory of defense and was supported by the evidence:

> An attempted homicide is excusable and therefore lawful . . . [w]hen the attempted homicide is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent . . . .

Fla. Std. Jury Instr. (Crim) 6.1. No record evidence suggested Mohammed possessed his shotgun unlawfully. He insisted that the gun discharged accidentally when Alicia grabbed it. The State's firearm expert acknowledged that holding a shotgun at a forty-five-degree angle was one of two ways to disassemble a shotgun but not the preferred way because it could lead to accidental discharge. Mohammed immediately told law enforcement the shooting had been an accident. He argued in closing that if Alicia had not grabbed the shotgun, it would not have discharged. If the trial court had issued the instruction, defense counsel would have had the benefit of a legal instruction to explain this defense in greater detail. *Cf. Pena*, 829 So. 2d at 295.

It is true that neither *Knight*, *Pena*, nor *Melendez* addresses a situation in which the facts of a case support an unissued defense instruction. But having concluded the instruction is in the nature of a defense to attempted second-degree murder, we are

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may wish to err on the side of caution and follow the directions in the standard instruction, which mandates its issuance in all attempted homicide cases.

bound by *Sochor*'s[5] holding that a failure to issue an unrequested defense instruction is not fundamental error. *See* 619 So. 2d at 290; *Muteei*, 708 So. 2d at 628.

Finally, Mohammed contends that our past holdings require the issuance of the Introduction to (Attempted) Homicide instruction in all homicide and attempted homicide cases and compel reversal. *See, e.g.*, *Blandon*, 657 So. 2d at 1199. We find that although *Knight* eliminated the relevance of discussing degrees, it did not specifically address when a trial court fundamentally errs by not issuing the instruction. In Mohammed's case, we apply *Sochor* and conclude its omission was not fundamental error. We therefore affirm Mohammed's judgment and sentence without prejudice for him to seek timely relief under Florida Rule of Criminal Procedure 3.850.

AFFIRMED.

WALLIS, J., concurs.
EISNAUGLE, J., concurs specially with opinion.

[5] Mohammed does not address *Sochor* in his briefs, instead urging us to apply the fundamental error test for incomplete or incorrect defense instructions. *See Woods*, 95 So. 3d at 927 (citing *Smith,* 76 So. 3d at 385). "This occurs where a defendant is deprived of his or her sole or primary defense strategy, and that defense is supported by evidence adduced at trial not otherwise characterized as weak." *Id*. (citing *McCoy v. State,* 56 So. 3d 37, 40 (Fla. 1st DCA 2010)). In this situation, we evaluate the totality of the record to determine whether fundamental error occurred. *See Garzon v. State*, 980 So. 2d 1038, 1043 (Fla. 2008).

Sochor does not address or distinguish these cases. One rationale for the different test could be that applying fundamental error to missing defense instructions places an unrealistic burden on trial judges to advocate for legal instructions, a job better left to defense counsel and better addressed in an ineffective assistance context. *See Smith*, 573 So. 2d at 310.

EISNAUGLE, J., concurring specially.

While I do not join all of the majority's analysis, I agree that we must affirm because our opinion in *Blandon v. State*, 657 So. 2d 1198 (Fla. 5th DCA 1995) does not apply after *Knight v. State*, 286 So. 3d 147 (Fla. 2019). Instead, our supreme court's decision in *Sochor v. State*, 619 So. 2d 285 (Fla. 1993) controls.