

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

MARISSA ALEXANDER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 1D12-2469

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Opinion filed September 26, 2013.

An appeal from the Circuit Court for Duval County.  
James H. Daniel, Judge.

Bruce A. Zimet of Bruce A. Zimet, P.A., Fort Lauderdale, Faith Gay, Alex Rossmiller, and Molly Alana Karlin of Quinn, Emanuel, Urquhart & Sullivan, LLP, New York, New York, and for Appellant.

Pamela Jo Bondi, Attorney General, Giselle D. Lysten, Assistant Attorney General, and Jay Kubica, Assistant Attorney General, Tallahassee, for Appellee.

BENTON, J.

Convicted of aggravated assault with a deadly weapon for firing what she described as a warning shot intended to make her husband desist from physical abuse, Marissa Alexander argues the judgment against her (and her twenty-year sentence) should be reversed on multiple grounds. We reject her contention that

the trial court erred in declining to grant her immunity from prosecution under Florida's Stand Your Ground law, but we remand for a new trial because the jury instructions on self-defense were erroneous.

Appellant stood trial only after the trial court denied her pretrial motion seeking immunity from prosecution.<sup>1</sup> She maintains the trial court abused its discretion in giving a self-defense instruction to the jury that, among other things, improperly shifted the burden to her to establish, beyond a reasonable doubt, that Mr. Gray was committing or was about to commit an aggravated battery when she discharged her pistol. At trial, the only real issue was whether she had acted in self-defense when she fired the gun. Because the jury instructions on self-defense were fundamental error, we reverse.

In his opening statement, defense counsel told the jury the appellant was

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<sup>1</sup> When the issue has been properly raised, the trial court must “determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches.” Peterson v. State, 983 So. 2d 27, 29 (Fla. 1st DCA 2008). See also Hair v. State, 17 So. 3d 804, 805 (Fla. 1st DCA 2009). The Stand Your Ground law provides in relevant part:

. . . [A] person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony[.]

§ 776.012, Fla. Stat. (2010). The court may not deny a motion simply because factual disputes exist; indeed the “court must decide the matter by confronting and weighing only factual disputes.” Peterson, 983 So. 2d at 29. See Dennis v. State, 51 So. 3d 456, 463 (Fla. 2010). We decline appellant's invitation to reweigh the facts.

forced to defend herself by firing the gun. (In closing, he described her as “terrified.”) After Mr. Gray accused her of infidelity and questioned the paternity of her week-old baby, she testified, she locked the bathroom door, yelling at him to leave, but Mr. Gray broke through the door, grabbed her by her neck, and demanded to know when she last had sexual relations with her ex-husband. She tried to push past him but he shoved her hard into the bathroom door. After struggling for what felt like an “eternity,” she testified, he relented and she ran from the bathroom straight to the garage.

Once inside the garage, appellant testified, she tried to leave the premises altogether but could not get the garage door open, and instead retrieved a gun (for which she had a permit) from the glove compartment of a vehicle in the garage. She then walked back into the house, she said, holding the gun by her side because she did not know whether Mr. Gray had left or not. As she walked into the kitchen, Mr. Gray saw the gun, and charged her “in a rage,” saying, “Bitch, I’ll kill you.” Startled, she raised the gun into the air and fired. Mr. Gray ran. According to appellant, she was forced to fire her gun into the air as a warning shot because it was the “lesser of two evils.”

For appellant, she testified, the firing of the gun was the culmination of a year-and-a-half’s abuse at her husband’s hands. She recounted for the jury at least three other incidents of physical abuse, beginning shortly after she moved in with

him in early 2009. She described Mr. Gray's choking her, attempting to strangle her, almost causing her to lose consciousness, and another occasion, six months later, when Mr. Gray shoved her repeatedly and violently, causing injuries that required hospitalization. That time she called law enforcement and Mr. Gray was arrested. She subsequently obtained a domestic violence injunction against him. In 2010, she testified, five months after she had become pregnant with Mr. Gray's child, he "head-butted" her twice, tore her clothes, and threw her to the ground. During all these episodes—and at other times, as well—he threatened to kill her, she said.

Several witnesses, including appellant's daughter, younger sister, mother, and ex-husband all testified they had seen appellant's injuries, injuries they understood Mr. Gray had inflicted. Two of Mr. Gray's sisters-in-law also testified that he had a reputation for violence in the community. The final defense witness, Mia Wilson, Ph.D., testified that the appellant met the criteria for "battered person's syndrome." The prosecution agreed the central question at trial was self-defense, and argued in closing: "Now at issue is self-defense in this case. . . . Remember at issue, really at issue in this case is whether Mr. Gray ran towards her, charged her and said, 'Bitch I'm going to kill you.' You have to decide if that actually happened." . . . "What this case is about, ladies and gentlemen, is whether this defendant under the law was justified in her actions of discharging

that gun.” The fundamental question before the jury, the issue on which the jury’s verdict hinged, was self-defense.

To guide their deliberations, the trial judge instructed the jury on self-defense but did so in language that was problematic in two important respects, and which constituted fundamental error as a result. First, as regards aggravated battery, the jury was instructed as follows:

A person is justified in using deadly force if she reasonably believes that such force is necessary to prevent:

1. imminent death or great bodily harm to herself or another, or
2. the imminent commission of Aggravated Battery against herself or another.

#### AGGRAVATED BATTERY

To prove the crime of Aggravated Battery, the following two elements must be proven beyond a reasonable doubt. The first element is a definition of battery.

1. Rico Gray Sr. intentionally touched or struck **MARISSA DANIELLE ALEXANDER** against her will.
2. Rico Gray Sr. in committing the battery intentionally or knowingly caused great bodily harm to **MARISSA DANIELLE ALEXANDER**.

(Emphasis added.) By including the phrase “beyond a reasonable doubt” when giving the instruction on the aggravated battery prong of the self-defense instruction, the trial court improperly transmuted the prosecution’s burden to prove

guilt beyond a reasonable doubt into a burden on the appellant to prove self-defense beyond a reasonable doubt, depriving her of a trial under the correct rule.

The defendant's burden is only to raise a reasonable doubt concerning self-defense.<sup>2</sup> The defendant does not have the burden to prove the victim guilty of the aggression defended against beyond a reasonable doubt. "When a defendant claims self-defense, the State maintains the burden of proving the defendant committed the crime and did not act in self-defense." Montijo v. State, 61 So. 3d 424, 427 (Fla. 5th DCA 2011). "The burden never shifts to the defendant to prove

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<sup>2</sup> In deciding Montijo v. State, 61 So. 3d 424 (Fla. 5th DCA 2011), the Fifth District relied on Murray v. State, 937 So. 2d 277 (Fla. 4th DCA 2006), which involved facts similar to those in the present case. The defendant in Murray asserted self-defense, alleging he sought to prevent his roommate's commission of an aggravated battery, Murray, 937 So. 2d at 278, and the court instructed the jury that Murray, the defendant, had to prove the elements of aggravated battery beyond a reasonable doubt. Id. at 279-80. In reversing the conviction, the court's opinion asked whether Murray had to "prove the additional facts for self-defense beyond a reasonable doubt?" The court answered its own question, rhetorical or not:

No, he did not have to prove self-defense beyond a reasonable doubt. He did not have to prove even that his additional facts were more likely true than not. The real nature of his burden concerning his defense of justification is that his evidence of additional facts need merely leave the jury with a reasonable doubt about whether he was justified in using deadly force. Hence, if he wanted his self-defense to be considered, it was necessary to present evidence that his justification might be true. It would then be up to the jury to decide whether his evidence produced a reasonable doubt about his claim of self-defense.

Id. at 279 (footnote omitted). See also Alvarado v. State, 98 So. 3d 80, 81 (Fla. 5th DCA 2012) (reaffirming Montijo on similar self-defense instructions).

self-defense beyond a reasonable doubt. Rather, he must simply present enough evidence to support giving the instruction.” Id.

We reject the state’s argument that the erroneous instructions on self-defense were not fundamental because self-defense was not appellant’s sole defense. While not every erroneous jury instruction on an affirmative defense is fundamental error, see Martinez v. State, 981 So. 2d 449, 455 (Fla. 2008), some errors reach down into “the legality of the trial itself.” Hamilton v. State, 88 So. 2d 606, 607 (Fla. 1956). Fundamental error occurs where the instruction is “so flawed as to deprive defendants claiming the defense . . . of a fair trial.” Smith v. State, 521 So. 2d 106, 108 (Fla. 1988). On the evidence adduced below in the present case, it is entirely possible “that a verdict of guilty could not have been obtained without the assistance of the error alleged.” Hamilton, 88 So. 2d at 607.

We also agree with appellant, moreover, that the trial court erred in giving the self-defense instruction when it indicated self-defense applied only if the victim suffered an “injury.” The appellant was charged with aggravated assault but—under any possible view of the evidence—inflicted no injury.<sup>3</sup> See Brown v. State,

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<sup>3</sup> The jury instruction provided:

JUSTIFIABLE USE OF DEADLY FORCE

An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which **MARISSA DANIELLE ALEXANDER** is charged if the injury to Rico Gray Sr. resulted from the justifiable use of deadly force.

59 So. 3d 1217, 1218 (Fla. 4th DCA 2011) (holding standard self-defense jury instructions which authorized self-defense only if the victim suffered injury did not adequately state the law and negated appellant's self-defense theory where no injury occurred). See also Garrido v. State, 97 So. 3d 291, 294 (Fla. 4th DCA 2012) (citing Brown and Bassallo v. State, 46 So. 3d 1205 (Fla. 4th DCA 2010)). Under the cases, the jury instructions' requirement of an injury should have been eliminated. Since no injury occurred in the present case as a result of appellant's firing her gun,<sup>4</sup> the trial court erred in giving the standard jury instruction on justifiable use of deadly force in defense of self.

The defendant was "entitled to have the jury correctly instructed on self-defense." Montijo, 61 So. 3d at 427. The trial court committed fundamental error in requiring proof beyond a reasonable doubt that appellant's husband committed aggravated battery immediately before she fired the warning shot, or would have done so but for the shot. Accordingly, we reverse and remand for a new trial.

Reversed and remanded.

LEWIS, C.J., CONCURS; WETHERELL, J., CONCURS IN RESULT WITH OPINION.

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<sup>4</sup> The state argued that "injury" encompasses psychological or emotional injury such as fear. If so, such a definition should have been made explicit in the instructions. See Garrido v. State, 97 So. 3d 291, 294-95 (Fla. 4th DCA 2012).



WETHERELL, J., concurring in result.

I agree based on the case law cited in the majority opinion that this case must be reversed and remanded for a new trial as a result of the fundamentally erroneous jury instructions pertaining to the issue self-defense, which was the central issue in this case.

I write separately to emphasize that the facts summarized in the majority opinion describe the shooting and the events leading up to it in the light most favorable to Appellant. The jury also heard testimony that painted Appellant as the aggressor during the incident and directly contradicted Appellant's version of the events, including her all-important claim that she only fired the gun because her husband charged at her in a rage while threatening to kill her. It was the prerogative of the jury to determine which version of events to believe and, by its verdict, it appears that the jury rejected Appellant's version of events.<sup>5</sup>

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<sup>5</sup> The trial court likewise rejected Appellant's version of events when it denied her claim of immunity under the Stand Your Ground law after making the following relevant findings:

On August 1, 2010, the Defendant shot at or near Rico Gray Sr. [and his two sons]. The Defendant had not been living in the marital home for the two months leading up to the shooting. On the evening of July 31, 2010, the Defendant drove herself to the marital home and parked in the garage, closing the garage door after parking her vehicle. The Defendant stayed the night in the marital home. The next morning, on August 1, 2010, Rico Gray Sr. arrived at the marital home with his two

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sons [] and the children entered the home through the garage door. Rico Gray Sr. made the family breakfast and nothing went awry.

After breakfast, the Defendant went into the master bedroom. Before entering the bathroom, the Defendant handed her phone to Rico Gray Sr. to show him pictures of their newborn baby [], who was still in the hospital. At that point, the Defendant went into the master bathroom while Rico Gray Sr. looked through the phone. While going through the phone, Rico Gray Sr. observed texts from the Defendant to her ex-husband Lincoln Alexander prompting Rico Gray Sr. to question whether the newborn baby was his. At this point, Rico Gray Sr. opened the bathroom door to confront the Defendant regarding the texts. A verbal argument ensued between the Defendant and Rico Gray Sr. For this reason, Rico Gray Sr. stepped out of the bathroom and yelled for his sons to put their shoes on because they were leaving. Rico Gray Sr. returned to the bathroom and demanded that the Defendant explain the texts and the verbal argument continued. During the verbal argument Rico Gray Sr. stood in the doorway to the bathroom and the Defendant could not get around him. Either Rico Gray Sr. moved from the doorway or the Defendant pushed around him to exit the bathroom.

Rico Gray Sr. moved to the living room where his children were. Subsequently, the Defendant emerged from the master bedroom and went into the garage where her car was parked. The Defendant testified she was trying to leave the residence but could not get the garage door to open. (The Court notes that despite the Defendant's claim she was in fear for her life at that point and trying to get away from Rico Gray she did not leave the house through the back or front doors which were unobstructed. Additionally, the garage door had worked previously and there was no evidence presented to support her claim.) The Defendant then retrieved her

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firearm from the glove box of the vehicle. The Defendant returned to the kitchen with the firearm in her hand and pointed it in the direction of all three Victims. Rico Gray Sr. put his hands in the air. The Defendant shot at Rico Gray Sr., nearly missing his head. The bullet traveled through the kitchen wall and into the ceiling in the living room. The Victims fled the residence and immediately called 911. The Defendant stayed in the marital home and at no point called 911. The Defendant was arrested on the date of the incident.

The Defendant posted bail prior to arraignment and was ordered by the Court and signed a document through Pretrial Services stating she was to have no contact with the Victims in the instant case. However, the Defendant continued to have contact with the Victims in this case, more specifically with Rico Gray Sr. Prior to Rico Gray Sr.'s deposition, the Defendant and Rico Gray Sr. discussed what he should say at deposition.

Shortly after Rico Gray Sr.'s deposition, the Defendant drove to Rico Gray Sr. 's new house where his two children [] were staying (not the Defendant's home). While there, the Defendant physically attacked Rico Gray Sr., causing injury to Rico Gray Sr.'s face. Again, Rico Gray Sr. immediately called 911 after the incident and the Defendant did not. The Defendant was arrested on new charges and her bond was revoked.

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There is insufficient evidence that the Defendant reasonably believed deadly force was needed to prevent death or great bodily harm to herself, another or to prevent the commission of a forcible felony. During the date in question, the Defendant alleged that while in the bathroom Rico Gray Sr. pushed her, and the bathroom door hit her in the leg when it swung open. Per the Defendant's own testimony, she did not suffer serious

The same will be true if Appellant is retried upon remand: the jury will have to resolve the conflicts in the evidence and determine whether Appellant is guilty of the crimes charged (or a lesser included offense) or whether her actions were justified in the name of self-defense. But the question as to whether Appellant is entitled to immunity from prosecution under the Stand Your Ground law is no longer open for debate because that issue was definitively resolved against Appellant after a full and fair evidentiary hearing in a ruling that has now been affirmed by this court. See footnote 1, supra.

With these observations, I concur in the disposition of this case.

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bodily injury as a result of the altercation that took place in the bathroom. Further, after Rico Gray Sr. exited the master bedroom, the Defendant intentionally passed by the Victims and entered the garage where she immediately armed herself and proceeded back into the home. This is inconsistent with a person who is in genuine fear for his or her life.

After weighing the credibility of all witnesses and other evidence, this Court finds that the Defendant has not proved by a preponderance of the evidence that she was justified in using deadly force in defense of self. Hence, the Defendant has not met her burden of establishing her right to immunity as a matter of fact or law.

(emphasis added).