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

EMMANUEL ROSADO,

Appellant/Cross-Appellee,

v.

Case Nos. 5D18-1763 and 5D19-262

STATE OF FLORIDA,

Appellee/Cross-Appellant.

_____/

Opinion filed October 16, 2020

Appeal from the Circuit Court
for Volusia County,
R. Michael Hutcheson, Judge.

James S. Purdy, Public Defender,
and Edward J. Weiss, Assistant Public
Defender, Daytona Beach, for
Appellant/Cross-Appellee.

Emmanuel Rosado, Sneads, pro se.

Ashley Moody, Attorney General,
Tallahassee, and Pamela J. Koller,
Assistant Attorney General, Daytona
Beach, for Appellee/Cross-Appellant.

WALLIS, J.

Emmanuel Rosado appeals the judgment and sentence entered after a jury found him guilty of battery and attempted second-degree murder. While Rosado's appeal was

pending, he filed two motions to correct sentencing errors pursuant to Florida Rule of Criminal Procedure 3.800(b)(2); one challenging the costs of investigation and the other challenging his life sentence based on an alleged Apprendi[1] violation. The trial court dismissed the rule 3.800(b)(2) motion challenging the costs of investigation, and it granted the rule 3.800(b)(2) motion based on the Apprendi violation and resentenced Rosado to thirty years in prison. On appeal, Rosado makes several arguments related to the propriety of the judgment and he argues that the trial court erred in dismissing his rule 3.800(b)(2) motion challenging the costs of investigation. The State of Florida cross appeals, arguing that the trial court erred when it granted Rosado's rule 3.800(b)(2) motion and resentenced him. Because the trial court erred in dismissing the rule 3.800(b)(2) motion challenging the costs of investigation, we reverse that order without further discussion and remand so that the trial court can rule on Rosado's motion. See Fla. R. App. P. 9.140(g)(2)(B) ("Upon discovery of an unpreserved sentencing, disposition, or commitment order error, the court may strike the brief and allow for a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) . . . to be filed."). We likewise reverse the order granting the rule 3.800(b)(2) motion and resentencing Rosado. We write only to address the State's cross-appeal. In all other respects, we affirm.

The State charged Rosado by information with one count of aggravated battery with a firearm for an injury he inflicted on his wife during a domestic disturbance. The State additionally charged Rosado by information with two counts of attempted first-degree murder of Deputies Cheek and Luoma, two law enforcement officers who responded to the incident, pursuant to section 782.065(1) and (2), Florida Statutes (2016).

[1] Apprendi v. New Jersey, 530 U.S. 466 (2000).

The jury convicted Rosado of battery on count one and the lesser-included offense of attempted second-degree murder of Deputy Cheek on count two. It returned a not-guilty verdict on count three. The trial court sentenced Rosado to time served on count one and life in prison on count two. Rosado filed a direct appeal challenging his judgment and sentence. While his appeal was pending with this Court, he filed the aforementioned rule 3.800(b)(2) motion, challenging his life sentence based on an alleged Apprendi violation. The trial court entered an order granting the rule 3.800(b)(2) motion, concluding that there was an Apprendi violation because the verdict form failed to reflect the special finding that Rosado had knowledge of the victim's status as a law enforcement officer at the time he committed the crimes. Therefore, the trial court resentenced Rosado to thirty years in prison.

The State argues that the trial court erred when it granted Rosado's rule 3.800(b)(2) motion because the jury was properly instructed on each element of the lesser-included offense of attempted second-degree murder, and it is apparent that the jury found each element of the crime beyond a reasonable doubt.[2]

In Apprendi, the United States Supreme Court reiterated that a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." 530 U.S. at 477 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)). Therefore, under Apprendi, "any factual finding that increases the maximum sentence must be found by a jury beyond a reasonable doubt." Ramroop v. State, 214 So. 3d 657, 664 (Fla. 2017).

[2] We reject without comment the State's claim that it was improper to raise this issue in a rule 3.800(b)(2) motion.

In Ramroop, the Florida Supreme Court considered the statute at issue here, section 782.065, Florida Statutes, which carries a mandatory life sentence for the attempted second-degree murder of a law enforcement officer. Specifically, Ramroop considered whether the statute "creates a substantive criminal offense of attempted murder of a law enforcement officer that includes as an essential element that the defendant knew that the victim was a law enforcement officer." Id. at 659. The Ramroop court concluded that section 782.065 includes as an element of the crime that the defendant knew of the victim's status as a law enforcement officer when he committed the crime. Id. at 662. Moreover,

> [d]ue to the knowledge requirement and the fundamental, constitutional principles announced in Apprendi, a defendant may be subject to the increased sentence set forth in section 782.065 only when a jury finds beyond a reasonable doubt that the offense was committed with knowledge that the victim was a law enforcement officer. In other words, a defendant is not subject to the increased punishment under section 782.065 if he or she did not know that the victim was a law enforcement officer when he or she committed the offense.

Id. at 665. Therefore, the court held that section 782.065 "is a reclassification statute that creates a substantive offense, which includes knowledge as an essential element." Id. In Ramroop, the jury was not instructed to determine whether Ramroop knew that the victim was a law enforcement officer at the time of the offense and, therefore, the court held that Ramroop's life sentence for attempted second-degree murder was fundamental error. Id. at 666. As a result, the Court reversed and remanded for a new trial. Id. at 668.

Contrary to Rosado's arguments, Ramroop and Apprendi do not require that a jury make its findings in a special interrogatory verdict form. Rather, all that is required is that

the jury find beyond a reasonable doubt any factual finding that increases the maximum sentence, which occurred here. Unlike the instructions in Ramroop, here, the jury was properly instructed on each element necessary to convict Rosado of attempted second-degree murder. Specifically, the jury was instructed, *inter alia*: "To prove the crime of attempted second degree murder as to Deputy Eric Cheek, the State must prove the following five elements beyond a reasonable doubt. . . . Four, Emmanuel Rosado knew that Eric Cheek was a law enforcement officer." These instructions coupled with the information, which identified the crime that had been charged, clearly establish that the jury made the requisite knowledge finding beyond a reasonable doubt. Because it is clear from the verdict form and from the jury instructions that the jury made the required knowledge finding, the lower court erred in granting the rule 3.800(b)(2) motion and in resentencing Rosado to thirty years in prison. Accordingly, the order granting Rosado's rule 3.800(b)(2) motion is reversed and this matter is remanded. On remand, the trial court is directed to reinstate the life sentence.

AFFIRMED in Part; REVERSED in Part; REMANDED with Instructions.

EDWARDS and SASSO, JJ., concur.