

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

JANUARY TERM 2004

PAUL H. CLEVELAND,

Appellant,

v.

CASE NO. 5D03-2067

STATE OF FLORIDA,

Appellee.

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Opinion filed July 9, 2004

Appeal from the Circuit Court  
for Volusia County,  
Julianne Piggotte, Judge.

James B. Gibson, Public Defender, and  
Susan A. Fagan, Assistant Public Defender,  
Daytona Beach, for Appellant.

Charles J. Crist, Jr., Attorney General,  
Tallahassee, and Allison Leigh Morris,  
Assistant Attorney General, Daytona Beach,  
for Appellee.

PER CURIAM.

Paul H. Cleveland appeals his conviction for aggravated battery.<sup>1</sup> We reverse and remand for a new trial because the trial court committed fundamental error when it negated Cleveland's self-defense claim by instructing the jury that the use of force was not justified if he was committing or attempting to commit aggravated battery.

At trial, the trial court instructed the jury on Cleveland's self-defense claim. However, the

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<sup>1</sup> § 784.041, Fla. Stat. (2002).

trial court also gave an instruction on the forcible felony exception to self-defense. The forcible felony instruction was based on section 776.041(1), Florida Statutes (2002), which is applicable only in circumstances where the person claiming self-defense is engaged in another independent forcible felony at the time. *Giles v. State*, 831 So. 2d 1263 (Fla. 4th DCA 2002); *see also Zuniga v. State*, 869 So. 2d 1239 (Fla. 2d DCA 2004); *Barnes v. State*, 868 So. 2d 606 (Fla. 1st DCA 2004). More specifically, the forcible felony instruction is given in situations where the accused is charged with at least two criminal acts, the act for which the accused is claiming self-defense as well as a *separate* forcible felony. In the instant case, the trial court's instruction on the forcible felony exception to self-defense was erroneous because Cleveland was charged with only one forcible felony, the alleged aggravated battery. *Giles*, 831 So. 2d at 1265. Giving a section 776.041(1) instruction where the only charge against Cleveland was the alleged aggravated battery, an act he claimed was done in self-defense, would improperly negate the self-defense claim. *Id.* at 1266.

Although Cleveland did not make an objection at trial to the section 776.041(1) instruction, the giving of the instruction to the jury constitutes fundamental error. *E.g.*, *Zuniga*, 869 So. 2d at 1239; *Rich v. State*, 858 So. 2d 1210 (Fla. 4th DCA 2003).

REVERSED and REMANDED.

PETERSON, GRIFFIN and PALMER, JJ., concur.