IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2011

ARIZONA WILLIS, III

Appellant,

v. Case No. 5D10-3311

STATE OF FLORIDA,

Appellee.

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Opinion filed September 23, 2011

Appeal from the Circuit Court
for Orange County,
Alan S. Apte, Judge.

James S. Purdy, Public Defender, and Rose M. Levering, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

COHEN, J.

Arizona Willis, III, Appellant, was convicted of attempted second-degree murder and robbery with a deadly weapon.[1] His sole argument on appeal is that the jury instruction on the lesser included offense of voluntary manslaughter constituted

[1] Willis was originally charged in a three-count information with attempted first-degree murder with a weapon, robbery with a deadly weapon, and aggravated battery with a deadly weapon. Post-trial, the aggravated battery with a deadly weapon charge was dismissed.

fundamental error, entitling him to a new trial on the charge of attempted second-degree murder. We agree and reverse.

At trial, the evidence showed that Fredo Hilaire, a cab driver, picked up a fare, later identified as Willis, from the Sands Hotel. As Hilaire drove, Willis stabbed him in the neck and back. The cab crashed into a parked car and Hilaire, covered in blood, exited the cab. Hearing the crash, two witnesses exited their home and observed Willis as he continued to stab Hilaire and demand money. Witnesses from the hotel identified Willis as the individual who ordered the cab. The two witnesses from the home, and the victim, all identified Willis as the perpetrator. Blood on one of Willis' shoes matched that of the victim. Willis' defense was mistaken identity.

The trial court's instruction on the lesser included offense of voluntary manslaughter stated that "Arizona Willis, III committed an act which was intended to cause the death of Fredo Hilaire." Willis did not object to this instruction.

In Montgomery v. State, 39 So. 3d 252 (Fla. 2010), the supreme court held that under Florida law "the crime of manslaughter by act does not require that the defendant intended to kill the victim," and any such instruction which required proof of an intent to kill constituted fundamental error. Id. at 255, 258.

Willis argues that Montgomery applies equally to attempted voluntary manslaughter by act. The State disagrees and posits, citing Williams v. State, 40 So. 3d 72, 75 (Fla. 4th DCA 2010), that this distinction is supported by the fact that "the Supreme Court has not amended the attempted manslaughter instruction, even though it has twice amended the manslaughter instruction within the last [three] years."

This court has recently weighed in on the issue in Burton v. State, 36 Florida Law Weekly D738 (Fla. 5th DCA Apr. 8, 2011), certifying conflict with Williams. In Burton, we agreed with the First District, which concluded that an instruction on attempted voluntary manslaughter by act, requiring the jury to find an intent to kill, suffers from the same infirmities found in Montgomery. Burton, 36 Fla. L. Weekly at D739. See also Bass v. State, 45 So. 3d 970 (Fla. 3d DCA 2010); Gonzalez v. State, 40 So. 3d 60 (Fla. 2d DCA 2010). Therefore, we reverse the conviction for attempted second-degree murder, and affirm the conviction for robbery with a deadly weapon.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

ORFINGER, C.J., and JACOBUS, J., concur.