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

ARNOLD JEROME KNIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 1D14-2382

Opinion filed July 28, 2016.

An appeal from the Circuit Court for Okaloosa County.
John T. Brown, Judge.

Nancy A. Daniels, Public Defender, Steven L. Seliger, Assistant Public Defender, and Mark Graham Hanson, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Angela R. Hensel, Assistant Attorney General, Tallahassee, for Appellee.

KELSEY, J.

Appellant, the defendant below, challenges his conviction and sentence for attempted second-degree murder. The evidence supported the conclusion that he used a heavy, metal hydraulic jack handle to beat his former girlfriend very severely in her face and head, breaking the arm she used to try to block the attack and breaking one of her eye sockets in addition to inflicting other serious injuries

to her face and head, leaving her with permanent residual impairments. Defendant argues that the trial court committed fundamental error by using a jury instruction on the lesser-included crime of attempted voluntary manslaughter by act that the Florida Supreme Court had invalidated several years earlier for incorrectly including an element of intent to kill. The state concedes that the manslaughter instruction was fundamentally erroneous under Florida Supreme Court precedent. The parties disagree, however, on whether defense counsel waived the error. On the facts presented, we conclude that the error was waived. We therefore affirm Defendant's conviction and sentence for attempted second-degree murder.

Intent To Kill Is Not An Element Of Manslaughter.

The Florida Supreme Court held in 2010—nearly four years before the trial in this case—that the standard jury instruction then in effect for voluntary manslaughter by act erroneously included an element of intent to kill, by instructing that the defendant must have committed an act or procured the commission of an act that was "intended to cause the death" of the victim. State v. Montgomery, 39 So. 3d 252, 259-60 (Fla. 2010) (approving this Court's 2009 decision reaching the same conclusion, Montgomery v. State, 70 So. 3d 603 (Fla. 1st DCA 2009)). After Montgomery, the supreme court issued a new interim manslaughter instruction that eliminated the erroneous reference to an intent to kill,

instead stating that the jury must find the defendant "intentionally committed an act or acts that caused the death of" the victim. In re Amendments to Standard Jury Instructions in Criminal Cases--Instruction 7.7, 41 So. 3d 853, 854-55 (Fla. 2010).[*]

Although Montgomery involved *completed* rather than *attempted* voluntary manslaughter by act, the correct instruction for the attempted crime obviously also would not include intent to kill because the distinction between completed and attempted manslaughter is not a difference in the elements of manslaughter but only a difference in whether the crime was prevented or otherwise failed to reach completion. See § 777.04(1), Fla. Stat. (2014) ("A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt . . . ."). Thus, the proper instruction for *attempted* voluntary manslaughter by act was settled in Montgomery as well, by this Court in 2009, and affirmed by the Florida Supreme Court in 2010. Montgomery, 70 So. 3d at 607, aff'd, 39 So. 3d at 259-60.

Even if there had been any doubt about the correct instruction for *attempted* voluntary manslaughter by act, we had made it clear by 2009 in Lamb v. State, 18

[*] The supreme court issued an amended manslaughter instruction in 2011 clarifying that it requires an intentional act not constituting negligence, but that amendment to the instruction is not at issue here. In re Amendments to Standard Jury Instructions in Criminal Cases--Instruction 7.7, 75 So. 3d 210, 211 (Fla. 2011).

So. 3d 734 (Fla. 1st DCA 2009). In Lamb, we held that an instruction including intent to kill was erroneous also as to *attempted* manslaughter by act. 18 So. 3d at 735. On review of our decision in Lamb based on conflict with a decision of the Fourth District Court of Appeal, the Florida Supreme Court approved Lamb and held that it was fundamental error to instruct a jury that *attempted* manslaughter by act requires intent to kill. Williams v. State, 123 So. 3d 23, 30 (Fla. 2013).

The Jury Instruction Here Was Erroneous.

In spite of these developments in the law that occurred as many as five years before the trial below, the manslaughter jury instruction used here retained the incorrect element of intent to kill. It was virtually identical to that disapproved in Williams, which stated "[Defendant] 'committed an act which was *intended to cause the death' of* [Victim]." 123 So. 3d at 25 (emphasis added) (quoting Lamb, 18 So. 3d at 735). The jury instruction here also was substantively the same as that disapproved in Montgomery, which included the element that "(Defendant) intentionally caused the death of (victim)." Montgomery, 39 So. 3d at 256. This jury instruction clearly was erroneous. The giving of this erroneous jury instruction constituted fundamental error. Williams, 123 So. 3d at 25, 27; Montgomery, 39 So. 3d at 258.

The Fundamental Error Was Waived.

Fundamental error in a jury instruction can be waived. See, e.g., Moore v. State, 114 So. 3d 486, 489 (Fla. 1st DCA 2013), review dismissed, 181 So. 3d 1186, 1186-87 (Fla. 2016) (finding waiver as to erroneous manslaughter instruction where defense counsel affirmatively agreed to it in spite of having been expressly advised of the Montgomery decision). It is axiomatic that waiver "is the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right." Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 n. 12 (Fla. 2001). The existence of a waiver is a question of fact. Hill v. Ray Carter Auto Sales, Inc., 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999). In Moore, we certified a question of great public importance as to what facts will constitute a waiver of an erroneous jury instruction, but the supreme court declined to review our decision. Moore, 181 So. 3d at 1186-87. We must, therefore, continue to resolve the question of waiver on a case-by-case basis in light of the specific facts of each case. We hold that on the facts presented here, the error in the manslaughter jury instruction was waived.

The record indicates that counsel for both parties had discussed jury instructions before the charge conference and had agreed on some changes. At the charge conference, defense counsel stated that he had read all of the proposed jury instructions and had no objections to them. He then made detailed comments and

requests on several instructions and on the verdict form, particularly with respect to adding battery offenses to the verdict form and instructions. He consulted with Defendant during the charge conference and stipulated to adding the battery offenses without requiring amendment of the information. During a recess after the state rested, the parties placed on the record additional changes to the jury instructions discussed between counsel with respect to the instruction for aggravated battery and the definition of a weapon for the weapon aggravation instruction, specifically including the voluntary manslaughter instruction. Defense counsel agreed to have the court read the instructions to the jury before closing arguments. No other discussion focused on the manslaughter instruction in general or specifically on the erroneous intent-to-kill language in that instruction.

The court orally instructed the jury prior to closing arguments, without objection from either party. The court instructed the jury on the original charge of attempted first degree premeditated murder with a weapon, and on *eight* lesser offenses: attempted first degree premeditated murder, attempted second degree murder with a weapon, attempted second degree murder, attempted voluntary manslaughter with a weapon, attempted voluntary manslaughter, aggravated battery with a deadly weapon or great bodily harm, felony battery with great bodily harm, and battery.

Closing arguments focused on the charged crime of attempted first-degree premeditated murder, with the state arguing among other things that intent to kill was obvious from the evidence including the nature and severity of the victim's injuries. Defense counsel argued several times that the evidence did not prove Defendant intended to kill the victim. After closing arguments, the trial court called to counsels' attention several discrepancies where the instructions did not list all lesser included offenses, and the court proposed to instruct the jury to note those instances and refer to the verdict form for complete information. Defense counsel agreed with the proposal. The jury returned a verdict finding defendant guilty of attempted second degree murder with a weapon. Defense counsel polled the jury, which confirmed its verdict.

As already noted, the parties dispute whether these facts support a finding that defense counsel waived the error in the manslaughter instruction. Neither Montgomery nor Williams addressed the question of whether the fundamental error in giving the improper jury instructions was waived. The Florida Supreme Court has held that "objecting to erroneous instructions is the responsibility of a defendant's attorney, and the attorney's failure to object to such instructions can properly constitute a waiver of any defects." Ray v. State, 403 So. 2d 956, 961 (Fla. 1981). This Court in Moore addressed waiver of the specific erroneous jury instruction at issue here. 114 So. 3d at 489-90. Moore involved two errors in an

instruction on manslaughter as a lesser-included offense, including its use of the erroneous requirement that the state prove intent to kill. 114 So. 3d at 488-89. We refused to grant a new trial due to the erroneous intent element in the jury instruction, finding on the facts of Moore that counsel waived the error. The trial court and prosecutor in Moore expressly raised the inclusion of the intent language as a possible error, to which defense counsel did not respond; but they ended up agreeing to use the standard instruction from 2008, which did include the intent language. The court read the instruction out loud and defense counsel agreed with it, declining to add anything to it. The instructions were given with no objections.

It does not appear that the parties in Moore discussed or were aware of the then-recent developments in Montgomery and Lamb. The trial in Moore occurred in late June of 2010, about two months after release of the supreme court's decision in Montgomery; about sixteen months after release of our decision in Montgomery; and about eight months after release of our decision in Lamb. At that point it was perhaps more understandable than it is now that judges' bench books and lawyers' form libraries would not have been updated to include amendments in jury instructions.

On our review of Moore's direct appeal, we concluded that the facts established a waiver of the fundamental error arising from including the element of intent in the manslaughter instruction. Moore, 114 So. 3d at 489. Of particular

weight was the fact that the trial court expressly directed defense counsel's attention to the intent element as a potential error, and counsel agreed to using the language anyway because it was in the standard instructions (albeit an outdated version, which no one mentioned). See also Joyner v. State, 41 So. 3d 306, 307 (Fla. 1st DCA 2010) (finding waiver where counsel specifically agreed with the erroneous instruction for manslaughter by act, and referenced it in his closing argument). More recently, we found a waiver of this same jury instruction error where defense counsel agreed to the instruction at the charging conference and declined to challenge the language though he had several opportunities to do so, and the parties discussed Montgomery. Facin v. State, 188 So. 3d 859, 860-61 (Fla. 1st DCA 2015), review denied, 2016 WL 3002446 (Fla. May 25, 2016).

We do not construe our holdings in these cases as limited to their specific facts, and specifically we do not hold that a waiver results only when the record expressly reflects that defense counsel was aware of Montgomery or Williams and still failed or refused to object to the jury instruction. Other facts may suffice to demonstrate a waiver, and we find the facts of this case demonstrated a waiver. We are aware that as a general rule a waiver will not result from mere ignorance or unknowing acquiescence, but we find that more than mere unknowing acquiescence occurred here.

At the outset, it is significant to our analysis that by the time this case came to trial in late June of 2014, our decisions in Montgomery and Lamb were five years old. The Florida Supreme Court's decision approving our decision in Montgomery was four years old. The supreme court's amended jury instruction was likewise four years old. In re Amendments, 41 So. 3d at 854-55. The supreme court's decision in Williams was sixteen months old. It is difficult to believe that defense counsel was unaware of these five-year-old changes in the law directly relevant to his practice. He was obligated to stay abreast of developments in his practice area and was chargeable with knowledge of Montgomery and Williams. See R. Reg. Fla. Bar 4-1.1, Competence ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."), and comment, "Maintaining competence. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject." See also Johnson v. State, 796 So. 2d 1227, 1228–29 (Fla. 4th DCA 2001) ("A reasonably effective criminal defense attorney must keep himself or herself informed of significant developments in the criminal law....") (cited in Monroe v. State, 41 Fla. L. Weekly S192, 2016 WL 1700525, at *7 n.7 (Fla. Apr. 28, 2016) (noting that defense counsel should have

been aware of decision rendered two years prior to the trial at issue)). Defense counsel was obligated to object to the erroneous jury instruction, and his failure to do so created a waiver. Ray, 403 So. 2d at 961.

Defense counsel's active involvement in developing the jury instructions also supports our finding of waiver. This was not a situation of a word or phrase missing from an instruction that could be overlooked easily; rather, the entire incorrect instruction was present from the beginning, and the record reflects that counsel was actively, repeatedly involved in reviewing and revising the instructions. Far from mere silent acquiescence or failure to object, counsel participated in pre-trial discussions about the instructions, and participated in additional discussions at the start of trial and before closing arguments. He asserted at the beginning of trial that he had read and had no objections to the jury instructions. As the discussion developed, he requested changes and additions, adding three lesser battery offenses to the instructions and verdict form, and thereby gave the jury plenty of opportunities to exercise its pardon power if it was inclined to do so. He consulted with his client, and made a stipulation to obtain instructions on more favorable lesser offenses. These facts do not show defense counsel as passive or unaware. Quite the contrary, these facts show that counsel's agreement to the erroneous instruction was intentional, and therefore that he

waived Defendant's right to now object to the instruction in order to obtain a new trial.

The Law Will Not Incentivize Error.

Our extension of Moore to find a waiver on these facts is also informed in significant part by the importance of avoiding situations that incentivize defense counsel to commit error. We have observed that asserting the fundamental error argument against an unobjected-to jury instruction creates a "bizarre incentive" for defense counsel to allow erroneous instructions to go to the jury:

> To reverse on these facts would guarantee a defendant a new trial anytime there was any error in an instruction. The consequence of such a rule would essentially obligate a defense attorney to stand mute and, if necessary, agree to an erroneous instruction . . . . In fact, under such precedent, an attorney who brings a faulty jury instruction to the court's attention or refuses to agree to an instruction that misstates the law would sacrifice his client's opportunity for a second trial and would risk being found incompetent as a consequence.

Calloway v. State, 37 So. 3d 891, 896-97 (Fla. 1st DCA), review denied, 51 So. 3d 1154 (Fla. 2010); see also Joyner, 41 So. 3d at 307 ("Encouraging counsel to invite such error subverts the trial process and is counter to the interests of justice."); Facine, 188 So. 3d at 862 (repeating concerns of Calloway and Joyner and deferring ineffective assistance of counsel claim to post-conviction proceedings because "[w]e cannot say with confidence there is no conceivable tactical

explanation for the conduct of [defendant's] trial counsel" in allowing erroneous instruction to go to the jury).

Counsel have a professional obligation to review proposed jury instructions for accuracy. The time to point out errors in jury instructions is before the case goes to the jury. If the facts support a good faith conclusion that counsel unknowingly failed to recognize an error, a remedy may lie in a post-conviction motion. On the other hand, reviewing courts should not countenance counsel's tactical inaction. To protect against tactical manipulation of the legal system, we cannot take an overly narrow view of what constitutes a waiver of a fundamentally erroneous jury instruction. We have no indication from the Florida Supreme Court that it intended such consequences in its cases dealing with jury instruction error. We note again that the Florida Supreme Court declined to address these issues on review of our decision in Moore, instead discharging jurisdiction after briefing and oral argument even though the briefs and argument raised these and related issues. 181 So. 3d at 1186-87. While we do not hold that mere inaction suffices to constitute a waiver, we also refuse to go so far as to require facts equaling or approaching those of Moore before finding a waiver. On the facts of this case, we find that defense counsel waived the fundamental error in the improper jury instruction for manslaughter, and therefore we affirm Defendant's conviction and sentence.

AFFIRMED.

WETHERELL, J., CONCURS; WOLF, J., DISSENTS WITH OPINION.

WOLF, J., Dissenting.

I respectfully dissent because I would find there was no waiver of the fundamental error contained in the jury instructions. The majority holds that defense counsel's participation in discussions and drafting of instructions other than the instruction at issue, coupled with an imputed knowledge of the law concerning the defective instruction, constituted a waiver of the fundamental error. That conflicts with all existing case law generally concerning the concept of waiver and specifically pertaining to waiver of fundamental error contained in a jury instruction.

The majority correctly points out that waiver "is the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right." Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 n.12 (Fla. 2001) (emphasis added). In the context of jury instruction, a "record . . . [that] reflects nothing more than unknowing acquiescence" is insufficient to show waiver of fundamental error. Williams v. State, 145 So. 3d 997, 1003 (Fla. 1st DCA 2014). See also Swearingden v. State, 40 Fla. L. Weekly D1114 n.2 (Fla. 1st DCA May 12, 2015) ("because the record does not reflect that he specifically requested or affirmatively agreed to the challenged portions of the instructions, he did not waive the issue for appeal"); Burns v. State, 170 So. 3d 90, 94 n.3 (Fla. 1st DCA 2015) ("The record .

. . reflects nothing more than . . . unknowing acquiescence" by agreeing generally to the jury instructions as proposed, which "falls far short of an affirmative agreement" necessary to waive fundamental error); Moore v. State, 114 So. 3d 486, 492-93 (Fla. 1st DCA 2013) (finding no waiver of fundamental error where there was not "any indication that counsel was alerted to the fact the instruction was incomplete"); Black v. State, 695 So. 2d 459, 461 (Fla. 1st DCA 1997) (finding in order for counsel to waive the fundamental error of failing to instruct on justifiable or excusable homicide, "defense counsel must be aware that an incorrect instruction is being read and must affirmatively agree to, or request, the incomplete instruction").

Here, as in Williams, 145 So. 3d at 1003, the record reflects nothing more than unknowing acquiescence. The majority's decision to presume that defense counsel in this case was aware of the specific legal issue implicated in State v. Montgomery, 39 So. 3d 252 (Fla. 2010), simply because counsel was a criminal attorney is contrary to the well-established precedent cited above which holds that it must be clear from the face of the record that counsel knowingly and affirmatively agreed to the erroneous instruction. To presume that all criminal defense attorneys are actively aware of and contemplating all well-settled criminal law at all times during trial would essentially presume that all fundamental error is waived. Thus, I dissent.