FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4628

WALTER RAMONE FORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Santa Rosa County.
David Rimmer, Judge.

November 30, 2020

PER CURIAM.

Walter Ramone Ford appeals his convictions and sentences for one count of second-degree murder with a firearm, two counts of attempted second-degree murder with a firearm, and one count of discharging a firearm from a vehicle within 1,000 feet of a person. He argues that the trial court erred by denying his motion for judgment of acquittal and by giving erroneous jury instructions. We affirm.

I.

Ford was one of two gunmen involved in a drive-by shooting that killed one victim and seriously injured two others. He was

tried along with two codefendants: Dedric Keandre Davis, the other gunman; and Kyhem Jalil Johnson, the driver of the car.

Melissa Pocopanni testified that on the night of the shooting, she loaned her car to Ford and two of his friends, Davis and Johnson, because they told her they needed it to do something illegal. She agreed because she expected to share in the proceeds of whatever activity they had planned. When she met them at the house of Johnson's cousin, Ronald Green, she saw Ford in the garage with a gun in his hands. When they left together, Johnson drove, Pocopanni was in the rear driver-side seat, Davis was in the front passenger seat, and Ford was in the rear passenger-side seat. She testified that they drove to a house where a group of people were congregating in the backyard and Johnson said, "Yeah, that's them." After circling the block and returning to where the group was, Ford and Davis pulled up their hoodies and each of them took out a gun. Pocopanni heard someone in the front seat say, "light their asses up" right before the shooting, and she partially covered her head with a towel as the shooting began. She said Ford and Davis rolled down their windows on the passenger side of the car, and she heard shots being fired at the group of people in the backyard who were about fifteen yards away. She described Ford's gun, which she also saw on the back seat next to him after the shooting. They drove to another friend's house where Pocopanni left them, and then she drove herself home. When she was arrested later that night, she told police she believed Ford and Davis shot at the group because someone had said hurtful things to Davis.

Green testified that he saw Ford and Davis with "a .357, a Beretta, a .9mm, and a .38" while they were at his house in the past. He did not see them with guns on the day of shooting, but they were upset about a Facebook post and one of them talked about driving down the street where the shooting took place and "looking for somebody, and seeing if they were there." Green testified that after the shooting, Ford and Davis came back to his house where Davis told Green that "they had pulled up to Applegate [Street], and they rolled down their windows, and they shot, and they seen [sic] people falling, and then they drove off." Ford, who was in the conversation, did not say anything or dispute how Davis described the shooting. The next morning, Johnson

came over to Green's house and told him that he was driving the car during the shooting.

Ashley Johns, one of the victims, testified that she saw the car drive by and then circle back around the block. She saw guns sticking out of both windows on the passenger side of the car, then she was shot five times. Jermun Nairn, another victim, testified that he was shot in the foot right after he saw two windows go down on the passenger side of the car. Malorie Buehler testified that she was sitting in the backyard with the group when the car slowly drove past them and the shooting started. And Quin Deramus testified that the car drove past them, circled around the block, then stopped in front of Johns who was about five feet away from him when the shooting started. He saw two guns sticking out of the windows on the passenger side of the car.

The State's firearms expert testified that the bullet taken from the deceased victim, Thomas Buckhalter, was a ".38 caliber class bullet, which includes .38 Special, .357 Magnum, and .9mm Ruger." One of the bullets recovered from Johns' leg was a .38 caliber and was more consistent with being a .9mm Ruger bullet. And because each bullet had different rifling characteristics, he believed that the bullets were fired from different guns.

Lastly, the detective who interviewed Pocopanni on the night of the shooting told him that Davis had a revolver and Ford had an automatic handgun during the shooting. A later search of Ford's and Davis' Facebook accounts uncovered a picture of Davis with a revolver and Ford with an automatic.

Ford moved for a judgment of acquittal, adopting the argument made by Johnson's defense counsel that there was no evidence that Johnson, who was charged as a principal, had the intent to participate in the crime. He also argued there was no evidence that Ford had a gun in his hand or shot a specific person. The trial court denied Ford's motion because Pocopanni testified that Ford and Davis were the ones shooting out of her car's windows.

The parties individually reviewed each page of the jury instructions along with the trial court. Ford and Davis were each

charged with second-degree murder, while Johnson was charged as a principal to second-degree murder. Although the instructions included the "and/or" conjunctive phrase between the codefendants' names, Ford did not object to any part of the instructions and agreed to them as read.

The jury found Ford guilty on all counts. He was sentenced to concurrent terms of life in prison for the murder and attempted murder counts, and thirty years in prison for the discharging a firearm from a vehicle count. This timely appeal follows.

II.

"We review the denial of a motion for judgment of acquittal de novo; however, all evidence and inferences therefrom are viewed in a light most favorable to the State." *Williams v. State*, 261 So. 3d 1248, 1252 (Fla. 2019). "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002).

Ford argues on appeal that he is entitled to an acquittal because the proof of his guilt was entirely circumstantial and the State did not refute every reasonable hypothesis of innocence. We disagree.

First, Ford did not raise this argument in the trial court. Instead, Ford adopted the argument of Johnson's defense counsel that there was no evidence Johnson had a conscious intent to participate in the crime. Ford's counsel also added that no evidence showed that Ford had a gun in his hand or shot at a specific person. Because Ford failed to specifically raise the "circumstantial evidence/reasonable hypothesis argument below, that argument was not preserved for appeal." *Johnson v. State*, 287 So. 3d 673, 676 (Fla. 1st DCA 2019).

In addition, Ford would not be entitled to that standard of review even if his argument had been properly preserved. The supreme court has since receded from the special standard of appellate review previously applied to cases based entirely on

circumstantial evidence. *Bush v. State*, 295 So. 3d 179, 200–01 (Fla. 2020). Now, in all cases in which the sufficiency of the evidence to support a conviction is challenged, the standard is whether the State presented competent, substantial evidence to support the verdict. *Id.*

A. Second-Degree Murder

To convict Ford of second-degree murder, the State had to prove Ford caused the victim's death by committing a criminal act that was imminently dangerous and demonstrated a depraved mind without regard for human life. *See Miranda v. State*, 113 So. 3d 51, 54 (Fla. 2d DCA 2013); § 782.04(2), Fla. Stat. (2016); § 775.087(2)(a)3., Fla. Stat. (2016).

Viewed in a light most favorable to the State, the evidence was sufficient to support Ford's conviction for second-degree murder. Pocopanni testified that she saw Ford with a gun right before the shooting. Ford and Davis then rolled down the windows, and she heard shots being fired. She also saw a gun on the back seat by Ford after the shooting. Other witnesses testified that passengers in the front and back on the passenger side of the car fired weapons. Green testified that Davis later confessed to him that he and Ford pulled up to the group, rolled down their windows and started shooting, then saw people falling as they drove off. Ford, who was part of that conversation, did not dispute what Davis said.[*]

The State's firearm expert testified that the bullet that killed Buckhalter was the same caliber as the gun Ford possessed. Although he also believed that the bullets found in Buckhalter and Johns came from different guns, the jury could have found that both bullets came from a gun fired by Ford or that the bullet that killed Buckhalter came from Ford's gun. The fact that Davis was

[*] The State argued to the jury, without objection, that Davis' confession to Green was an adoptive admission of Ford. *See* § 90.803(18)(b), Fla. Stat. (2018) (describing an adoptive admission as "[a] statement of which the party has manifested an adoption or belief in its truth").

also convicted of the same murder does not render the evidence insufficient to sustain Ford's conviction; factually inconsistent verdicts are permitted in Florida. *Brown v. State*, 959 So. 2d 218, 221 (Fla. 2007). Even if Ford did not fire the bullet that killed Buckhalter, the evidence was sufficient to convict him as a principal to Davis' shooting of the victim. He concedes this point on appeal, but argues he was not charged as a principal. But a defendant need not be charged as a principal to support a conviction as a principal. *State v. Roby*, 246 So. 2d 566, 571 (Fla. 1971) (explaining that "it is immaterial whether the indictment or information alleges that the defendant committed the crime or was merely aiding or abetting in its commission, so long as the proof establishes that he was guilty of one of the acts denounced by the statute").

Lastly, Ford's act of shooting into a crowd of people was imminently dangerous to human life and demonstrated a depraved mind. *See Brown v. State*, 243 So. 3d 1037, 1040 (Fla. 1st DCA 2018); *Presley v. State*, 499 So. 2d 64, 65 (Fla. 1st DCA 1986).

For these reasons, the evidence was sufficient to support Ford's conviction for second-degree murder.

B. Attempted Second-Degree Murder
and Discharging a Firearm from a Vehicle

To convict Ford on the two counts of attempted second-degree murder, the State had to prove that he intentionally committed a criminal act that would have resulted in the death of Johns and Nairn but he failed to do so, and the act was imminently dangerous and demonstrated a depraved mind without regard for human life. *Coicou v. State*, 39 So. 3d 237, 241 (Fla. 2010); §§ 782.04(2), 777.04(1), Fla. Stat. (2016). To convict Ford of discharging a firearm from a vehicle within 1,000 feet of another person, the State had to prove that he occupied a vehicle and knowingly and willfully discharged a firearm from that vehicle within 1,000 feet of any person. § 790.15(2), Fla. Stat. (2016).

For the same reasons discussed above, the evidence is also sufficient to support Ford's convictions for both crimes. Even though Nairn testified that Ford did not shoot at him, other

evidence suggested he did. Specifically, Pocopanni testified that Ford had a black gun with a long clip concealed in his clothing, he rolled down his window, and then she heard shots being fired at the crowd gathered outside. And the firearms expert testified that the bullet that wounded Johns' leg was fired from a gun of the same caliber as the gun Ford possessed. Johns testified that she first saw the shooter's car when it was at a corner about twenty or forty feet away, and Deramus testified that the car stopped right in front of Johns when the shooting started. Thus, the trial court properly denied Ford's motion for judgment of acquittal. *See Brown*, 243 So. 3d at 1040 (reaffirming that conflicting witness testimony does not entitle a defendant to a judgment of acquittal, nor can a motion for judgment of acquittal be based on witness credibility).

III.

In his final issue on appeal, Ford argues that the trial court committed fundamental error when it used the conjunctive phrase "and/or" between the names of the defendants in the jury instructions. We disagree.

The use of "and/or" between codefendants' names in jury instructions is error. *Garzon v. State*, 980 So. 2d 1038, 1045 (Fla. 2008). As a threshold matter, Ford did not object to the use of that phrase below. Thus, we can reverse only if the error is fundamental. To be considered fundamental, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilt could not have been obtained without the assistance of the alleged error." *Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019) (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)). Reviewing courts must look at "the totality of the record to determine if the 'and/or' instruction" meets the "exacting requirements of fundamental instruction error." *Garzon*, 980 So. 2d at 1043.

In *Garzon*, the supreme court determined that the instruction did not constitute fundamental error for several reasons. First, the evidence linking Garzon to the crime was strong. *Id.* at 1043–44. The jury was also given an instruction on principals that properly explained how a defendant could be found guilty based on the acts

of another. *Id.* at 1044. Further, the jury was given a "multiple defendants" instruction that "clearly explained to the jury that its verdict as to one defendant should not affect its verdict as to another." *Id.* The jury's acquittal of some codefendants on some counts showed it knew each defendant was not responsible for the acts of the others, and the verdict form focused on one defendant and one crime each. *Id.* at 1044–45.

Here, the evidence linking Ford to the shooting was strong. Eyewitnesses testified that two people shot from the passenger-side windows of the car. Pocopanni testified that Ford was in the rear passenger-side seat, he took out a gun that was concealed in his clothing, and then she heard shots being fired at the group of people. Another witness testified that Davis confessed he and Ford committed the shooting, and Ford did not dispute those statements during that conversation with the witness. The jury was properly instructed on the law of principals. It also received a "multiple defendants" instruction, which reinforced that the charges and evidence against each defendant must be considered separately, and a guilty verdict for one defendant must not affect the verdict for another defendant. In addition, the jury specifically found that Ford actually possessed and discharged a firearm. That finding demonstrates that the jury did not convict Ford based on the acts of his codefendants but, instead, on his actual commission of the crime. Finally, the State never argued that Ford was responsible for his codefendants' crimes.

In short, the use of the "and/or" conjunctive phrase in the jury instructions does not make this case one of the rare cases in which the interests of justice present a compelling demand for applying the fundamental error doctrine.

AFFIRMED.

RAY, C.J., and B.L. THOMAS and KELSEY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jason A. Cobb, DeFuniak Springs, for Appellant.

Ashley Moody, Attorney General, and Benjamin Louis Hoffman, Assistant Attorney General, Tallahassee, for Appellee.