FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3802

STATE OF FLORIDA,

Appellant,

v.

KRISTEN WAGNER,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
Michael A. Flowers, Judge.

November 30, 2022

KELSEY, J.

For acts Appellee committed in 2014, a jury convicted her of the attempted first-degree murder of her then-husband, and discharge of a firearm resulting in his great bodily harm. We affirmed her judgment and sentence. *Wagner v. State* (*Wagner I*), 240 So. 3d 795, 796–98 (Fla. 1st DCA 2017) (holding battered–spouse syndrome evidence was inadmissible because Appellee's defense was accidental discharge of her gun). The case comes to us again on the State's appeal from an order granting Appellee's postconviction motion for new trial under Florida Rule of Criminal Procedure 3.850, in which she alleged ineffective assistance of trial counsel. We reverse.

Facts.

On the night in question, Appellee was drinking. She and her husband got into an argument that started in the living room and moved to the bedroom. As the argument escalated, he took his pillow and a blanket back to the living room couch. Appellee took her gun, a Ruger .380–caliber semi-automatic pistol with a laser sight, out of a safe in the bedroom, and put it in her pocket, with a fully loaded magazine, a round chambered, and the safety off. She dressed to leave, but he convinced her to stay because she had been drinking.

The couple continued fighting in the bedroom. The incident became a physical fight that the husband testified Appellee started by hitting him repeatedly while screaming at him. She said he choked her, pushed her down, and slapped her; he denied much of that. The evidence included pictures of red marks on Appellee's arm and neck. He admitted he threw her cell phone against the wall and the phone broke.

During the fighting, Appellee did not pull the gun out of her pocket or use it. Her husband did not know she had the gun on her. He was never armed that night and there was evidence that there were no other guns in the house.

Appellee left the house, still armed, and walked to a house across the cul-de-sac. Her husband stepped outside the front door and watched her. She knocked on the neighbors' door and waited a while, but they did not answer. They testified that they heard a knock but were slow coming to the door because they had already gone to bed. By the time they got to their door she was walking away, and she turned around and looked at them but did not go back or say anything to them. Though there were many other houses close to hers, she did not go to any of them. She walked back across the street.

Appellee checked the door of her car parked in the driveway. It was locked. Appellee said her husband was outside the front door in what she described as an aggressive posture. The front door was inset to form a vestibule or small porch. The light over the door was on. Appellee was in a grassy area or flower bed about 30 feet

away from the door. She demanded her car keys, and said her husband told her to come and get them. She testified that she pulled out the gun at this point, held it with both hands, and pointed it at her husband. He went back in the house, got the keys, and tossed them to her from the front door. They landed a few feet from her. Her husband turned around, went back in the house, and shut the glass storm door behind him, and walked away, leaving the wooden front door open.

Appellee has steadfastly maintained, and testified at trial, that when she bent down to pick up the keys with her left hand, the gun in her right hand fired accidentally. In contrast, the neighbors testified that they saw her pick up the keys first, and that the gun fired after that.

Appellee testified that the gun had jammed once before. Ballistics testing after the shooting indicated that the gun was working normally and had a 6¾-to-7-pound trigger pull, making it about 40% harder to fire it than to open a soda can.

The bullet shattered the closed glass storm door and struck Appellee's husband in the back as he was walking away, farther into the house. It seriously wounded him. Appellee walked to the car and put the gun in the center console. She started the car and backed up a few feet, then stopped, according to her testimony. The neighbors testified that she actually left the driveway and drove down the road a short distance before driving back.

After parking the car, Appellee went back in the house, but did not search for her husband or call 911. Her husband was locked in his son's bedroom while the son was calling 911 and applying pressure to the gunshot wound. Appellee rummaged around in the couple's bedroom searching for her wallet, ultimately taking her husband's phone, wallet, and work badge. She drove west down Interstate 10 from Crestview to Holt, then doubled back through town past the courthouse, ending up behind the Wal-Mart, where police located her about an hour and forty-five minutes after the shooting. She did not stop and ask for help, and did not call 911 at any time although she had her husband's phone with her. She used the phone only to call her ex-husband, who did not answer.

At trial, Appellee attempted to assert a battered-spouse-syndrome (BSS) defense, but the trial court excluded it for lack of supporting evidence. She proceeded on theories of self-defense and accidental discharge. The trial court instructed the jury on justifiable attempted homicide, excusable attempted homicide, justifiable use of deadly force, and self-defense. The court did not instruct the jury on the "no duty to retreat" portion of Florida's Stand Your Ground law. *See* § 776.012(2), Fla. Stat. (2014).

The jury rejected Appellee's defenses and found her guilty of attempted first-degree murder with discharge of a firearm. The trial court sentenced her to 35 years in prison with a 25-year mandatory minimum for the firearm charge. *Wagner I*, 240 So. 3d at 796–97.

On direct appeal, Appellee argued that the trial court erred in refusing to admit BSS evidence. We rejected her argument and affirmed her judgment and sentence, reasoning that her defense of accidental discharge was fundamentally inconsistent with BSS. *Id.* at 796–98.

Among other postconviction proceedings, Appellee filed a motion under Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of trial counsel.[1] She asserted that her trial

[1] Appellee belatedly sought discretionary review of *Wagner I* in the Florida Supreme Court, which was denied. *See Wagner v. State*, No. SC18-376, 2018 WL 1224625 (Fla. Mar. 9, 2018) (dismissed for untimeliness, subject to reinstatement); *Wagner v. State*, No. SC18-376, 2018 WL 1719179 (Fla. Apr. 6, 2018) (denying motion for reinstatement); *Wagner v. State*, No. SC18-1640, 2019 WL 404586 (Fla. Jan. 31, 2019) (closing SC18-1640, granting belated discretionary review, and creating SC19-141 as notice to invoke discretionary jurisdiction); *Wagner v. State*, No. SC19-141, 2019 WL 3036549 (Fla. July 11, 2019) (declining to review and denying petition for review). We note that we have jurisdiction over the present appeal even though Appellee's 3.850 motion was initially untimely, because the Florida Supreme Court granted belated review. *See Ward v. Dugger*, 508 So. 2d 778, 779 (Fla. 1st DCA 1987) (holding deadline for filing a 3.850 motion is tolled during discretionary review proceedings in the Florida Supreme

counsel was ineffective for failing to request a "no duty to retreat" instruction from Florida's Stand Your Ground law. The omitted statutory language was as follows:

> A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

§ 776.012(2), Fla. Stat. After an evidentiary hearing, the trial court granted this postconviction motion in an unelaborated order that we now reverse.

Applying the *Strickland* Standards.

A party asserting ineffective assistance of trial counsel has the burden of establishing both deficient attorney performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984). The deficiency prong asks whether counsel performed "outside the

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Court); *Mullins v. State*, 974 So. 2d 1135, 1136–37 (Fla. 3d DCA 2008) (Florida Supreme Court has jurisdiction to review district court opinions addressing questions of law, and of per curiam decisions citing cases pending review in the supreme court).

Appellee also has filed a 3.800 motion, another 3.850 motion, and a federal habeas petition. *See Wagner v. State*, 263 So. 3d 751 (Fla. 1st DCA 2019) (No. 1D18-2678) (table) (per curiam affirmance of 3.800 denial where appellant argued pro-se that her 35-year sentence, with 25-year mandatory minimum, was illegal); *Wagner v. State*, No. 1D20-1706 (Fla. 1st DCA dismissed June 5, 2020) (dismissing appeal of 3.850 motion pursuant to notice of voluntary dismissal filed by Appellee's counsel); *Wagner v. Inch*, No. 3:20-cv-5219-MCR-MJF, 2020 WL 4018613 (N.D. Fla. June 18, 2020) (recommending dismissal of mixed habeas petition because state 3.850 ineffective assistance motion was still pending); *Wagner v. Inch*, No. 3:20-cv-5219-MCR-MJF, 2020 WL 4018282 (N.D. Fla. July 16, 2020) (adopting magistrate's report and recommendation and dismissing habeas petition).

wide range of reasonable professional assistance." *Betts v. State*, 792 So. 2d 589, 590 (Fla. 1st DCA 2001). The prejudice prong requires the claimant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"; i.e., "a probability sufficient to undermine confidence in the outcome." *Hunter v. State*, 817 So. 2d 786, 794 (Fla. 2002).

Our standard of review is de novo in applying the law to the facts. *See Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). When a trial court makes findings of fact in resolving a postconviction motion, we defer to findings that have support in competent, substantial evidence. *Cummings-El v. State*, 863 So. 2d 246, 250 (Fla. 2003) (quoting *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001)).

Although Appellee at times both below and before this Court has argued broadly that trial counsel was ineffective as defined under *Strickland* because the jury was not instructed on "self-defense," that is not entirely accurate. More precisely, the jury instructions omitted only the last sentence of the Stand Your Ground statute, quoted above, which eliminates any duty to retreat under certain circumstances. Nevertheless, the trial court robustly instructed the jury on self-defense within the instructions on justifiable use of deadly force, again with respect to excusable homicide, and again under justifiable attempted homicide. The jury was instructed as follows:

> An issue in this case is whether the Defendant acted in self-defense. It is a defense to the offense with which Kristen Wagner is charged if injury to Ricky Wagner resulted from the justifiable use of deadly force.
>
> And deadly force means force likely to cause death or great bodily harm.
>
> A person is justified in using deadly force if she reasonably believes that such force is necessary to prevent, one, imminent death or great bodily harm to herself or another or the imminent commission of false imprisonment against herself or another.

> The term "false imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority or against her or his will.
>
> In deciding whether the Defendant was justified in the use of deadly force, you must judge her by the circumstances by which she was surrounded at the time the force was used. The danger facing the Defendant need not have been actual. However, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the Defendant must have actually believed that the danger was real.
>
> In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of the Defendant and Ricky Wagner.
>
> If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether the Defendant was justified in the use of deadly force, you should find the Defendant not guilty.
>
> However, if from the evidence you are convinced that the Defendant was not justified in the use of deadly force, you should find her guilty if all of the elements of the charge have been proved.

With respect to the single sentence about duty to retreat that was not given, the charge conference transcript is somewhat confusing about what counsel and the trial court thought was being included in the instructions. Both lawyers, as well as the trial court, initially agreed that the evidence did not support giving the duty-to-retreat instruction. Here is the pertinent part of the transcript:

THE COURT: All right. No duty to retreat. Now this is, from the perspective of the facts we have heard, doesn't seem to fit our pattern, however, I'll hear from you because one can understand an argument.

MR. STEWART [Defense counsel]: Judge, I do believe –

THE COURT: This is a stand your ground instruction, is it not?

MR. STEWART: Yes, Your Honor.

THE COURT: It doesn't seem that that's what, in the best light of Ms. Wagner's testimony, it seems that her testimony was as follows. That she was in the yard and I think she said was, all I want was out of there. And she held a gun because she was seeking to leave. And I wondered why that necessarily fits into this instruction.

MR. STEWART: Under the provided defense, Your Honor, I don't believe that it is necessary.

THE COURT: State, what is your position?

MS. TORRES: We don't believe it's necessary, Judge.

THE COURT: I don't believe it's necessary and I'm not going to give it. I don't think it fits or is applicable to the one I'm focusing on for purpose of my analysis, is Ms. Wagner's testimony. Okay.

MR. STEWART: I believe that goes onto the next page, Your Honor.

THE COURT: Yeah. It does. So the whole next page, from this Court's perspective, is a continuation of that which we have already dealt with and I have no intention of reading that. Any objection?

MS. TORRES: No, sir.

After the lawyers and trial court agreed that the duty-to-retreat instruction did not apply and would not be given, they revisited the description of when deadly force would be justified. A few pages later in the transcript, they discussed whether to give an instruction on justifiable use of deadly force under section 782.02, Florida Statutes, which provides that "The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or her or upon or in any dwelling house in which such person shall be." § 782.02, Fla. Stat. (2014). The court stated an inclination to give the instruction under section 776.012(2) instead because that "covers it all." It appears the trial court was focused only on the first sentence of section 776.012(2), which provides, "A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony." Comparing the provisions, section 776.012(2) expressly mentions death, great bodily harm, and forcible felony; while section 782.02 only mentions murder and "any felony." Thus, the trial court described section 776.012(2) – its first sentence only – as "covers it all."

The parties view this second transcript passage two different ways. The State argues there was no intent to re-introduce discussion of a duty-to-retreat instruction, and Appellee argues to the contrary.[2] Viewing this charge-conference discussion in context, it appears the court was focused on utilizing the broader scope of the first sentence of section 776.012(2) in comparison to section 782.02, and not focused on or concerned about the duty-to-

[2] Some confusion may arise from looking only at the charge conference transcript without following along in the criminal jury instructions. The trial court was following the instructions, which combine language from multiple statutes. *See In re: Standard Jury Instructions in Crim. Cases—Rep. No. 2009-01*, 27 So. 3d 640, 642–45 (Fla. 2010). Use of an instruction that is based on only part of a statute does not pull in the entire statute. Perhaps this section of the criminal jury instructions could better distinguish between similar statutes and their respective component parts.

retreat instruction, which the court and both lawyers unanimously had deemed inapplicable just moments earlier. After the trial court pointed out that the first sentence of section 776.012(2) was more inclusive than section 782.02, the discussion moved to identifying aggravated battery and false imprisonment as two possible forcible felonies that Appellee's testimony might support "if believed by the jury," as the trial court put it.

We therefore agree with the State that the transcript demonstrates that neither the lawyers nor the trial court intended to include a duty-to-retreat instruction, given the evidence adduced at trial. This shifts the factual basis of the issue on appeal slightly, from whether Appellee's counsel negligently failed to request a retreat instruction as asserted in her 3.850 motion; or negligently failed to realize it had been omitted, as asserted on appeal; to whether counsel negligently acquiesced to omitting it.

For our purposes the question comes down to whether the retreat instruction from the Stand Your Ground statute applied at all, given the evidence at trial. "[A] trial judge is not required to give an instruction where there is no nexus between the evidence in the record and the requested instruction." *Mora v. State*, 814 So. 2d 322, 330 (Fla. 2002). Beyond being "not required" to give an instruction lacking an evidentiary predicate, a trial court errs in giving such an unsupported instruction. *Montgomery v. State*, 291 So. 3d 170, 175 (Fla. 2d DCA 2020) ("While it is true that the trial court has broad discretion in instructing the jury, it is also true that a trial court errs when it gives an instruction that has no factual basis in the record."). The circuit court could have given a duty-to-retreat instruction only if the evidence supported it, and we find no such evidentiary predicate. That means counsel was not deficient in failing to ensure that the trial court gave the instruction. Further, because the evidence at trial did not support the giving of the retreat instruction, its omission did not prejudice Appellee.

The duty-to-retreat sentence at issue – the second sentence in section 776.012(2) – cannot properly be interpreted or applied outside its intended statutory context. The first sentence of this subsection itself circumscribes the circumstances under which the retreat language applies, defining the relevant context as follows:

> **A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.** A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

§ 776.012(2), Fla. Stat. (emphasis added).

The Stand Your Ground law suspends the common-law duty to retreat only in limited, defined circumstances, which the record demonstrates did not exist here. The threat must be "imminent" in time; and in nature it must be deadly, or sufficient to cause "great bodily harm," or constitute a "forcible" felony. Notably, Appellee did not file a motion seeking Stand Your Ground immunity before trial. She did not raise a Stand Your Ground defense at trial, either; her theory was accidental shooting. The evidence, and in particular the timeline of events leading up to the shooting, would not support this defense. The analysis might be different if Appellee had pulled her gun on her husband in the midst of the physical fight she said they were having in the confines of their bedroom. But she did not.

The relevant time is immediately before, and the moment when, Appellee shot her husband. The evidence is clear that she was under no "imminent" threat of death, great bodily harm, or the commission of any forcible felony against herself or anyone else. A materially significant temporal and physical break had occurred. The fighting had stopped. She had left the house, while her husband had stayed inside. She had walked across the cul-de-sac to a neighboring house, knocked, waited, walked back to check her car door, and then walked over to the front yard. She and she alone was armed and pointing her loaded weapon, with a round

chambered and the safety off, at her unarmed husband spotlighted by a porch light.

On this record, no legitimate evidentiary basis existed to instruct the jury on the duty to retreat from an "imminent" threat, since Appellee's husband posed no imminent threat. *See Chaffin v. State*, 121 So. 3d 608, 612 (Fla. 4th DCA 2013) (upholding rejection of self-defense claim where perceived danger was not imminent, and defendant admitted that the alleged aggressor did not threaten to shoot and never reached for his gun).

Appellee attempted to overcome this evidence of her exclusive lethality by testifying at trial that she was afraid her unarmed husband would come down and get her and drag her back inside. But that claimed fear, asserted by a woman holding a loaded gun trained on her unarmed husband inside the house 30 feet away up a landscaped hill, falls far, far short of the "imminent"–threat circumstances in which the Stand Your Ground law applies. At any instant during that part of the episode, if the need arose to protect herself, Appellee had the ability and the means to do exactly what she ultimately did: pull the trigger. The deadly force in her hands would, by its very nature, provide her instantaneous protection. There was always absolutely zero chance that her husband could outrun a bullet if he chose to advance on her. There was no threat. Given the evidence at trial of the moments when the deadly danger supposedly existed, the retreat instruction could not have applied.

Further, no search of the voluminous trial records yields a single instance where "retreat" was raised or argued on its merits. Defense counsel mentioned the phrase "duty to retreat" early in voir dire, but never followed up on it or adduced evidence about it. Rather, as we noted in *Wagner I*, Appellee's primary theory of defense was accident, and the jury clearly rejected that defense. 240 So. 3d at 796–98.

Appellee nonetheless attempts to bring "retreat" into play by pointing to the State's passing comment in closing argument that Appellee could not plausibly assert self-defense against her husband's commission of a forcible felony. Counsel's comment ended in "she could have left," and that is the little phrase on which Appellee hangs this big argument. The context makes it obvious

that the prosecutor was not making a duty-to-retreat argument, but rather was arguing that the evidence did not support any claim that Appellee's husband was attempting to commit a forcible felony against Appellee when she shot him. She could not have **reasonable** fear at that moment. The State pointed out that, far from being in danger, Appellee was physically distant from her husband, separated by a closed door, armed and able to defend herself, had her car keys, and was free to leave at any time. Appellee's strained reliance on this four-word phrase in closing argument cannot overcome the evidence and the law.

We hold that Appellee failed to meet her burden of demonstrating either deficient performance by her trial counsel, or prejudice flowing from his performance. We reverse the trial court's order and remand for reinstatement of Appellee's judgment, sentence, and imprisonment.

REVERSED and REMANDED.

JAY and M.K. THOMAS, JJ., concur.

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

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