

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2014

MILAGRO CUNNINGHAM,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D09-2737

[February 26, 2014]

ON REMAND FROM THE SUPREME COURT OF FLORIDA

PER CURIAM.

Milagro Cunningham was tried by jury and convicted of attempted second-degree murder, a lesser included offense of the charged attempted first-degree murder (count I); kidnapping a child under thirteen years of age (count II); three counts of sexual battery on a child under twelve years of age (counts III, IV and V); and aggravated child abuse (count VI). The defendant appealed, challenging both his convictions and the resulting sentences. We affirmed the defendant's convictions, but reversed the life sentences imposed for counts II, III, IV and V in light of *Graham v. Florida*, 560 U.S. 48 (2010), remanding for resentencing on these counts.

Among the issues defendant raised was a claim that the trial court fundamentally erred by giving the then-standard jury instruction for the lesser-included offense of attempted manslaughter by act. We resolved this issue adversely to the defendant, relying upon our earlier decision in *Williams v. State*, 40 So. 3d 72 (Fla. 4th DCA 2010) ("*Williams I*"). The defendant petitioned for review in the Florida Supreme Court, and while the petition was pending, the Florida Supreme Court quashed this court's opinion in *Williams I*. See *Williams v. State*, 123 So. 3d 23, 30 (Fla. 2013) ("*Williams II*"). The court held:

[A] trial court commits fundamental error in giving the standard jury instruction on attempted manslaughter by act where the defendant is convicted of a crime no more than one step removed from the improperly instructed offense.

Id. at 27.

By order, the supreme court accepted jurisdiction of this case, quashed this court's opinion, and remanded for reconsideration upon application of its opinion in *Williams II. Cunningham v. State*, No. SC11-2346, 2014 WL 289808 (Fla. Jan. 24, 2014). In light of *Williams II*, we hold that the trial court committed fundamental error in giving the then-standard jury instruction on attempted manslaughter by act.

Accordingly, we reverse the defendant's conviction for attempted second-degree murder and remand for a new trial on that count. Defendant's convictions for counts II, III, IV, V and VI are unaffected by *Williams* and are, accordingly, once again affirmed.

Affirmed in part; Reversed in Part; and Remanded for Proceedings Consistent with this Opinion.

STEVENSON, MAY and CIKLIN, JJ., concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Charles E. Burton, Judge; L.T. Case No. 2005CF006814A02.

Carey Haughwout, Public Defender, and Paul E. Petillo, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Helene C. Hvizd, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.