

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

GILLION ANTHONY GRAHAM,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D09-531

[June 13, 2012]

GERBER, J.

The defendant appeals from his convictions and sentences for second degree murder with a firearm, aggravated battery with a firearm, willfully discharging a firearm within 1,000 feet of a person, and shooting into an occupied vehicle. He raises two arguments: (1) the trial court gave an erroneous jury instruction on manslaughter as a lesser included offense of second degree murder; and (2) the trial court erred in sustaining the state's objection to certain cross-examination of a state witness.

We agree with the first argument. We direct the circuit court to vacate the defendant's conviction and sentence for second degree murder with a firearm and conduct a new trial on that count. *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010).

The second argument is without merit. Therefore, we affirm the defendant's convictions and sentences for aggravated battery with a firearm, willfully discharging a firearm within 1,000 feet of a person, and shooting into an occupied vehicle.

Affirmed in part, reversed in part, and remanded for new trial on Count I only.

MAY, C.J., and HAZOURI, J., concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lucy Chernow Brown, Judge; L.T. Case No. 2005CF010760AXX.

Antony P. Ryan, Regional Counsel, Nancy Jack and Genevieve Hall, Assistant Regional Counsel, Office of Criminal Conflict and Civil Regional Counsel, Fourth District, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Katherine Y. McIntire, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.