DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CARLOS RUBEN RODRIGUEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D19-1106

July 16, 2021

Appeal from the Circuit Court for Collier County; Joseph G. Foster, Judge.

Howard L. Dimmig, II, Public Defender, and Benedict P. Kuehne, Special Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Jonathan P. Hurley, Assistant Attorney General, Tampa, for Appellee.

MORRIS, Chief Judge.

Carlos Ruben Rodriguez appeals his judgment and life sentence after a jury found him guilty of second-degree murder with a firearm and third-degree murder of the same person. *See* Fla. R.

App. P. 9.030(b)(1)(A). Mr. Rodriguez raises five issues on appeal relating to (1) the Confrontation Clause, (2) double jeopardy, (3) the prosecutor's improper comments, (4) his motion for judgment of acquittal, and (5) his motion for mistrial. Because the trial court failed to cure the double jeopardy violation, we reverse and remand for the trial court to dismiss count three. We affirm Mr. Rodriguez's second-degree murder conviction and sentence without further comment, finding his other issues to be without merit.

I. Background

The State ultimately charged Mr. Rodriguez with second-degree murder with a firearm (count one), aggravated battery (count two), and third-degree murder (count three).[1] Counts one and three related to the death of K.E. Count two related to the shooting of C.S.

Both the State and the defense presented numerous witnesses and exhibits during a three-day jury trial. Afterwards, the jury

[1] Initially, the State listed third-degree murder as count five on the information, but the trial court renumbered the offense as count three for the trial after it severed two other counts. For simplicity and consistency, we refer to the offense of third-degree murder as count three throughout this opinion.

found Mr. Rodriguez guilty of both murder counts as charged and not guilty of aggravated battery. The trial court adjudicated Mr. Rodriguez guilty of second-degree murder and third-degree murder.

At the sentencing hearing, the prosecutor advised the trial court that it violated double jeopardy to convict and sentence Mr. Rodriguez on both murder counts. The prosecutor requested the trial court to rescind its previous adjudication of guilt for third-degree murder "and not impose a sentence on that count but not to dismiss it either, to just leave it there as the jury verdict with no sentence." The prosecutor believed that would take care of any double jeopardy issue, and the defense had no objection. The trial court granted the prosecutor's request. It stated, "I'll go ahead and rescind the adjudication on the third-degree murder charge entered after the jury verdict, and we'll leave it at that." It sentenced Mr. Rodriguez to life in prison for count one, second-degree murder. The trial court then rendered a written judgment and sentence on count one only; it did not mention count three. The trial court did not memorialize its rescission of adjudication of guilt for count three in a written order.

II. Discussion

Mr. Rodriguez argues that the charges, trial, and convictions of both second-degree murder and third-degree murder for a single death violated double jeopardy under the principle of merger. He further asserts that the trial court's rescission of its adjudication of count three did not cure the fundamental error. To cure the error, he asserts that we must vacate the jury verdict for count three or remand for the trial court to enter an adjudication of not guilty for count three.

A. The Double Jeopardy Violation

Although defense counsel did not object to the prosecutor's proposed resolution of the dual murder convictions, "a double jeopardy violation constitutes a fundamental error that we may address for the first time on appeal." *Rubio v. State*, 233 So. 3d 482, 483 (Fla. 2d DCA 2017). "[D]ouble jeopardy affords three basic protections: 'against a second prosecution for the same offense following an acquittal, against a second prosecution for the same offense after a conviction, and against multiple punishments for the same offense.' " *Claps v. State*, 971 So. 2d 131, 133 (Fla. 2d DCA

2007) (quoting *Rodriguez v. State*, 875 So. 2d 642, 644 (Fla. 2d DCA 2004)).

Initially, in the past, "the principle of merger, prohibiting multiple punishments for a single killing, '[was] an exception to the standard double jeopardy analysis.' " *Barnett v. State*, 283 So. 3d 927, 929 (Fla. 2d DCA 2019) (quoting *Williams v. State*, 90 So. 3d 931, 934 (Fla. 1st DCA 2012)). But recently, the Florida Supreme Court held that "the single homicide rule is no longer applicable under Florida law." *State v. Maisonet-Maldonado*, 308 So. 3d 63, 70 (Fla. 2020). "After the 1988 amendment, the plain language of section 775.021[, Florida Statutes,] clearly expresses that offenses which pass the codified *Blockburger*[2] test should be punished separately and that there is no exception for offenses arising from a single death." *Id.* at 69.

Under the codified *Blockburger* test, a person may be dually convicted, for double jeopardy purposes, of separate criminal offenses committed "in the course of one criminal transaction or episode" where "each offense requires proof of an element that the

[2] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

other does not," unless an exception under section 775.021(4)(b)(1)-(3), Florida Statutes (2016), applies. § 775.021(4)(a); *Maisonet-Maldonado*, 308 So. 3d at 66-67 (citing § 775.021(4)(a)). The exceptions are: (1) "[o]ffenses which require identical elements of proof," (2) "[o]ffenses which are degrees of the same offense as provided by statute," and (3) "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." § 775.021(4)(b).

Here, second-degree murder and third-degree murder are separate offenses. *Compare* § 782.04(2), Fla. Stat. (2016) (defining second-degree murder as "[t]he unlawful killing of a human being, when perpetrated *by any act imminently dangerous to another and evincing a depraved mind regardless of human life*, although without any premeditated design to effect the death of any particular individual" (emphasis added)), *with* § 782.04(4) (defining third-degree murder as "[t]he unlawful killing of a human being, when perpetrated without any design to effect death, *by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony* other than [those enumerated in subsections (a)-(s)]" (emphasis added)); *see also Mitchell v. State*, 830 So. 2d 944, 946 (Fla. 5th

DCA 2002) (explaining that attempted second-degree murder and attempted felony murder "constitute separate offenses under *Blockburger* because each crime contains an element that the other does not"). Therefore, dual convictions for the second-degree murder and third-degree murder would be barred only "if the offenses meet the criteria in one of the exceptions." *Maisonet-Maldonado*, 308 So. 3d at 67 (quoting *State v. Florida*, 894 So. 2d 941, 945 n.2 (Fla. 2005), *receded from on other grounds by Valdes v. State*, 3 So. 3d 1067, 1077 (Fla. 2009)).

The first and third exceptions do not apply. *See* § 775.021(4)(b)(1), (3). For the first exception, second-degree murder and third-degree murder do not require identical elements of proof. *See* § 782.04(2), (4). Second-degree murder requires proof of an "act imminently dangerous to another and evincing a depraved mind regardless of human life," § 782.04(2), and third-degree murder requires that the person be "engaged in the perpetration of, or in the attempt to perpetrate, any felony other than [those enumerated therein]," § 782.04(4). For the third exception, "the lesser offense is not subsumed by the greater offense" because second-degree murder and third-degree murder

are separate under the *Blockburger* test. *See Maisonet-Maldonado*, 308 So. 3d at 71 ("[B]ecause these two offenses satisfy the *Blockburger* same-elements test, the third exception does not apply because, as we explained in *Gaber*[*v. State*, 684 So. 2d 189, 192 (Fla. 1996)], '[i]f two statutory offenses are found to be separate under *Blockburger*, then the lesser offense is not subsumed by the greater offense.' " (third alteration in original)).

This leaves the second exception: "[o]ffenses which are degrees of the same offense as provided by statute." § 775.021(4)(b)(2). "[T]he plain meaning of the language of subsection (4)(b)(2) . . . is that '[t]he Legislature intends to disallow separate punishments for crimes arising from the same criminal transaction only when the *statute* itself provides for an offense with multiple degrees.' " *Valdes*, 3 So. 3d at 1076 (second alteration in original) (quoting *State v. Paul*, 934 So. 2d 1167, 1176 (Fla. 2006) (Cantero, J., specially concurring)).[3] "It prohibits separate punishments only when a criminal statute provides for variations in degree of the

[3] *Valdes* abandoned the "primary evil" test and receded from the majority opinion in *Paul* to the extent that it applied the "primary evil" test. *Valdes*, 3 So. 3d at 1077.

same offense, so that the defendant would be punished for violating two or more degrees of a single offense." *Id.* at 1076 (quoting *Paul*, 934 So. 2d at 1177).

Second-degree murder and third-degree murder are degree variants of each other as they are in the same statute and are degree variants of the same offense, murder. *See* § 782.04(2), (4); *Valdes*, 3 So. 3d at 1076 (stating, as an example, that the second exception applies to the three degrees of murder identified in section 782.04 (citing *Paul*, 934 So. 2d at 1177)); *cf. Maisonet-Maldonado*, 308 So. 3d at 71 (explaining that vehicular manslaughter and fleeing or eluding causing serious injury "are clearly not degree variants of each other because they do not share a common name, contain very different formal elements, and exist in completely different chapters of Florida Statutes"). The second exception applies here, and double jeopardy principles bar dual convictions for second-degree murder and third-degree murder. *See* § 775.021(4)(b)(2); *Maisonet-Maldonado*, 308 So. 3d at 68-69.

Contrary to Mr. Rodriguez's assertion on appeal, however, double jeopardy protections do not extend to the information or jury selection phase. *See Claps*, 971 So. 2d at 134 (concluding that the

argument that double jeopardy protections extend "to an earlier stage in the proceedings, such as the information or jury selection phase" fails); *State v. Lewek*, 656 So. 2d 268, 268 (Fla. 4th DCA 1995) ("Despite this clear rule saying that a defendant cannot be *convicted* of both manslaughter and vehicular homicide for a single death, there is no such rule saying that he cannot be *charged* with both crimes."). The State permissibly charged and tried Mr. Rodriguez on the dual homicide offenses without violating double jeopardy. *See Claps*, 971 So. 2d at 134-35 ("The State's ability to choose from a menu of options to pursue a criminal conviction in no way conflicts with double jeopardy considerations. . . . Allowing the jury to exercise its fact-finding function to decide which crime—or crimes—may have been committed, even when based on the same facts, is a classic and appropriate function of the jury trial system, just as a court's determination as a matter of law which guilty verdicts will be precluded from adjudication and sentencing on double jeopardy grounds is a similarly appropriate function of the judiciary.").

Double jeopardy concerns arose once the jury returned guilty verdicts on the dual murder offenses. *See State v. Tuttle*, 177 So.

3d 1246, 1250-51 (Fla. 2015) (explaining "that double jeopardy concerns arise once guilty verdicts on overlapping crimes are returned" and "that the trial court may cure a violation before adjudication").

B. Curing the Double Jeopardy Violation

To resolve this double jeopardy concern, Mr. Rodriguez argues that the trial court had to either vacate the guilty verdict, *see Bolding v. State*, 28 So. 3d 956, 957 (Fla. 1st DCA 2010) ("When a jury finds a defendant guilty of two offenses, and the defendant cannot be adjudicated guilty of both due to the constitutional prohibition against double jeopardy, the proper remedy is to vacate the verdict of guilt as to one of the offenses." (citing *Werhan v. State*, 673 So. 2d 550, 553 (Fla. 1st DCA 1996))), or adjudicate him not guilty of count three, *see Murphy v. State*, 16 So. 3d 269, 269 (Fla. 5th DCA 2009) ("A trial court must adjudicate and sentence a defendant convicted of a crime, or in an appropriate case, adjudicate the defendant not guilty due to a lack of sufficient evidence to convict, double jeopardy, or any other legally sufficient reason. The trial court may not simply refuse to act." (citing *State v. Houghtailing*, 704 So. 2d 163, 164 (Fla. 5th DCA 1997))).

It is true. The trial court here failed to avoid the double jeopardy violation when it orally rescinded its adjudication of guilt for count three and omitted the count from the written judgment and sentence. The trial court's actions are akin "to withholding an adjudication of guilt or declining to impose a sentence, neither of which cures a double jeopardy violation." *See Hernandez v. State*, 112 So. 3d 572, 574 (Fla. 4th DCA 2013). Instead, to cure the double jeopardy violation, the trial court needed to vacate the conviction that placed Mr. Rodriguez in double jeopardy. *See Bolding*, 28 So. 3d at 957.

Typically, Florida courts cure a double jeopardy violation—and inherently vacate the conviction that placed the defendant in double jeopardy—by dismissing the duplicative count. *See, e.g.*, *D.T. v. State*, 257 So. 3d 609, 610 (Fla. 2d DCA 2018) (remanding for dismissal of the counts violating double jeopardy); *Weaver v. State*, 219 So. 3d 229, 230 (Fla. 3d DCA 2017) (holding the trial court properly granted the defendant's motion to vacate the judgments of counts two and three and properly dismissed the counts on double jeopardy grounds); *Hernandez*, 112 So. 3d at 573-74 (remanding to dismiss duplicative counts); *cf. Tuttle*, 177 So. 3d at 1247 ("Prior to

sentencing, the State informed the trial court that dual convictions for attempted home invasion robbery and armed burglary presented double jeopardy concerns, and asked that the court dismiss the attempted home invasion robbery conviction, which carries a lesser sentence. Tuttle objected and asserted that the court was required to dismiss the armed burglary conviction, which carries a higher sentence." (footnote omitted)). We see no reason to break away from precedent.

Mr. Rodriguez's reliance on *Hernandez*, *Murphy*, and *Houghtailing* is misguided; the cases do not support his proposition that the required remedy to cure a double jeopardy violation is to enter an adjudication of not guilty. *See Hernandez*, 112 So. 3d at 574; *Murphy*, 16 So. 3d at 269; *Houghtailing*, 704 So. 2d at 164. *Murphy* and *Houghtailing* merely indicated: "A trial court must adjudicate and sentence a defendant convicted of a crime, *or in an appropriate case*, adjudicate the defendant not guilty due to a lack of sufficient evidence to convict, double jeopardy, or any other legally sufficient reason. The trial court may not simply refuse to act." *Murphy*, 16 So. 3d at 269 (emphasis added) (citing *Houghtailing*, 704 So. 2d at 164); *Houghtailing*, 704 So. 2d at 163-

64. The statement was based on Florida Rule of Criminal Procedure 3.670's requirement that the trial court render a written judgment when the defendant is found guilty or acquitted. Ultimately, there was no double jeopardy violation in *Murphy* or *Houghtailing*, and the reversible error was the trial courts' failure to enter written judgments on all the counts. *Murphy*, 16 So. 3d at 269; *Houghtailing*, 704 So. 2d at 163-64.

Hernandez later cited *Murphy* in the context of a double jeopardy violation and explained that "[t]he trial court could not avoid a double jeopardy violation simply by omitting the three remaining burglary convictions from the written judgment. The trial court's action was more analogous to withholding an adjudication of guilt or declining to impose a sentence, neither of which cures a double jeopardy violation." *Hernandez*, 112 So. 3d at 574. The Fourth District reversed for the trial court to dismiss the counts that violated double jeopardy, not to enter adjudications of not guilty. *Id.*

The dismissal of a duplicative count nullifies the jury verdict, which is the conviction that places the defendant in double jeopardy. *See generally Bolding*, 28 So. 3d at 957 ("The question

before us is whether the jury's finding of guilt as to the lewd or lascivious molestation charge constituted a conviction, such that the record of this finding on the judgment and sentence placed Appellant in double jeopardy. This issue may be settled by reference to the statutory definition of 'conviction.' Section 921.0021, Florida Statutes (2008), defines 'conviction' as 'a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld.' Thus, the constitutional prohibition against multiple convictions for the same criminal offense is violated even when a trial court adjudicates the defendant guilty of one offense and withholds adjudication of guilt as to the other offense.").[4] By nullifying the jury verdict, the order of dismissal also inherently nullifies the determination that requires the entry of a written judgment of guilty or not guilty under rule 3.670. *See Houghtailing*, 704 So. 2d at 164.

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[4] *Bolding* relies on the definition of "conviction" in the Criminal Punishment Code; there is no definition of "conviction" in the chapter for section 775.021(4), which codifies the *Blockburger* test and provides the legislature's intent for statutory construction. Though at one point, the statute refers to "conviction and adjudication of guilt" as if they are separate events. § 775.021(4)(a). So *Bolding*'s conclusion that the conviction is the jury verdict or plea seemingly conforms with section 775.021(4).

Thus, the proper remedy to cure the double jeopardy violation in this case was for the trial court to enter a written order dismissing count three. *See D.T.*, 257 So. 3d at 610; *Hernandez*, 112 So. 3d at 574.

III. Conclusion

The dual murder convictions, or guilty verdicts for counts one and three, violate double jeopardy. *See* § 775.021(4)(b)(2); *Maisonet-Maldonado*, 308 So. 3d at 68-69. The trial court's oral rescission of its prior adjudication of guilt for count three did not cure the double jeopardy violation. *See Hernandez*, 112 So. 3d at 574. Accordingly, we reverse and remand for the trial court to render a written dismissal of count three. We affirm Mr. Rodriguez's remaining judgment and sentence.

Reversed and remanded with directions.

KELLY and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.