DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MALIQUE DEVON GARY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D20-740

November 24, 2021

Appeal from the Circuit Court for Pinellas County; Chris Helinger, Judge.

Howard L. Dimmig, II, Public Defender and Frederick W. Vollrath, Special Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee; and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

LABRIT, Judge.

Malique Gary appeals his conviction and sentence for third-degree murder with a firearm. He was charged with

first-degree murder, but the jury convicted him only of the lesser-included offense. Mr. Gary was sentenced to fifteen years in prison.

Mr. Gary argues that the trial court erred by admitting impermissible *Williams*[1] rule evidence and by denying his request for an "independent act" jury instruction.[2] We agree with the latter

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[1] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

[2] The standard "independent act" jury instruction is as follows:

> If you find that the crime alleged was committed, an issue in this case is whether the crime of (crime alleged) was an independent act of a person other than the defendant. An independent act occurs when a person other than the defendant commits or attempts to commit a crime
>
> 1. which the defendant did not intend to occur, and
>
> 2. in which the defendant did not participate, and
>
> 3. which was outside of and not a reasonably foreseeable consequence of the common design or unlawful act contemplated by the defendant.
>
> If you find the defendant was not present when the crime of (crime alleged) occurred, that, in and of itself, does not establish that the (crime alleged) was an independent act of another.
>
> If you find that the (crime alleged) was an independent act of [another] [(name of individual)], then

point, so we reverse Mr. Gary's conviction and remand for a new trial. We need not address the *Williams* rule issue because our resolution of the jury instruction issue is dispositive.

Background

Mr. Gary was charged with the murder of Ricardo Guzman. Mr. Gary arranged for his cofelon to buy marijuana from Mr. Guzman, who was shot and killed during the transaction. The State's theory of the case was that Mr. Gary planned to rob Mr. Guzman; Mr. Gary claimed he only intended to facilitate a drug buy and that he had no idea his cofelon intended to rob Mr. Guzman.

Mr. Gary's counsel requested an independent act jury instruction, arguing that his "theory of the case" was that Mr. Gary "set up a drug deal, and as soon as he saw a gun, he ran. And it wasn't—it was never intended for it to be a robbery . . . ." The State opposed the request, arguing that the instruction was improper because (1) it is foreseeable that someone could be hurt or killed during a drug deal and (2) the State introduced evidence that

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> you should find (defendant) not guilty of the crime of (crime alleged).

Fla. Std. Jury Instr. (Crim.) 3.6(l).

"rebutted" Mr. Gary's independent act theory. The trial court refused to give the requested instruction.

Analysis

We review a trial court's refusal to give a requested jury instruction for abuse of discretion. *Williams v. State*, 34 So. 3d 768, 770 (Fla. 2d DCA 2010). This discretion is limited in criminal cases because the "defendant is entitled to have the jury instructed on his or her theory of defense if there is any evidence to support this theory, and so long as the theory is recognized as valid under the law of the state." *Id.* at 770–71; *see Thomas v. State*, 787 So. 2d 27, 29 (Fla. 2d DCA 2001).

The "independent act" doctrine is recognized under Florida law, and it applies

> when one cofelon, who previously participated in a common plan, does not participate in acts committed by his cofelon, which fall outside of, and are foreign to, the common design of the original collaboration. Under these limited circumstances, a defendant whose cofelon exceeds the scope of the original plan is exonerated from any punishment imposed as a result of the independent act.

Ray v. State, 755 So. 2d 604, 609 (Fla. 2000) (cleaned up). Stated otherwise, the doctrine applies when "after participating in a

common plan or design to commit a crime, one of the [codefendants] embarks on acts not contemplated by the other defendants or participants in the crime, and commits additional criminal acts beyond the scope of the original collaboration." *Barfield v. State*, 762 So. 2d 564, 566 (Fla. 5th DCA 2000).

As this court has explained, "[w]hether the independent act instruction should be given depends on the evidence." *Upshaw v. State*, 871 So. 2d 1015, 1017 (Fla. 2d DCA 2004). More particularly, if **any** evidence is "introduced at trial which supports the theory of the defense, a defendant is entitled to have the jury instructed on the law applicable to his theory of defense when he so requests." *Id.*; *see McGee v. State*, 792 So. 2d 624, 626 (Fla. 4th DCA 2001) ("Where there is evidence from which a jury could determine that the acts of the [cofelon] resulting in murder were independent from the underlying felony, a defendant is entitled to an independent act instruction." (citing *Bryant v. State*, 412 So. 2d 347 (Fla. 1982))).

Here, there was evidence from which a jury could conclude that the acts of Mr. Gary's cofelon were independent from the underlying marijuana buy that Mr. Gary had arranged. Mr. Gary's

defense theory was predicated on his testimony that he intended only to buy drugs but that his cofelon unexpectedly pulled a gun and shot the victim drug seller while Mr. Gary fled.

The State argues that the trial court properly refused the instruction because murder was within the scope of the planned criminal activity. This argument improperly assumes that Mr. Gary and his cofelon intended to rob the victim drug dealer, a fact which was disputed at trial. Mr. Gary testified that he and his cofelon had been smoking marijuana and that his cofelon asked him to assist in procuring more marijuana. Mr. Gary admitted to being the "middleman" on the marijuana buy but testified that he didn't have a gun, he didn't know his cofelon had a gun, and he didn't know there was going to be a robbery. Mr. Gary thought his cofelon "was going to buy weed, we were going back to his house, we were going to smoke or whatever, then I was going to go back home." When his cofelon "upped a gun" on Mr. Guzman, Mr. Gary became frightened and "turned and ran home as fast as [he] could."

These facts are similar to those in *Harvey v. State*, 26 So. 3d 685, 686 (Fla. 5th DCA 2010), where the victim "was killed during the course of a robbery which occurred in connection with an

attempted drug purchase." *Id.* As did Mr. Gary, the defendant in *Harvey* "testified that he attempted to arrange the drug transaction, but that he had no intention of participating in any robbery, and that the robbery and the murder of [the victim] were both outside the original plan of selling marijuana." *Id.* Our sister court reversed the conviction, explaining:

> While the evidence presented was sufficient to convict the defendant as charged, evidence was presented which supported the defendant's theory that the robbery, and thus the murder, were independent acts from the original plan to sell the marijuana. As such, an instruction on the independent act doctrine should have been given.

Id. at 687. That reasoning applies with equal force to the instant facts.

As we have previously stated, "[i]t is for the jury, not the court, to determine what weight to give the defendant's evidence" supporting an independent act defense. *See Upshaw*, 871 So. 2d at 1017; *accord Flemmings v. State*, 838 So. 2d 639, 640 (Fla. 5th DCA 2003); *see also Thomas*, 787 So. 2d at 30 (stating that defendant "was entitled to a jury instruction on his theory that [the victim's] murder was [the cofelon's] independent act[,] and not committed in furtherance of the men's initial criminal scheme" to rob a

drugstore); *McGee*, 792 So. 2d at 627 (holding that the trial court reversibly erred by withholding independent act instruction in a drug deal gone bad case where there was evidence from which jury could find that the defendant "did not plan or actively participate in the robbery, that the murder was [the cofelon's] independent act, and that [defendant] was not guilty of second-degree murder").

Mr. Gary's theory of defense was that Mr. Guzman's murder was the result of his cofelon's independent act. While his veracity may be questionable, Mr. Gary's testimony supported that defense. The jury, not the court, must decide what weight to give Mr. Gary's testimony. The trial court abused its discretion by refusing to give the independent act instruction. *See Upshaw*, 871 So. 2d at 1017 ("A defendant is entitled to an instruction on his theory of defense however flimsy the evidence which supports that theory, or however weak or improbable his testimony may have been." (cleaned up)).

The State contends, in conclusory fashion, that even if the trial court erred by failing to provide the independent act instruction, the error was harmless. *See generally State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). The State is burdened to "prove beyond a reasonable doubt that the error complained of did not

contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *Harvey*, 26 So. 3d at 687–88 (quoting *DiGuilio*, 491 So. 2d at 1135). The State made no argument whatsoever to support its harmless error claim, so it has not met its burden.

Reversed and remanded.

NORTHCUTT and CASANUEVA, JJ., Concur.

Opinion subject to revision prior to official publication.