Third District Court of Appeal

State of Florida

Opinion filed June 10, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1143
Lower Tribunal No. 16-161-A-K

Derek M. David,
Appellant,

vs.

The State of Florida,
Appellee.

An appeal from the Circuit Court for Monroe County, Luis M. Garcia, Judge.

Donald C. Barrett, P.A. and Donald C. Barrett, for appellant.

Ashley Moody, Attorney General, and Asad Ali, Assistant Attorney General, for appellee.

Before SALTER, LINDSEY, and MILLER, JJ.

MILLER, J.

Appellant, Derek David, challenges his conviction and sentence for three counts of attempted manslaughter with a firearm in violation of section 782.07, Florida Statutes, one count of aggravated assault with a firearm in violation of section 784.021, Florida Statutes, and five counts of related misdemeanors. On appeal, he raises numerous claims, two of which are intertwined and merit further discussion.[1] Finding fundamental error, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

The facts salient to our analysis are not largely disputed. In the early morning hours of March 21, 2016, David and his wife, Jodi, having previously imbibed alcoholic beverages while patronizing several establishments in Key West, began to quarrel. Two unidentified men approached the couple, apparently concerned that a domestic incident was unfolding. One of the men pushed David away from his wife and David attempted to strike him with a closed fist.

Predictably, an affray ensued. David fell to the ground and sustained a physical attack. Upon regaining his footing, he began to walk away. However, one of the men struck him in the back of the head. David again stumbled and was

[1] We find no merit in the State's cross-appeal. See State v. Barton, 523 So. 2d 152, 153 (Fla. 1988) (finding attempted manslaughter–a third-degree felony–to be the lesser crime of aggravated battery–a second-degree felony).

subjected to another physical overture. Jodi simultaneously struggled with the other stranger.

Both men departed, with Jodi following closely behind. David trailed at a marked distance. A second pair of bystanders, Brendan Boudreau and Trent Pauls, drew near. Boudreau was visiting the Florida Keys for the purpose of filming a work-related documentary. As they approached Jodi, she lashed out.

In the ill-fated aftermath, witnessing the altercation from afar, David, a concealed carry permit holder, retrieved his firearm and unsuccessfully endeavored to discharge a warning shot in the air. He then fired four rounds, stricking Boudreau, Reid Ogden, and Scott McBride, the latter of whom were tourists. All three men suffered non-mortal injuries.

While hastily departing from the shooting scene, Derek purportedly brandished his firearm at both a tavern security guard and a barkeeper. He was subsequently apprehended and taken into custody. During the arrest, law enforcement officers observed that David was combative, and his speech was slurred, loud, and laced with profanities.

David was charged by information with three counts of attempted second-degree murder, two counts of aggravated assault with a firearm, one count of discharging a firearm in public, one count of using a firearm while under the

influence of alcoholic beverage, one count of violating the concealed firearm permit, and one count of resisting an officer without violence.

David steadfastly maintained his actions were necessary to defend his wife from the imminent use of unlawful force. However, his efforts to invoke immunity pursuant to section 776.032, Florida Statutes (2016), Florida's "Stand Your Ground Law," were fruitless in both the trial court and an ensuing prohibition action.[2] See David v. State, 233 So. 3d 1105 (Fla. 3d DCA 2017).

The case proceeded to trial. David again relied upon the theory that he was defending his wife. At the close of the defense case, the lower tribunal reduced the three charges of attempted second-degree murder to attempted manslaughter by act. During the charge conference, arguing that McBride and Ogden were unintended victims of the shooting, the State sought a transferred intent jury instruction. David asked that the instruction include the additional language: "harm caused to an unintended victim is also justified if the shot fired was the proper and prudent exercise of self-defense or in the defense of others." The trial court acquiesced to both requests and endeavored to draft a single combined instruction.

[2] In 2017 the Florida Legislature amended section 776.032, Florida Statute, to re-position the burden of proof upon the State to show "by clear and convincing evidence that the defendant was not justified in using or threatening to use force." Love v. State, 286 So. 3d 177, 182 (Fla. 2019) (citation omitted). However, the amendment only "applies to those immunity hearings, including in pending cases, that take place on or after the statute's effective date." Id. at 188.

The jury was instructed on transferred intent as follows:

> Transferred intent. If a person intends to shoot a person and in the process shoots a different person, the law transfers the intent to shoot from the person who was aimed at to any person who was shot.
>
> If the use of deadly force was justified, then unintended harm to an unintended victim is also justified if the shot was fired in the proper and prudent exercise of self-defense.

Hence, the reference to "defense of others" was omitted.

In the State's initial summation, the prosecutrix focused heavily upon the pure happenstance that the uninvolved victims were visiting Key West. She emphasized the enduring trauma resulting from the crimes, ultimately synthesizing the victims' status as tourists with the nature of the injuries inflicted. During her argument, she characterized the bullet wounds as souvenirs, "given" by David. Repeated objections to this line of argument were overruled.

Later, in the rebuttal closing, the second-chair prosecutor implored the jury to return "a verdict that also speaks the truth and speaks justice" for each of the individually named victims. The defense failed to raise an objection.

Following deliberations, the jury found David guilty of three counts of attempted manslaughter with a firearm, one count of aggravated assault with a firearm, one count of improper exhibition of a firearm, and the four related misdemeanors, as charged. David was subsequently sentenced to an eighteen-year term of incarceration. The instant appeal followed.

On appeal, David asserts reversible error in jury selection, two separate jury instructions, and closing argument. Our analysis focuses on the unwitting omission of the critical phrase in the transferred intent instruction and a combination of preserved and unpreserved error in closing argument.

LEGAL ANALYSIS

"[A] defendant is entitled to have a jury instruction on any valid defense supported by the evidence." Mora v. State, 814 So. 2d 322, 330 (Fla. 2002) (citation omitted). It is well-established Florida law that "[i]f the killing of the party intended to be killed would, under all the circumstances, have been excusable or justifiable homicide upon the theory of self-defense, then the unintended killing of a bystander, by a random shot fired in the proper and prudent exercise of such self-defense, is also excusable or justifiable." Brown v. State, 84 Fla. 660, 661, 94 So. 874, 874 (1922) (citing Pinder v. State, 27 Fla. 370, 8 So. 837 (1891)); see 16 Fla. Jur. 2d Criminal Law § 470 ("If the slaying of an attacker would in the circumstances be self-defense, the person attacked will be free from liability if, in attempting to defend himself or herself, he or she unintentionally kills a third person."); McCray v. State, 89 Fla. 65, 66, 102 So. 831, 831 (1925) ("If the killing of the party intended to be killed would, under all the circumstances, have been excusable or justifiable homicide upon the theory of self-defense, then the unintended killing of a bystander, by a random shot fired in the proper and prudent exercise of such self-defense is also

excusable or justifiable.") (citation omitted); V.M. v. State, 766 So. 2d 280, 281 (Fla. 4th DCA 2000) ("Where self-defense is a viable defense to the charge of battery on an intended victim, the defense also operates to excuse the battery on the unintended victim.") (citations omitted).

In the instant case, David sought to transfer his defense of others claim by instructing the jury "unintended harm to an unintended victim is also justified if the shot was fired in the proper and prudent exercise of the defense of others." Because unintended injury to a bystander is indeed justifiable if resulting from shots fired in the proper and prudent defense of another, and, here, there was sufficient "evidence in the record to support [this theory of] defense, [David] was entitled to the requested instruction." Riles v. State, 33 So. 3d 808 (Fla. 1st DCA 2010) (citation omitted).

Nonetheless, as the defense failed to alert the trial court to the flaw in the final instructions, we engage a fundamental error analysis.[3] See Bush v. State, 45 Fla. L. Weekly S145, S157 (Fla. May 14, 2020) ("In the absence of a contemporaneous objection, relief is not appropriate unless the complained-of comments constitute

[3] "The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system." Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990). "A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings." Id. (citation omitted). However, an exception lies "where fundamental and constitutional rights are ignored, [as] due process does not exist, and a fair trial in contemplation of law cannot be had." Chambers v. Mississippi, 410 U.S. 284, 305, 93 S. Ct. 1038, 1051, 35 L. Ed. 2d 297 (1973) (citation omitted).

fundamental error."). "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126 (1976) (citation omitted). Hence, "the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." Estes v. Texas, 381 U.S. 532, 540, 85 S. Ct. 1628, 1632, 14 L. Ed. 2d 543 (1965). Nevertheless, "to justify a reversal in the absence of [a] timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So. 2d 481, 484 (Fla. 1960); see Card v. State, 803 So. 2d 613, 622 (Fla. 2001) ("[F]undamental error . . . has been defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty . . . could not have been obtained without the assistance of the alleged error.") (citation omitted). "In other words, 'fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.'" State v. Delva, 575 So. 2d 643, 645 (Fla. 1991) (quoting Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982)).

In order "[t]o determine whether a jury instruction deprived the defendant of a fair trial, a court should conduct a 'totality of the circumstances analysis.'" Neal v. State, 169 So. 3d 158, 161 (Fla. 4th DCA 2015) (quoting Croom v. State, 36 So. 3d 707, 709 (Fla. 1st DCA 2010)). "In considering the effect of an erroneous

instruction under the fundamental error analysis, the court reviews the instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel." Sims v. State, 140 So. 3d 1000, 1004 (Fla. 1st DCA 2014) (citing Smith v. State, 76 So. 3d 379, 383 (Fla. 1st DCA 2011)). After reviewing the same, "if the totality of the circumstances indicates there is no reasonable possibility an alleged jury instruction error contributed to the verdict, the error is not fundamental." Croom, 36 So. 3d at 709 (citation omitted).

As a threshold matter, the State contends reference to the defense of others in the jury instructions frees the proceedings from the taint of error.[4] We are not so persuaded.

"[W]hen an error occurs in the instruction on the defendant's sole defense, 'it is more likely that the error should be regarded as fundamental.'" Sims, 140 So. 3d at 1004 (quoting Bradley v. State, 127 So. 3d 806, 808 (Fla. 2d DCA 2013)). Here, David's sole defense at trial was that he acted to defend his wife. He specifically contended the confluence of events precipitating the shooting transpired in rapid

[4] We further note that while the jury was instructed in accord with the standard jury instruction on transferred intent, Florida Rule of Judicial Administration 2.270(a) recognizes that,

> [s]tandard jury instructions approved for publication and use . . . are not approved or otherwise specifically authorized for use by the supreme court and their approval under this rule shall not be construed as an adjudicative determination on the legal correctness of the instructions, which must await an actual case and controversy.

succession and led him to believe his wife was the victim of an assault perpetrated by one or more assailants. David advanced this theory consistently and continuously, raising it first during his pretrial immunity hearing, then in opening statement, the adversarial testing of the State's case, the defense case, the charge conference, and, finally, in closing argument.

It is axiomatic that at least two of the three victims were unintended targets. Based on this pivotal fact, the transferred intent instruction was of singular significance. As the effect of the erroneous instruction was to inform the jury that transferred justification only applied to self-defense, not defense of others, it divested the jury of the ability to find that, if David was lawfully protecting his wife, the shooting of any unintended victims was insulated.[5]

Although the jury was indeed informed elsewhere that acting in the defense of others could constitute a viable defense, the justifiable use of deadly force instruction directed the jury to consider the relative physical capacities as between Boudreau and Jodi. Consequently, it was implicitly tailored to encompass only those actions taken by David to defend Jodi from Boudreau. Accordingly, it failed to

[5] Other jurisdictions characterize this theory of defense as transferred justification. See Allen v. State, 723 S.E.2d 684 (Ga. 2012); State v. Davis, 651 So. 2d 323 (La. Ct. App. 1995); Brunson v. State, 764 S.W.2d 888 (Tex. Crim. App. 1989). Juries are provided with the instruction that, "[u]nder th[e] principle [of transferred justification], no guilt attaches if an accused is justified in shooting to repel an assault, but misses and kills [or injures] an innocent bystander." Crawford v. State, 480 S.E.2d 573, 575 (Ga. 1997) (citations omitted).

address reasonable measures taken by David to safeguard Jodi from the use of force by any other individual. No other instruction informed the jury that a volitional act in furtherance of the defense of another shielded culpability imposed by transferred intent. Given the unique circumstances presented in this case, we cannot conclude the error was vitiated by the ancillary instructions. See Lane v. State, 44 Fla. 105, 120, 32 So. 896, 900 (1902) ("While it is true that instructions must be considered as a whole, and it is sufficient if, taken together, they state the law correctly, yet general instructions given cannot cure an error committed in giving a specific instruction.") (citation omitted). Thus, we examine the remaining circumstances of the trial, including the evidence adduced and the strategies embraced by the parties.

The error inherent in excluding "defense of others" was compounded by the inclusion of the isolated reference to self-defense within the same instruction. David never asserted that he acted to defend himself, likely eschewing such a theory as unreasonable, given his remote location from the scene of the altercation. Nonetheless, the instructional allusion to self-defense, in seclusion, left the jury with the impression that David was indeed raising self-defense. This inadvertently and indirectly created a strawman defense, which was likely expeditiously rejected by the jury. See Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1100 (3d Cir. 1984) (Aldisert, J., concurring) (Raising "conclusions artificially and self-constructed . . . [utilizes] the technique . . . known as . . . attacking something that has not been

asserted. In the vernacular, this is known as erecting a strawman and then striking it down."); Canesi v. Wilson, 730 A.2d 805, 820 (N.J. 1999) (O'Hern, J., concurring) ("In formal logic, the technique of setting up an argument that does not exist and then refuting that misrepresented argument is called the 'straw man' fallacy.") (citation omitted).

Further, any assertion that the errant jury instruction did not "reach[] down into the validity of the trial itself to the extent that [the] verdict of guilty . . . could not have been obtained without the assistance of the . . . error," Card, 803 So. 2d at 622 (citation omitted), "is clearly rebutted when the jury instruction is combined with" the second assignment of error, "comments made by the prosecutor during closing argument." Butler v. State, 493 So. 2d 451, 453 (Fla. 1986); see McArthur v. State, 801 So. 2d 1037, 1040 (Fla. 5th DCA 2001) ("In order to determine whether improper remarks constitute reversible error, they should be reviewed within the context of the closing argument as a whole and considered cumulatively within the context of the entire record.") (citation omitted). In the initial summation, the State focused upon the unfortunate happenstance that the unintended victims were present at the scene of the shooting. The prosecutrix highlighted the enduring psychological impact of the crimes on the unintended victims, purporting to synthesize their status as tourists with "souvenirs," in the form of bullet wounds, "given" by David. This line of argument was objected to, and lent no value to the purpose of closing

argument, which is "to help the jury understand the issues in [the] case by 'applying the evidence to the law applicable to the case.'"[6] Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1028 (Fla. 2000) (citation omitted).

Similarly, in the rebuttal closing, the State made repeated calls for justice for the victims, identifying each by name. These overreaching remarks, were, by design, only intended to invoke sympathy, and have been "uniformly condemned." Cardona v. State, 185 So. 3d 514, 522 (Fla. 2016) (citations omitted); see also Augustine v. State, 143 So. 3d 940, 941 (Fla. 4th DCA 2014) (finding prosecutor's invitation to the jury to return a guilty verdict based on what jurors believed the "truth" to be improper); Servis v. State, 855 So. 2d 1190, 1194 (Fla. 5th DCA 2003) ("It is improper for an attorney to give a personal opinion as to the justness of the cause, . . . [as] the state's comments [may] result[] in an impermissible attack on the defense theory and defense counsel.") (citation omitted); Edwards v. State, 428 So.

[6] "Where the [prosecutorial] comments were improper and the defense objected, but the trial court erroneously overruled defense counsel's objection, [courts] apply the harmless error standard of review." Cardona v. State, 185 So. 3d 514, 520 (Fla. 2016) (citing Snelgrove v. State, 921 So. 2d 560, 568 (Fla. 2005); Doorbal v. State, 837 So. 2d 940, 956-57 (Fla. 2003)). This standard "places the burden on the state, as the beneficiary of the error, 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." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) (citation omitted). "The harmless error rule is 'concerned with the due process right to a fair trial' and 'preserves the accused's constitutional right to a fair trial.'" Johnson v. State, 53 So. 3d 1003, 1007 (Fla. 2011) (quoting DiGuilio, 491 So. 2d at 1135-36).

2d 357, 359 (Fla. 3d DCA 1983) ("Counsel have been consistently admonished, and the arguments [asking justice for the victim] have been condemned as unfair, intemperate, and unethical.") (citations omitted).

Accordingly, we hold that the error here denied David the "ability to transfer his defense to the unintended" victims, Nelson v. State, 853 So. 2d 563, 565 (Fla. 4th DCA 2003), and, upon this rare record, we cannot be confident he "receive[d] a fair trial consistent with the Due Process Clause of the Fourteenth Amendment." Sheppard v. Maxwell, 384 U.S. 333, 335, 86 S. Ct. 1507, 1508, 16 L. Ed. 2d 600 (1966). Thus, reversal is warranted.

Reversed and remanded.