

# **Third District Court of Appeal**

## **State of Florida**

Opinion filed September 16, 2020.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D18-2217  
Lower Tribunal No. 17-19033

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**Daniel Lopez,**  
Appellant,

vs.

**The State of Florida,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mark Blumstein,  
Judge.

Eugene F. Zenobi, Criminal Conflict and Civil Regional Counsel, Third  
Region of Florida, and Jacqueline Rae Brandt, Assistant Regional Counsel, for  
appellant.

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

Before FERNANDEZ, LINDSEY and GORDO, JJ.

GORDO, J.

Daniel Lopez appeals his conviction and sentence for aggravated assault with a firearm and possession of a firearm by a convicted felon. On appeal, Mr. Lopez argues the trial court erred by denying his request for the standard Justifiable Use of Non-Deadly Force Jury Instruction, instruction 3.6(g). See Fla. Std. Jury Instr. (Crim.) 3.6(g). We agree, reverse and remand for a new trial.<sup>1</sup>

### **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

On September 29, 2017, Mr. Lopez and the two victims, Wanderley Suiero and Anathalia Castellanos, were involved in an incident. Mr. Lopez and the State presented different accounts of the facts and circumstances that preceded the incident in question. The parties agree, however, that the disagreement culminated in an encounter in a parking lot.

Mr. Lopez testified that he approached Mr. Suiero's vehicle in traffic and observed a gun inside of the car. Mr. Lopez then returned to his truck, and, as he was driving away, heard a loud noise in the bed of his truck, as if something had been thrown in there. Mr. Lopez posited that Mr. Suiero threw a gun into his truck bed. Mr. Lopez pulled into a nearby parking lot to speak with his girlfriend, Lisette

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<sup>1</sup> Mr. Lopez also argues that the trial court erred by denying his Motion for Mistrial based upon cumulative error. Because we conclude that the jury was not properly instructed and reverse on that basis, we need not reach the merits of this second argument.

Morera,<sup>2</sup> who was in a nearby vehicle. Once in the parking lot, Mr. Lopez noted that Mr. Suiero and Ms. Castellanos had followed him into the lot. Mr. Lopez testified that because he had seen a gun in Mr. Suiero's car, he feared for his and Ms. Morera's safety. This prompted him to look for something in his truck bed with which he could defend himself. It was then that Mr. Lopez discovered that there was a gun in the bed of his truck. He testified, and so did Ms. Morera, that upon discovering the gun, he ran over to Ms. Morera's car in an attempt to get rid of the firearm.

According to the State, it was at that point that Mr. Lopez took the firearm from the bed of his truck and assaulted the victims. Mr. Lopez was subsequently charged with aggravated assault with a firearm, possession of a firearm by a convicted felon and fleeing or attempting to elude a law enforcement officer. At trial, the State corroborated its theory by presenting a video, recorded on one of the victims' cell phones, that depicted the alleged assault by Mr. Lopez.

Although Mr. Lopez's theory of defense was, in part, to deny the use of force entirely, he presented testimony that supported a self-defense theory in the alternative. Mr. Lopez testified as follows:

Q: So, how did you feel when you got out of your car and you saw [Mr. Suiero's] car behind your car?

A: I felt in danger.

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<sup>2</sup> The record contains several spelling variations of Ms. Morera's name. We use the spelling provided by Ms. Morera during her trial testimony.

Q: Did you also hear [Ms. Morera] yelling at that time?

A: Yes

Q: Were you also worried that [Ms. Morera] was in danger?

A: Exactly.

Q: Is that when you start searching in the back of your car?

A: Yes.

Q: What kinds of things do you have in the bed of your truck that you were looking for at that time?

A: I have a lot of recycled things. Trash, iron, a little bit of everything.

Q: Okay. And why were you looking for one of those items?

A: Because I wanted to defend myself because I saw that that man had a gun and I thought he could be behind me to do something to me or to [Ms. Morera].

In closing, defense counsel reiterated that prior to finding the gun in the back of his truck, Mr. Lopez was “worried for himself [and Ms. Morera].” The closing argument made clear that Mr. Lopez was arguing that he felt he needed to defend himself after having seen a gun in Mr. Suiero’s car. Mr. Lopez further testified that he possessed the gun solely for the purpose of disposing of it. Both he and Ms. Morera testified, and his counsel argued, that he never pointed the firearm at the victims. Additionally, Mr. Lopez never testified or conceded that he used force or threatened to use force against Mr. Suiero and Ms. Castellanos.

At the charging conference, the defense specifically requested that the jury be read the standard justifiable use of nondeadly force instruction, instruction 3.6(g). It argued “that pointing a firearm at someone is not deadly force. There is no testimony of any discharge or attempted discharge or any physical contact made with

the firearm to the victim's body.” The State objected to the trial court reading the nondeadly force instruction.

The State's argument for the reading of the standard deadly force instruction, instruction 3.6(f), was that an officer “made the firearm safe” when she retrieved it from Mr. Lopez's truck bed. It further posited that the video supported the fact that Mr. Lopez used deadly force.<sup>3</sup> The State concluded its argument by stating that it was unaware of a “[single] case that says a projectile has to be expelled in order for it to be deadly force.” The court stated that it was going to give the jury only the deadly force instruction requested by the State. The defense then reiterated its objection.

The jury found Mr. Lopez guilty of aggravated assault with a firearm and possession of a firearm by a felon. The trial court sentenced Mr. Lopez to five years for the aggravated assault and eight years for possession of the firearm, to run concurrently, followed by five years of probation. This appeal followed.

### **LEGAL ANALYSIS**

“[W]e review a trial court's decision to exclude a requested jury instruction for an abuse of discretion . . . .” Rodriguez v. State, 147 So. 3d 1066, 1068 (Fla. 3d DCA 2014) (citing Carpenter v. State, 785 So. 2d 1182, 1199–200 (Fla. 2001);

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<sup>3</sup> Based on the testimony and evidence introduced by the State, we conclude the trial court properly gave the standard deadly force instruction to the jury.

Martin v. State, 110 So. 3d 936, 938 (Fla. 1st DCA 2013)). However, the trial court’s discretion in whether to give a jury instruction regarding a defense from evidence introduced at trial “is rather narrow because a criminal defendant is entitled to have the jury instructed on his or her theory of defense.” Radler v. State, 290 So. 3d 87, 90 (Fla. 3d DCA 2020) (quoting St. Pierre v. State, 228 So. 3d 583, 585–86 (Fla. 4th DCA 2017)). This is so “if there is any evidence to support this theory, no matter how weak or flimsy.” Id. (quoting St. Pierre, 228 So. 3d at 585–86 (internal citations and quotations omitted)). Thus, we must determine whether there was any evidence introduced at trial that would support Mr. Lopez’s request for the justifiable use of non-deadly force instruction. See Rodriguez, 147 So. 3d at 1068.

Part of Mr. Lopez’s case theory relied on the justifiable use of force or self-defense. He testified that he feared for his safety and Ms. Morera’s because of the gun he had seen in Mr. Suiero’s car, and that he had reason to think he needed to defend himself. This prompted him to look for a tool of some sort in the bed of his truck, which is when he discovered the firearm at issue in the case. In closing, the defense reiterated that Mr. Lopez was worried about his and Ms. Morera’s safety and felt he needed to defend himself from Mr. Suiero. He also maintained throughout the trial that he had neither used nor threatened to use force against Mr. Suiero and Ms. Castellanos. See § 776.012, Fla. Stat. (2019). Mr. Lopez presented evidence supporting his theory of the case, which was, in part, that even assuming

he used force against the victims, it was non-deadly force.<sup>4</sup> He argued his actions were justified because he feared for either his safety or Ms. Morera's.

Accordingly, we conclude that Mr. Lopez was entitled to the justifiable use of nondeadly force instruction, and the trial court abused its discretion in failing to give the requested instruction to the jury. "Having determined that the trial court improperly denied the request for a jury instruction on the justifiable use of non-deadly force . . . , we reverse and remand for a new trial." Radler, 290 So. 3d at 93.

Reversed and remanded.

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<sup>4</sup> "'Non-deadly' force means force not likely to cause death or great bodily harm." Fla. Std. Jury Instr. (Crim.) 3.6(g).