Third District Court of Appeal

State of Florida

Opinion filed October 23, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1959
Lower Tribunal No. 16-11296

Lamar Lindo,
Appellant,

vs.

The State of Florida,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Stacy D. Glick, Judge.

Carlos J. Martinez, Public Defender, and Susan Lerner, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Jeffrey R. Geldens, Assistant Attorney General, for appellee.

Before FERNANDEZ, HENDON, and MILLER, JJ.

MILLER, J.

Appellant, Lamar Lindo, challenges his conviction and sentence for attempted manslaughter by act, in violation of section 782.07(1), Florida Statutes (2019). On appeal, Lindo contends the lower tribunal erred in instructing the jury on the forcible-felony exception to self-defense, as he was not charged with an independent forcible felony.[1] See § 776.041(1), Fla. Stat. (2019). Finding fundamental error, we reverse and remand for a new trial.

FACTS AND BACKGROUND

On May 30, 2016, Lindo, a Miami-Dade Parks, Recreation, and Open Spaces Department employee and part-time security guard, slept at the abode of his paramour, Nicole Mitchell. Mitchell resided with her children in a second-floor apartment, located above a storefront, adjacent to an expansive parking lot.

Shortly after six o'clock the following morning, Bobby Jackson, the father of one of Mitchell's daughters, arrived at the home, purportedly to retrieve a pendant. Upon his arrival, Jackson alerted the occupants of the residence to his presence by loudly knocking on the front door. Thereafter, Jackson exchanged text messages with Mitchell. A child subsequently exited the home and furnished the requested

[1] Lindo raises other assignments of error, including that his trial counsel was ineffective in failing to object to the same. As we find fundamental error in the instruction to the jury necessitates reversal, we decline to consider the remaining claims.

trinket to Jackson. Jackson walked to the nearby parking lot, where Lindo's vehicle was parked.

Mitchell observed Jackson in the parking lot and warned him away from Lindo's car. Mitchell and Jackson engaged in a verbal spar, and Lindo left the apartment and walked toward his vehicle. Jackson violently attacked Lindo and a prolonged struggle ensued. Jackson eventually pushed Lindo into the vehicle, breaking the front window on the driver's side. Lindo retrieved his legally acquired firearm from the glove compartment of his automobile.

The series of events that followed were divergently described by the witnesses at trial. Lindo testified he "drew [his] firearm because [he] was in danger of [his] life." Jackson testified that he retreated, evidencing his surrender. Nonetheless, in the moments that followed, Lindo fired two shots, the latter of which struck Jackson, resulting in lower-extremity paralysis. Lindo was arrested and charged with attempted first-degree murder. The case proceeded to a jury trial.

During directed verdict motions, the lower tribunal reduced the attempted first-degree murder charge to attempted second-degree murder. Accordingly, the jury was instructed on two lesser included offenses: (1) attempted manslaughter by act; and (2) felony battery. The court further furnished the "forcible felony" jury instruction, as follows:

> However, the use and/or threatened use of deadly force is not justified if you find that Lamar Lindo was attempting to commit, committing, or

> escaping after the commission of attempted second-degree murder, manslaughter by act, or felony battery.

See § 776.041(1), Fla. Stat. Neither party objected to the instruction.

Following deliberations, the jury returned a verdict of guilt for attempted manslaughter by act with a firearm. Lindo was sentenced to a term of ten years of incarceration and the instant appeal ensued.

STANDARD OF REVIEW

"Whether an error in jury instructions is fundamental and so calls for reversal even in the absence of an objection in the trial court is a question of law." Burns v. State, 170 So. 3d 90, 96 (Fla. 1st DCA 2015). Accordingly, we review "the issue of unpreserved fundamental error under the de novo standard." Id. (quoting Elliot v. State, 49 So. 3d 269, 270 (Fla. 1st DCA 2010)). "The failure to give an instruction on an affirmative defense is not per se fundamental error." Mosansky v. State, 33 So. 3d 756, 758 (Fla. 1st DCA 2010) (citation omitted). Rather, "[t]he fundamental error doctrine applies 'only in rare cases where . . . the interests of justice present a compelling demand for its application.'" Id. (quoting Martinez v. State, 981 So. 2d 449, 455 (Fla. 2008) (internal citations omitted)).

LEGAL ANALYSIS

"The right to self defence [was] the first law of nature," firmly rooted in the desire to maintain the "King's peace."[2] Dist. of Columbia v. Heller, 554 U.S. 570, 606, 128 S. Ct. 2783, 2805, 171 L. Ed. 2d 637 (2008). Hence, under the common law, "[j]ustifiable homicide was faultless." Darrell A. H. Miller, Self-Defense, Defense of Others, and the State, 80 Law & Contemp. Probs. 85, 88 (2017). Nonetheless, "in most governments it has been the study of rulers to confine the right [of self-defense] within the narrowest limits possible." Heller, 554 U.S. at 606, 128 S. Ct. at 2805.

In Florida, in accord with this historical precedent, "[t]he forcible-felony exception provides that self-defense is not available as a justification if the defendant '[i]s attempting to commit, committing, or escaping after the commission of, a forcible felony.'" Redding v. State, 41 So. 3d 353, 354 (Fla. 2d DCA 2010) (alteration in original) (quoting § 776.041, Fla. Stat.). "[I]t is error for a trial court to read the forcible-felony instruction to the jury where the defendant is not charged with an independent forcible felony," because when the instruction is read in the

[2] In medieval England, the King's peace was "[a] royal subject's right to be protected from crime (to 'have peace') in certain areas subject to the king's immediate control, such as the king's palace or highway." *King's Peace*, Black's Law Dictionary (11th ed. 2019). "The weight of modern authority, in [the United States Supreme Court's] judgment, establishes the doctrine that when a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." Beard v. United States, 158 U.S. 550, 562, 15 S. Ct. 962, 966, 39 L. Ed. 1086 (1895).

absence of an independent forcible felony, self-defense is negated. Martinez, 981 So. 2d at 457; see also Redding, 41 So. 3d at 355 ("When the [forcible-felony] instruction is read in the absence of a charge of an independent forcible felony, it essentially negates the defendant's theory of self-defense.") (citation omitted).

In the instant case, Lindo was charged with a single crime. Consequently, "no independent forcible felony was present," and the jury instructions were flawed. Martinez, 981 So. 2d at 450. "Jury instructions are 'subject to the contemporaneous objection rule'" and here, Lindo "did not object to the disputed instruction." State v. Weaver, 957 So. 2d 586, 588 (Fla. 2007).

Nonetheless, "[t]he rule that questions not raised in the trial court cannot be raised for the first time on appeal, is not without exceptions, among which are errors 'affecting fundamental rights of the parties.'" Chambers v. Mississippi, 410 U.S. 284, 304, 93 S. Ct. 1038, 1050, 35 L. Ed. 2d 297 (1973) (citation omitted). "[W]here fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had." Id. at 305, 93 S. Ct. at 1051. In accord with these established principles, "[a]bsent fundamental error, failure to object to the jury instructions at trial precludes appellate review." Walton v. State, 547 So. 2d 622, 625 (Fla. 1989), cert. denied, 493 U.S. 1036, 110 S. Ct. 759, 107 L. Ed. 2d 775 (1990) (citations omitted).

The erroneous reading of a jury "instruction constitutes fundamental error **only when it deprives the defendant of a fair trial**." Martinez, 981 So. 2d at 457 (citation omitted). "In determining the effect of [the erroneous] instruction on the validity of respondent's conviction, we accept . . . the well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368 (1973) (citation omitted). Accordingly, in this context, "fundamental error results when an inaccurate or misleading jury instruction negates a defendant's only defense." Granberry v. State, 919 So. 2d 699, 701 (Fla. 5th DCA 2006) (citations omitted).

A body of well-reasoned jurisprudence provides that "[t]he following factors are instructive when determining whether fundamental error occurred in this context: (1) whether self-defense is the defendant's sole defense; (2) whether the defendant's self-defense claim is a weak defense; and (3) whether the state relied on the erroneous instruction during closing." See Gregory v. State, 141 So. 3d 651, 655 (Fla. 4th DCA 2014) (citations omitted).

Here, it is axiomatic that self-defense was Lindo's sole defense. Although the evidence of self-defense was capable of differing conclusions, the jury could have reasonably believed Lindo's contention that he was attacked and overpowered by Jackson, and "that he responded with force to protect himself and his vehicle." Id.

Although the State did not rely upon the instruction in closing argument, under these circumstances, we conclude that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp, 414 U.S. at 147, 94 S. Ct. at 400; see also Furney v. State, 115 So. 3d 1095, 1097-98 (Fla. 4th DCA 2013) (finding that the erroneous reading of the forcible-felony instruction constituted fundamental error because petitioner's sole defense as to each of his charges was self-defense). Thus, reversal is warranted.

Reversed and remanded.