IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RAYNARD J. FORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-6091

Opinion filed September 3, 2015.

An appeal from the Circuit Court for Leon County.
Dawn Caloca-Johnson, Judge

Nancy A. Daniels, Public Defender, and David Alan Henson, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Angela R. Hensel, Assistant Attorney General, Tallahassee, for Appellee.

RAY, J.

On the authority of McGriff v. State, 160 So. 3d 167, 168-69 (Fla. 1st DCA 2015), and Garrett v. State, 148 So. 3d 466, 471 (Fla. 1st DCA 2014), review granted, No. SC14-2110, 2015 WL 2171635 (Fla. May 6, 2015), we reverse Appellant's judgment and sentence for second-degree murder and remand for a new trial. The trial court committed reversible error when it failed to instruct the

jury on Appellant's theory of self-defense based on section 776.012(1), Florida Statutes (2012), notwithstanding the fact that he was a convicted felon in unlawful possession of a firearm at the time of the deadly shooting. The trial court's instruction referencing a "duty to retreat" if Appellant was engaged in unlawful activity was an incorrect statement of then-existing law concerning Appellant's defense. This error was preserved and cannot be deemed harmless under the facts of this case. Appellant's judgment and sentences on the remaining counts are affirmed without comment.

AFFIRMED in part; REVERSED and REMANDED for a new trial in part.

LEWIS, J., CONCURS WITH OPINION; KELSEY, J., CONCURS IN PART AND DISSENTS IN PART WITH OPINION.

LEWIS, J., concurring.

I fully concur with reversing Appellant's judgment and sentence for second-degree murder and remanding for a new trial on the basis that the trial court reversibly erred by failing to instruct the jury on Appellant's theory of self-defense based on section 776.012(1), Florida Statutes (2012), [1] notwithstanding the fact that he was a convicted felon in unlawful possession of a firearm at the time of the deadly shooting. See McGriff v. State, 160 So. 3d 167, 168-69 (Fla. 1st DCA 2015) (holding that the trial court abused its discretion by instructing the jury that "'if [Appellant] was engaged in an unlawful activity, [his] use of deadly force was not justified if he could have reasonably and safely avoided the use of deadly force by retreating'" because it was an incorrect statement of the then-existing law, and remanding for a new trial "because the erroneous instruction effectively eliminated Appellant's sole defense and was emphasized several times by the prosecutor during closing argument"); Miles v. State, 162 So. 3d 169, 171-72 (Fla. 5th DCA 2015) (holding that "a defendant could assert immunity under section 776.012 even if he or she was engaged in an unlawful act at the time"); Roberts v. State, 40 Fla. L. Weekly D1438, at *6-10 (Fla. 1st DCA June 18, 2015) (finding that

[1] The Legislature has resolved the problem now before us by amending section 776.012, effective June 20, 2014, to grant immunity only to a person "not engaged in criminal activity." § 776.012, Fla. Stat. (2014).

although the trial court misstated the law when it instructed the jury that the appellant had a duty to retreat if she was engaged in an unlawful activity, the error was not fundamental under the facts of the case because it did not negate her theory of defense); Garrett v. State, 148 So. 3d 466, 471 (Fla. 1st DCA 2014), review granted, SC14-2110, 2015 WL 2171635 (Fla. 2015) ("The fact that [the appellant] was a convicted felon in unlawful possession of a firearm did not apply to the jury's consideration of whether [he] had a duty to retreat under section 776.012(1)."); Hill v. State, 143 So. 3d 981, 984-86 (Fla. 4th DCA 2014) (*en banc*) (holding that the defense provided in section 776.012(1) is available to persons engaged in an unlawful activity). I also agree with affirming Appellant's judgment and sentence on the remaining counts without comment.

KELSEY, J., concurring in part and dissenting in part with opinion.

I concur in the affirmance of Appellant's judgments and sentences for carrying a concealed firearm and possession of a firearm by a convicted felon during the 2012 killing at issue. I respectfully dissent, however, with respect to the jury instructions for first-degree murder and the lesser-included offense of second-degree murder. In my view, Appellant is not entitled to a Stand Your Ground instruction because he was engaged in unlawful activity (the firearm violations) at the time of the killing.

I recognize that the majority's disposition of this case is consistent with this Court's own precedent, by which we are bound absent an en banc determination to the contrary. See Roberts v. State, 40 Fla. L. Weekly D1438 (Fla. 1st DCA June 18, 2015); McGriff v. State, 160 So. 3d 167 (Fla. 1st DCA 2015); Ross v. State, 157 So. 3d 406 (Fla. 1st DCA 2015); Garrett v. State, 148 So. 3d 466, 471 (Fla. 1st DCA 2014), review granted, No. SC14-2110, 2015 WL 2171635 (Fla. May 6, 2015). Nevertheless, my analysis leads me to a contrary conclusion, which others have reached as well. See Darling v. State, 81 So. 3d 574, 578-79 (Fla. 3d DCA) ("Moreover, the 'stand your ground' law specifically requires that the person invoking the defense 'not [be] engaged in an unlawful activity.'"), review

denied, 107 So. 3d 403 (Fla. 2012).[2] The Fourth and Fifth Districts initially reached the same conclusion. Morgan v. State, 127 So. 3d 708, 716 (Fla. 5th DCA 2013) ("[T]he 'no duty to retreat' rule applies only when a person 'is not engaged in an unlawful activity.'"); Dorsey v. State, 74 So. 3d 521, 527 (Fla. 4th DCA 2011) ("The plain language of section 776.013(3) provides that the 'no duty to retreat' rule applies only when a person 'is not engaged in an unlawful activity.'"), review dismissed, 2015 WL 4394054 (Fla. July 17, 2015) (on petitioner's notice of dismissal). This was the state of the law when Appellant committed the offenses at issue here. Both the Fourth and the Fifth Districts have subsequently receded from their prior holdings. See Miles v. State, 162 So. 3d 169, 171 (Fla. 5th DCA 2014); Hill v. State, 143 So. 3d 981, 985-86 (Fla. 4th DCA 2014) (en banc).

I recognize this weight of authority, but I cannot conclude that the second sentence of section 776.012 of the Florida Statutes in effect from 2005 to 2014 was intended to be an elective alternative to section 776.013(3). The two provisions apply "in similar, if not identical, circumstances." Hill, 143 So. 3d at 984. They "appear to overlap" with respect to the degree of threatened harm that triggers the right of defensive force. Id. at 985. These two sections should not be interpreted as

[2] The Fifth District in Miles v. State, 162 So. 3d 169, 171 (Fla. 5th DCA 2014), asserted that the Third District concluded to the contrary in Pages v. Seliman-Tapia, 134 So. 3d 536, 539 (Fla. 3d DCA 2014). However, the court in Pages construed only the first sentence of section 776.012 dealing with non-deadly force. Pages, 134 So. 3d at 539-40.

if the other did not exist; but rather, they should be interpreted in harmony as part of a cohesive whole. E.g., Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992) ("[I]t is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole. . . . Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another."). Furthermore, to the extent of any inconsistency or repugnancy between the two sections, the more specific must prevail over the more general. Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959) (noting the "well settled rule of statutory construction . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation 'the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any.'") (quoting State v. McMillan, 45 So. 882, 884 (Fla. 1908)).

An interpretation of these two provisions of chapter 776 that ends up meaning the same thing for persons engaged in unlawful activity and those not so engaged improperly renders meaningless the unlawful activity exception of section 776.013(3). See, e.g., Bretherick v. State, 40 Fla. L. Weekly S411, 2015 WL 4112414 at *5–6 (Fla. July 9, 2015) (applying in Stand Your Ground context rule

of statutory construction to "avoid readings that would render part of a statute meaningless"). The Legislature stated in the preamble to the 2005 enactment of the Stand Your Ground law that it was intended to provide new rights to "law-abiding people." Ch. 2005-27, preamble, Laws of Fla. Properly interpreted, the specific unlawful activity exception of section 776.013(3) applies to the general rule stated in section 776.012. When the Legislature amended chapter 776 in 2014 to repeat the criminal activity exception expressly within section 776.012 itself, the final bill analysis described this as a *clarifying* change, noting cases that had treated the two sections inconsistently. Fla. H.R. Judiciary Comm., HB 89 (2014) Staff Analysis 1, 5-6 & n.18 (final June 27, 2014) (citing Pages, 134 So. 3d 536; State v. Wonder, 128 So. 3d 867 (Fla. 4th DCA 2013); Little v. State, 111 So. 3d 214 (Fla. 2d DCA 2013)). For these reasons, I would affirm Appellant's judgment and sentence for second-degree murder.