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

SKYLAR FRANCIS,

Appellant,

vs. DCA CASE NO. 5D18-3587

STATE OF FLORIDA,

Appellee.
________________________________/

APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Point one. The State asserts that here a crafty defendant successfully manipulated the system by seeking new counsel on two occasions. The record shows that initial counsel withdrew on his own motion after significant delay, and further shows that the assistant public defender who inherited the case refused to meet with his client on the eve of trial. The private attorney who ultimately tried the case was retained on that very day. The record does not support the interpretation the State puts on it.

Point two. The State argues that "it would have been pointless" for counsel to expressly seek more time to prepare with an expert to adduce mitigation testimony, since a five-year minimum mandatory sentence was inevitable on one of the counts. The aggregate sentence imposed, fifteen years in prison to be followed by fifteen years' probation, patently could have been significantly lower. The record does not support the State's view that the court in no way abused its discretion on this point.

Point three. The State does not acknowledge or attempt to distinguish the cases cited in the initial brief on this point. The cited cases warrant reversal in light of counsel's failure to seek a non-deadly-force instruction.

Point four. On Point 4A, the State argues that no special jury instruction was necessary or even proper on the question how the police may react to exigent

circumstances. It concedes that it had to prove the officers were acting in the course of their legal duties. The proposed instruction would have told the jury that officers may enter on private property to protect and serve the community, in cases where that is their sole motive. The State has cited no authority that brings that principle into question.

The State concedes that the anomaly in the instructions argued on point 4B was error, but denies it amounted to fundamental error. Since what threat the defendant reasonably perceived was placed at issue, the instruction amounted to fundamental error.

Points five and six. The State downplays the significance of the JQC proceeding that arose out of this trial and out of one other criminal case. The JQC's findings, which were not opposed by the judge and have been adopted by the Florida Supreme Court, support the conclusion that the combined distractions to the jury in this case warrant reversal on cumulative-error grounds.

ARGUMENT

POINT ONE

IN REPLY: JUST-RETAINED DEFENSE COUNSEL SOUGHT A CONTINUANCE OF THE TRIAL; THE COURT ABUSED ITS DISCRETION BY DENYING THE MOTION.

The State asserts that at the time the attorney who ultimately tried this case sought a continuance, the issues to be litigated had already been aired both in a stand-your-ground hearing and a suppression hearing. (Answer brief at 4) Neither type of hearing was held in this case; the State appears to be relying on a mistaken reference made by the trial prosecutor on one occasion. (R 878) At the time of the motion to continue, a hearing had been held on the defense motion for dismissal on the ground of outrageous police conduct, but newly-retained counsel was not part of that effort.

The State relies on the trial judge's perception, announced at the time she denied a continuance, that the case was not a complicated one. (Answer brief at 5) As this court recently held in Singer v. State, 2019 WL 6223118 (Fla. 5th DCA 2019), a judge's perception, at a similar juncture, that a proposed defense would bear little fruit "do[es] not override a defendant's due process righ[t] to an adequate opportunity to prepare for trial." Id. at *2. Ultimately, here as in Singer, "counsel was forced to proceed to trial unprepared, just as he predicted." Id.

The State further relies on the trial judge's perception that it was in the defendant's best interest to attain the peace of mind that would come with a resolution of his charges sooner rather than later. (Answer brief at 8, R 924) It appears from the record that Mr. Francis reasonably believed it was in his own best interest to have prepared counsel appear for him in a case where two serious felonies were charged.

At the time the judge expressed concern for the defendant's best interests, she also noted the interests of "any other folks who could be involved." (R 924) The State now argues, based on that comment, that this court should affirm because "it was time for the case to be resolved for both the victims involved." (Answer brief at 8, citing R 924) The victims in this case are both experienced police officers, well used to the stop-and-start nature of high-stakes criminal cases. In any event, the desire for closure is not one of the seven factors this court considers in weighing whether denying a continuance amounted to an abuse of discretion.

As it did below, the State asserts that this is a case where a crafty defendant successfully manipulated the system by seeking new counsel on two occasions. The record shows that initial counsel moved to withdraw after being in the case for nearly two years. (R 35, 57, 167). The record further shows that the assistant public defender who inherited the case refused in a cavalier fashion to meet with his client

after a court appearance on the eve of trial. The private attorney who ultimately tried the case was retained on that very day. The record does not support the interpretation the State puts on it; this court should reverse the convictions appealed from.

POINT TWO

IN REPLY: COUNSEL AT SENTENCING SOUGHT A MORE SEARCHING MENTAL-HEALTH EXAMINATION THAN HAD PREVIOUSLY BEEN CONDUCTED. THE COURT ABUSED ITS DISCRETION BY TAKING NO ACTION IN RESPONSE.

The State argues that “it would have been pointless” for counsel to expressly seek more time to prepare with an expert to adduce mitigation testimony, since a five-year minimum mandatory sentence was inevitable on the aggravated battery count. (Answer brief at 11-12) The defendant’s actual sentence is five years in prison on the attempted manslaughter count with ten years in prison to follow on the aggravated battery count, that prison term to be followed by fifteen years on probation. The aggregate sentence of fifteen years in prison to be followed by fifteen years’ probation patently could have been significantly reduced.

The State argues that the record supports the court’s decision to press onward with sentencing, even though defense counsel clearly was going to call no witnesses to support his seat-of-the-pants arguments. Those arguments were that

the defendant's capacity to appreciate the criminal nature of his conduct, and his ability to conform his conduct to legal requirements, were impaired by his mental state. By their nature such arguments cry out for evidentiary support. In support of its defense of the trial court's handling of the matter, the State notes that the author of the pretrial competency evaluation in the record "concluded that the defendant had no major mental illness." (Answer brief at 10, n.1) As noted in the initial brief, that evaluator apprised the court he had been hampered in his work by being provided with no school or medical records, and the trial testimony was that the defendant was both bipolar and off his medications at the time of the incident that gave rise to the charges. The record as a whole does not support the State's sanguine view that the court in no way abused its discretion on this point.

POINT THREE

IN REPLY: THE RECORD SHOWS THAT COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE.

The State argues that it would be premature to decide any issues regarding ineffective assistance of trial counsel, since this court has "no knowledge of counsel's strategical thinking." (Answer brief at 14) It does not address any of the shortcomings at sentencing that were brought out in the initial brief, but only suggests that at trial, counsel may have decided against arguing for an instruction on non-deadly force because he thought that arguing anything other than deadly

force would have cost him credibility with the jury. (Answer brief at 14) As noted in the initial brief, defense counsel *did* argue to the jury "there's reasonable doubt whether deadly force was even used in this incident," despite the fact he sought no jury instruction on non-deadly force. (T 1313)

The State does not acknowledge or attempt to distinguish Copeland v. State, 277 So. 3rd 1137 (Fla. 5th DCA 2019), or the other similar cases cited in the initial brief on this point. (Cf. amended initial brief at 30-33 with answer brief at 13-16) Instead it relies on a concurring opinion from a First DCA panel decision which announces its author's view that *in the absence of a claim of either preserved error or fundamental error*, a District Court's assumption that it has jurisdiction over an appeal from a conviction is tenuous. The grounds for reversal in this case are based in the interplay between ineffective assistance of counsel and an inappropriate reaction by the trial court to that ineffectiveness; those grounds were *both* raised in part in the defense motion for new trial, and both amount to fundamental error to the extent they were not preserved. Copeland and the similar cited cases from the Second and Fourth DCA's warrant reversal in themselves in light of counsel's failure to seek a non-deadly-force instruction, and the record as a whole supports reversal on the ground of constitutionally ineffective assistance of counsel.

POINT FOUR

A. IN REPLY: ON THIS RECORD, IT WAS ERROR TO DENY THE PROPOSED SPECIAL INSTRUCTION SETTING OUT WHEN EXIGENT CIRCUMSTANCES PERMIT OFFICERS TO ENTER A HOME.

The State relies on 2003 and 2006 cases from this court which set out that decisions on which jury instructions to give are discretionary. (Answer brief at 17) The State does not acknowledge Rockmore v. State, 140 So. 3rd 979 (Fla. 2014), cited in the initial brief for the express holding that *de novo* review is proper on the question whether a requested special instruction should have been given. *De novo* review is proper on this point pursuant to Rockmore.

The State, as it did below, argues that no special jury instruction was necessary or even proper on the question what actions the law allows peace officers to undertake as exigent circumstances unfold. (Answer brief at 17-18) It concedes that it had to prove the officers were acting in the course of their legal duties. (Answer brief at 18) However, it takes the position that the difference between the parties' positions on that point was straightforward and strictly factual. As it describes the jury trial, "the defendant contended that the officers barged onto the property because they did not like the defendant and his girlfriend telling them to go away" and "the State contended that the officers entered the yard to check on the safety of the occupants and investigate the 911 call." (Answer brief at 18) Later the State again simplifies: "the issue in this case was whether the defendant

reasonably believed that the officers were not acting in accord with their legal duty to protect citizens and investigate the 911 call, but instead were there to harm him or his girlfriend." (Answer brief at 20-21) The questions for the jury were in fact more subtle: one was whether the officers' perceptions of an immediate need for help remained reasonable after their initial investigation into noise at the goat farm. Another was whether the deputies in any event exceeded the scope of their legal duties when they pulled down the fence and entered the Francis property. The proposed instruction would have assisted the jury by clarifying that officers may enter on private property to protect and serve the community, in cases where that is their sole motive. The State has cited no authority which brings that principle into question, and the existing instructions did not convey that principle. Accordingly, the requested jury instruction should have been read.

B. IN REPLY: THE WRITTEN AND ORAL DEADLY-FORCE INSTRUCTIONS DIFFERED FROM THE AGREED-ON INSTRUCTIONS. THE CHANGE AMOUNTED TO FUNDAMENTAL ERROR IN THAT IT MAY HAVE PRECLUDED THE JURY FROM FINDING THAT SELF-DEFENSE WAS SHOWN.

The State concedes that the anomaly in the instructions argued on this point was error, but denies it amounted to fundamental error. (Answer brief at 20) It takes the position that whether the deputies appeared to intend an aggravated assault or battery, or instead a non-aggravated assault or battery, was not contested below. The testimony at trial diverged as to whether the officers had deadly weapons in hand when they forcibly entered the property. *What the defendant reasonably perceived* at that juncture was at issue. As noted in the initial brief, the jurors may have abandoned consideration of self-defense if they believed - based on the erroneously-included language – that they must unanimously find that the officers, objectively speaking, appeared to be armed with deadly weapons, or else objectively appeared to intend great harm. Where a jury may have believed the defendant's version of events, and where that version of events makes out a prima facie case of a recognized affirmative defense, but the jurors may still have found guilt because of an error in their instructions, this court reverses on fundamental-error grounds. *See* Johnson v. State, 632 So. 2d 1062 (Fla. 5th DCA 1994).

POINTS FIVE AND SIX

IN REPLY: THE COURT ABANDONED ITS NEUTRAL ROLE, AND CUMULATIVE ERROR WARRANTS REVERSAL.

The State argues that Point Five was not adequately preserved for appeal, in that the defense "never saw fit to raise the issue at the time the alleged impropriety occurred." (Answer brief at 23-24) During trial, counsel approached the bench with the judge's permission and put on the record that he believed she was making objections for the State; the judge responded "if you don't want me to comment on what you're doing, please just do it properly." (T 883-85) Later during trial, again outside the jury's presence, counsel told the judge "I take exception to you commanding me how to ask questions and commanding the witnesses on how to answer questions and hamstringing our defense." (T 990-91) On that occasion the judge responded "I'm directing you to the follow the evidence code. Now let's bring the jury in." (T 991) During the charge conference, defense counsel asked the judge to "verbalize what you want me to do instead of giving me hand signals." (T 1115) The judge responded that she had held her hand up "palm facing you, in the international 'stop' signal." (T 1115) Counsel responded "No, you put your finger across your throat at me." (T 1115) The judge rejoined that she may have put her finger across her mouth to indicate "zip it while he's speaking...I did not put my

finger across my throat." (T 1116) These objections, in combination with the motion for new trial, put the court on notice of the position now taken by Appellant.

The State downplays the significance of the JQC proceeding that arose out of this trial and out of one other criminal case. *See* Inquiry Concerning a Judge No. 19-101 and No. 19-175 re: Robin C. Lemonidis, 2019 WL 5996619 (Fla. 2019), where the Florida Supreme Court adopted the recommendation of a public reprimand that was cited in earlier briefing in this appeal. The State argues that disciplinary matters involve a different standard than does evaluation of a criminal appeal. (Answer brief at 27) This is true: the Florida Supreme Court reviews JQC findings to determine if they are supported by clear and convincing evidence. *See* Inquiry Concerning…Lemonidis at *2. It does not follow that this court should be unconcerned with the Florida Supreme Court's holding that the judge in this case "failed to establish, maintain, and enforce the highest standard of conduct; did not promote public confidence in the integrity and impartiality of the judiciary; was not patient, dignified, and courteous to litigants and lawyers; and neglected to perform her judicial duties without evidencing bias or prejudice." *See* id. This is particularly true where, as here, the State argues that it is impossible to evaluate the issue of counsel's adequacy because this court has "no knowledge of…the expressions or tone used by counsel and the trial judge during these proceedings." (Answer brief at 14) The JQC's findings, unopposed by the judge and adopted by

the Florida Supreme Court, give this court the information it needs to conclude that the combined distractions to the jury in this case warrant reversal on cumulative-error grounds.

CONCLUSION

This court should reverse the judgment appealed from and remand for a new trial, on the grounds set forth in this brief and Appellant's Amended Initial Brief. If that relief is not forthcoming, this court should reverse the sentence appealed from and remand for a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with Florida's Rules of Appellate Procedure in that it is set in 14-point proportionally spaced Times New Roman font.

/s/ *Nancy Ryan*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing reply brief has been electronically served on the Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com and mailed to Appellant on this 30th day of December, 2019.

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