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

ROBERT FRANKLIN FLOYD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 1D11-4465

Opinion filed January 3, 2014.

An appeal from the Circuit Court for Santa Rosa County.
Gary L. Bergosh, Judge.

Michael Ufferman, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Giselle Denise Lylen, Assistant Attorney General, Tallahassee, for Appellee.

VAN NORTWICK, J.

Robert Franklin Floyd challenges his conviction for second degree murder and shooting into an occupied vehicle. Floyd raises six issues on appeal, but we need only address one. Because the trial court's conflicting instructions to the jury amounted to fundamental error, we reverse and remand for a new trial.

On February 27, 2010, Floyd was hosting a party at his residence. During that party, a dispute arose amongst some of those in attendance. According to the State's evidence, Floyd shoved one of the individuals, who in turn displayed a pistol and who then retreated to his vehicle with a companion. Floyd meanwhile retrieved a rifle from his vehicle. The State further contended at trial that Floyd was the first to fire his weapon. Floyd, however, maintained that the other two individuals first opened fire from their vehicle, and only then did he return fire. A bullet struck the passenger of the vehicle in his back, causing his death. Floyd claimed self-defense pursuant to the "stand your ground" law, section 776.012, Florida Statutes (2010).

Before jury deliberations commenced, the trial court issued the following instructions:

> If the Defendant was not engaged in any unlawful activity and was attacked in any place where he had the right to be, **he had no duty to retreat** and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or another, or to prevent the commission of a forcible felony.
>
> * * *
>
> However, the use of deadly force is not justifiable if you find:
>
> 1. Robert Franklin Floyd initially provoked the use of force against himself, unless[:]

> A. The force asserted towards the Defendant was so great that he reasonably believed that he was in imminent danger of death or great bodily harm **and had exhausted every reasonable means to escape the danger other than using deadly force** [, or]
>
> B. In good faith the defendant withdrew from physical contact with another person and clearly indicated to that person that he wanted to withdraw and stop the use of deadly force. But that person continued or resumed the use of force.

(Emphasis added).

On appeal, Floyd argues that one part of the instruction negated the other, such that while the jury was correctly told that Floyd had no duty to retreat, the jury was also told that Floyd had to exhaust every reasonable means of escaping danger. The State maintains that, when read as a whole, the jury instructions are not confusing or erroneous as to constitute fundamental error. We disagree.

In determining whether the jury instructions constituted fundamental error, we must consider "the effect of the erroneous instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel." Smith v. State, 76 So. 3d 379, 383 (Fla. 1st DCA 2011).

Section 776.012, Florida Statutes, provides that:

> A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. **However, a person is justified in the use of deadly force and does not have a duty to retreat if**:

> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or
>
> (2) Under those circumstances permitted pursuant to s. 776.013 [i.e., home protection].

(Emphasis added). In other words, if the use of deadly force is necessary to prevent imminent death or great bodily harm to oneself or others, then deadly force is justified without regard to any effort to retreat. The jury instruction at issue, however, defines justifiable use of deadly force as being dependent not only upon the degree of threat facing a defendant, but also upon the degree to which the defendant has made an effort to escape the threat. In effect, the trial court instructed the jurors that Floyd both did *and* did not have a duty to retreat.

Floyd's only defense at trial was that he had used deadly force to defend himself and others. The conflicting jury instructions negated each other in their effect, and therefore negated their possible application to Floyd's only defense. As the court in Carter v. State, 469 So. 2d 194, 196 (Fla. 2d DCA 1985), explained:

> [W]here, as here, a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant.

See also Richards v. State, 39 So. 3d 431 (Fla. 2d DCA 2010) (holding that the erroneous use of an outdated jury instruction on the justifiable use of deadly force

requiring the defendant to retreat if possible negated defendant's claim of self-defense and rose to the level of fundamental error); Grier v. State, 928 So. 2d 368 (Fla. 3d DCA 2006) (explaining that fundamental error exists when incorrect jury instructions negate defendant's sole defense).

We therefore reverse Floyd's convictions, vacate his sentences, and remand for a new trial on both counts. On remand, the trial court is reminded that discretionary costs must be orally pronounced at sentencing before such may be imposed in a written sentence. See Nix v. State, 84 So. 3d 424, 426 (Fla. 1st DCA 2012).

WOLF and CLARK, JJ., CONCUR.