IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2011

MARCUS BURTON,

Appellant,

v. Case No. 5D10-1399

STATE OF FLORIDA,

Appellee.

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Opinion filed April 8, 2011

Appeal from the Circuit Court
for Orange County,
John H. Adams, Sr., Judge.

James S. Purdy, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

ORFINGER, J.

Marcus Burton appeals his convictions of attempted second-degree murder, aggravated assault and shooting at or into a vehicle. Burton challenges his attempted second-degree murder conviction based on the trial court's un-objected use of Standard Jury Instruction (Criminal) 6.6 to instruct on the lesser-included offense of attempted voluntary manslaughter. We agree that the instruction was fundamentally flawed and

reverse for a new trial as to that charge. We affirm Burton's convictions for aggravated assault and shooting at or into an occupied vehicle without further comment.

In State v. Montgomery, 39 So. 3d 252 (Fla. 2010), approving Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), the supreme court held that the standard jury instruction for manslaughter by act was fundamentally erroneous because it required the State to prove that the defendant "intentionally caused the death" of the victim, although the intent to kill is not an element of manslaughter. 39 So. 3d at 256. Because the instruction required the jury to find that the defendant intended to kill the victim in order to convict of the lesser offense of voluntary manslaughter by act, the court reasoned that the defendant was deprived of the jury's full consideration of the category 1 lesser offense.

Since Montgomery, the First and Fourth District Courts of Appeal have considered whether its holding is equally applicable to the jury instruction for the offense of attempted manslaughter by act and in doing so, reached opposite results. In Lamb v. State, 18 So. 3d 734 (Fla. 1st DCA 2009), the First District, citing Montgomery, answered this question in the affirmative. See also Rushing v. State, 35 Fla. L. Weekly D1376, D1377 (Fla. 1st DCA June 21, 2010) (holding standard jury instruction for attempted voluntary manslaughter "suffers from the very same infirmities as the instruction in Montgomery").[1] Conversely, the Fourth District, in Williams v. State, 40 So. 3d 72 (Fla. 4th DCA 2010), ruled otherwise and certified conflict with Lamb.

[1] Because the instruction concerned an offense only one step removed from the crime for which the defendant was convicted, the error is not subject to a harmless error analysis. See Pena v. State, 901 So. 2d 781 (Fla. 2005).

Having considered the supreme court's holding in Montgomery, we believe the analysis in Lamb and Rushing is correct, and conclude that the jury instruction utilized here for attempted manslaughter, which required proof of intent to kill, was fundamental error.

For these reasons, we reverse Burton's conviction of attempted second-degree murder and remand for a new trial on that charge. In doing so, we certify express and direct conflict with Williams.

AFFIRMED in part; REVERSED in part; CONFLICT CERTIFIED.

GRIFFIN, J., concurs.
LAWSON, J., concurs, with opinion.

I agree with the majority that *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010), compels a reversal in this case. I write to briefly explain why, in my view, an unpreserved error in the instruction one step removed from the crime for which the defendant was convicted should not result in an automatic reversal.

Generally, "for jury instructions to constitute fundamental error, the error must 'reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *Taylor v. State*, 36 Fla. L. Weekly S72, (Fla. Feb. 10, 2011) (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla.1960)). In this case, there was no error in the instructions on the charge of attempted second degree murder, and the evidence fully supported Burton's conviction on that charge. In other words, there is absolutely no reason to question the validity of the verdict rendered in this case. The concern, rather, is that if the jury had been instructed properly as to manslaughter, it might have ignored the law and instructions requiring that a verdict be returned for the highest offense proven beyond a reasonable doubt and instead might have "'exercise[d] its inherent 'pardon' power by returning a verdict on the next lower crime . . . .'" *Montgomery*, 39 So. 3d at 259 (quoting *Pena v. State*, 901 So. 2d 781, 787 (Fla. 2005)).

In *Sanders v. State*, 946 So. 2d 953 (Fla. 2007), the supreme court explained that jury pardons have become an accepted part of our criminal jurisprudence even though they are not based upon any constitutional right afforded a defendant and are essentially "a device without legal foundation . . . 'a verdict rendered contrary to the law and evidence' and . . . an aberration." *Id.* at 958 (quoting *Willis v. State*, 840 So. 2d

1135, 1138 (Fla. 4th DCA 2003) (Klein, J., concurring specially)). In the interest of brevity, I will not repeat the thorough discussion of jury pardons contained in *Sanders*, but would rhetorically ask why we have a rule that requires a reversal solely designed to afford a new jury the dubious opportunity to "disregard its oath and the trial court's instructions" and to render a verdict to a lesser offense than the evidence and the law require, *id*. at 958, when the defendant never raised the issue at trial.

I certainly understand why a per se reversal rule would apply to preserved error in this context. For example, in *Reddick v. State*, 394 So. 2d 417, 418 (Fla.1981), the supreme court announced just such a rule, stating that "[t]he failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per se reversible." As explained in *Johnson v. State*, 53 So. 3d 1003 (Fla. 2010), "per se reversible error" is a rule adopted for some types of error *involving issues that are properly preserved for appellate review by motion or objection in the trial court*, but where the affected party would have difficulty demonstrating prejudice on appeal. In *Reddick*, a reversal was proper because the trial court failed to give a *defense-requested* instruction on a lesser offense that would have afforded the defendant an opportunity for a jury pardon. The issue was preserved for appellate review because it had been presented to the trial court, which rendered an incorrect legal ruling in declining to give the requested instruction.

In this case, by contrast, Burton never objected to the manslaughter instruction, and even agreed at trial that the jury should be instructed exactly as it was on this lesser offense. The very reason why a per se reversal rule is warranted in this context -- that a defendant could never show that a jury would have disregarded the law, ignored its

oath, and rendered an aberrant verdict -- also demonstrates that the unpreserved error was not fundamental. I believe that the supreme court was correct in *Sanders*, in holding that "the possibility of a jury pardon cannot form the basis for a finding of prejudice" in postconviction proceedings. And, for the reasons more fully explored in *Sanders*, I fail to see why our courts should apply a fundamental error standard in this context, when the supreme court has correctly held that a defendant cannot demonstrate prejudice based on an argument that if the jury had been "'given the opportunity . . . [it might have] ignored its own findings of fact and the trial court's instruction on the law and found a defendant guilty of only a lesser included offense.'" *Id*. at 959-60 (quoting *Hill v. State*, 788 So. 2d 315, 319 (Fla. 1st DCA 2001)). If not bound by *Montgomery*, I would affirm.