

**DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH
DISTRICT**

Jose Luis Cosme-Sella v. State of Florida

No. 4D18-3425 (Fla. 4th DCA July 1, 2020) · No. No. 4D18-3425 · Decided July 1, 2020

SUMMARY

The Florida Fourth District Court of Appeal affirmed the defendant's convictions for second-degree murder with a weapon and robbery with a weapon. It reversed and remanded for correction of the robbery sentence, which exceeded the statutory maximum, and directed correction of scrivener's errors in the judgment. The court otherwise rejected or found unpreserved the defendant's claims concerning sufficiency of the evidence, the independent-act instruction, and sentencing considerations.

CASE DETAILS

COURT	District Court of Appeal of the State of Florida, Fourth District
WRITING FOR THE COURT	Gerber, J.; Gross, J.; Forst, J.
JURISDICTION	Florida
DECIDED	July 1, 2020
DOCKET	No. 4D18-3425
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The defendant appealed his convictions and sentences for second-degree murder with a weapon and robbery with a weapon. He also challenged the denial by operation of law of his Florida Rule of Criminal Procedure 3.800(b)(2) motions to correct sentencing and judgment errors.
STANDARD OF REVIEW	The opinion applies sufficiency-of-the-evidence review, reviews unpreserved instructional-error claims for fundamental error, and reviews sentencing and judgment errors for legal correctness.
PRECEDENTIAL VALUE	Published opinion; precedential value indicated by the provided metadata.
PARTIES	Jose Luis Cosme-Sella v. State of Florida

TOPICS

sentencing

criminal procedure

appellate procedure

preservation of error

standard of review

PRACTICE AREAS

Florida criminal law

criminal sentencing

appellate criminal procedure

QUESTIONS PRESENTED

1. Whether sufficient evidence supported the conviction for second-degree murder with a weapon.
2. Whether the State improperly shifted the burden of proof concerning the elements of the independent-act instruction and whether the trial court's curative instruction was sufficient.
3. Whether the trial court fundamentally erred at sentencing by considering elements of first-degree felony murder after the jury did not convict the defendant of that offense.
4. Whether the thirty-two-year sentence for robbery with a weapon exceeded the statutory maximum.
5. Whether the judgment contained scrivener's errors requiring correction.

HOLDINGS

1. The evidence was sufficient to support the defendant's conviction for second-degree murder with a weapon.
2. Although the State's rebuttal argument could have been misinterpreted as shifting the burden of proof to the defendant, the trial court's immediate instruction reminding the jury that the defendant did not have to prove anything sufficiently cured any potential misinterpretation.
3. The trial court did not fundamentally err by considering first-degree felony murder elements when sentencing the defendant for second-degree murder with a weapon because the sentencing statements did not indicate that the court had considered those elements.
4. The thirty-two-year sentence for robbery with a weapon was unlawful because it exceeded the thirty-year statutory maximum, and the defendant was entitled to a thirty-year sentence running concurrently with the thirty-two-year murder sentence.
5. The judgment required correction because it cited the wrong statutory provision for second-degree murder with a weapon and incorrectly classified robbery with a weapon as a felony punishable by life.

KEY QUOTATIONS

"We agree this statement could have been misinterpreted as shifting the burden of proof on the independent act instruction's elements to the defendant." (1)

"A sentence can exceed the statutory maximum, but only if the lowest permissible sentence under the sentencing code exceeds the statutory maximum." (2)

FACTUAL BACKGROUND

The defendant was convicted of second-degree murder with a weapon as a lesser included offense of first-degree murder with a weapon, and robbery with a weapon. The trial court imposed a thirty-two-year sentence for each conviction. The robbery sentence exceeded the thirty-year statutory maximum because the defendant's lowest

permissible sentence under the sentencing code was 23.95 years. The judgment also contained incorrect statutory references and incorrectly classified the robbery offense as a felony punishable by life.

PROCEDURAL HISTORY

The Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County entered judgments convicting the defendant of second-degree murder with a weapon and robbery with a weapon and imposed sentences of thirty-two years for murder and thirty-two years for robbery. The defendant filed Rule 3.800(b)(2) motions challenging the robbery sentence and scrivener's errors in the judgment; the trial court did not rule on the motions, which were deemed denied. On appeal, the Fourth District affirmed the convictions and murder sentence, reversed the robbery sentence, and remanded for correction of the sentence and judgment.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Impose a thirty-year sentence on the robbery-with-a-weapon conviction, to run concurrently with the thirty-two-year sentence for second-degree murder with a weapon. The defendant need not be present for this ministerial correction. Correct the judgment to cite section 782.04(2), Florida Statutes (2016), for the second-degree murder conviction and section 812.13(2)(b), Florida Statutes (2016), for the robbery conviction, and classify the robbery as a first-degree felony with a thirty-year maximum sentence rather than a felony punishable by life.

CASES CITED

- Boggess v. State, 269 So. 3d 616, 621 (Fla. 4th DCA 2019)
- Asencio v. State, 244 So. 3d 294, 299 (Fla. 4th DCA 2018)
- Flewellen v. State, 98 So. 3d 210, 211 (Fla. 4th DCA 2012)

OPINION

PER CURIAM.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JOSE LUIS COSME-SELLA, Appellant, v. STATE OF FLORIDA, Appellee. No. 4D18-3425 [July 1, 2020] Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jeffrey J. Colbath, Judge; L.T. Case No. 2016CF009732. Carey Haughwout, Public Defender, and Christine C. Geraghty, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Marc B. Hernandez, Assistant Attorney General, West Palm Beach, for appellee. GERBER, J. The defendant appeals from his convictions and sentences for second degree murder with a weapon (as a lesser included offense of first degree murder with a weapon) and robbery with a weapon as charged.

The defendant raises five arguments: (1) the state did not present sufficient evidence to support his second degree murder with a weapon conviction; (2) the state shifted the burden of proof on the independent act instruction's elements to the defendant, and the trial court's curative instruction was insufficient; (3) the trial court fundamentally erred during sentencing by considering first degree felony murder elements after the jury did not find him guilty of that crime; (4) the trial court erred by sentencing him above the statutory maximum for robbery with a weapon; and (5) the trial court's judgment contains scrivener's errors for both convictions.

We affirm on the first three arguments, reverse and remand for sentence correction on the fourth argument, and remand to correct the scrivener's errors on the fifth argument. We address each argument in turn. On the first argument, we conclude, without further discussion, that sufficient evidence supported the defendant's second degree murder with a weapon conviction.

On the second argument, a brief portion of the state's rebuttal argument was stated in the passive voice – “So this is not an independent act, it doesn't apply in this case. And again, look at all those acts, it requires all three elements to be proven and they just weren't.” (emphasis added).

We agree this statement could have been misinterpreted as shifting the burden of proof on the independent act instruction's elements to the defendant. However, we conclude the trial court's immediate curative instruction, reminding the jury that the defendant did not have to prove anything, sufficiently cured any misinterpretation. See *Boggess v. State*, 269 So.

3d 616, 621 (Fla. 4th DCA 2019) (“[A]n immediate curative instruction on the burden of proof may be sufficient to clarify an issue at bar and remove any confusion.”); *Asencio v. State*, 244 So. 3d 294, 299 (Fla. 4th DCA 2018) (“[A]bsent a finding to the contrary, juries are presumed to follow the instructions given them.”) (citation omitted).

The defendant did not object to the curative instruction's sufficiency, and therefore did not preserve his argument on appeal that the trial court could have improved the curative instruction by expressly informing the jury that the state had the burden to disprove the independent act instruction's elements.

On the third argument, we conclude, without further discussion, that the trial court's statements during sentencing did not indicate the trial court had considered first degree felony murder elements when sentencing the defendant for second degree murder with a weapon.

On the fourth argument, the defendant's Florida Rule of Criminal Procedure 3.800(b)(2) motion to correct sentencing error argued the statutory maximum for robbery with a weapon is thirty years in prison, but the trial court had incorrectly sentenced the defendant to thirty-two years in prison on that conviction.

The trial court did not rule on the defendant's motion to correct sentencing error, so the motion was deemed denied. The state now concedes the trial court erred by sentencing the defendant above the statutory maximum for that conviction.

We agree with the state's concession of error. "A sentence can exceed the statutory maximum, but only if the lowest permissible sentence under the sentencing code exceeds the statutory maximum." *Flewellen v. State*, 98 So. 3d 210, 211 (Fla. 4th DCA 2012) (citation omitted).

Here, the defendant's lowest permissible sentence was 23.95 years, which did not exceed the thirty-year statutory maximum for robbery with a firearm. See §§ 812.13(2)(b), 775.082(3)(b), Fla. Stat. (2016). Thus, we reverse the sentence on that conviction (count II) and, as the defendant has requested, remand for the trial court to impose a thirty-year sentence on that conviction, to run concurrently with the thirty-two year sentence on the second degree murder with a weapon conviction (count I).

The defendant need not be present for this ministerial correction. On the fifth argument, the defendant's rule 3.800(b)(2) motion also argued the trial court's judgment misidentified the statute citation for second degree murder with a weapon, and misidentified robbery with a weapon as a punishable by life ("PBL") felony when it is a first degree felony. Again, the trial court did not rule on the defendant's motion to correct sentencing error, so the motion was deemed denied.

The state now concedes those scrivener's errors in the judgment require correction. We agree with the concession of error. On count I, the defendant was convicted of second degree murder with a weapon under section 782.04(2), Florida Statutes (2016), not section 782.04(1)(a)1. and 2. as indicated in the judgment (and corresponding to first degree premeditated murder and felony murder).

On count II, the defendant was convicted of robbery with a weapon under section 812.13(2)(b), Florida Statutes (2016), as a first degree felony punishable by a thirty-year maximum sentence, not as a first degree felony "PBL." We remand for the trial court to correct the scrivener's errors in the judgment accordingly. Based on the foregoing, we affirm the defendant's convictions for second degree murder with a weapon and robbery with a weapon, affirm the defendant's sentence for murder with a weapon, reverse and remand for correction of the defendant's sentence for robbery with a firearm, and remand for correction of the scrivener's errors in the judgment.

Affirmed in part, reversed in part, remanded for sentence corrections. GROSS and FORST, JJ., concur. * * * Not final until disposition of timely filed motion for rehearing. 3