IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, FLORIDA

ANTHONY JAVON MINCEY,

Appellant,

Case No.: 1D17-2312
L.T. No.: 16-2016-CF-010139

v.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF ON THE MERITS

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Before the Honorable Judge Steven Whittington

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PRELIMINARY STATEMENT

Appellant, ANTHONY JAVON MINCEY, the appellant before this court, and the defendant in the trial court, will be referenced in this brief as "Mr. Mincey" or "Appellant." Appellee, State of Florida, the prosecution authority in the trial court, will be referenced herein as "the State" or "Appellee." This Court has jurisdiction as this is a direct appeal arising from a circuit court's decision imposing final judgment adjudicating guilt. Fla. R. App. P. 9.030(b)(1)(A); 9.140(b)(1)(A).

References to the record on appeal will be designated by the relevant volume number followed by the relevant page number in parentheses. As an example, Volume one page 120 will be referenced as (R. Vol. I, p. 120). The record consists of three volumes.

STATEMENT OF THE CASE

The State charged Mr. Mincey with Aggravated Battery in a Detention Facility in violation of section 784.082(1), Florida Statutes. (R. Vol. I, p. 9-10). Following a jury trial, the jury returned a guilty verdict to the lesser included offense, Battery in a Detention Facility, in violation of section 784.082(3), Florida Statutes. (R. Vol. I, p. 41). Following the guilty verdict, Mr. Mincey filed a motion for new trial. (R. Vol. I, p. 63-6). Following argument prior to the sentencing hearing, the trial court denied this motion. (R. Vol. I, p. 77; 104-7). Mr. Mincey was designated as a habitual offender, (R. Vol. I, p. 67), and the trial court sentenced him to ten years

in prison to run consecutive to his life sentence. (R. Vol. I, p. 68-74). Thereafter, Mr. Mincey filed his timely notice of appeal, (R. Vol. I, 82-83), and this brief follows.

STATEMENT OF THE FACTS

A. State's Case-in-Chief

The State called four witnesses to prove its case. Three of those witnesses were law enforcement officers and one witness was the victim. The following details each witnesses' testimony:

Officer Daniel Levy: On November 20, 2016, the day of the incident that gives rise to this date, Officer Levy was employed with the Jacksonville Sheriff's Office in street patrol. (R. Vol. III, p. 302-303). Part of his responsibilities include responding to calls for service at the Duval County Jail. (R. Vol. III, p. 303). He responded to the jail due to the reported battery. (R. Vol. III, p. 303). On that date, he arrived he interacted with Mr. Mincey and did not observe any injuries on his person. (R. Vol. III, p. 304). For these types of calls, he looks for injuries to assist him in determining who was the primary aggressor and whether there was mutual combat between the individuals involved. (R. Vol. III, p. 304). After meeting with Mr. Mincey, he met with the victim, Mr. Thomas, at Shands Hospital. (R. Vol. III, p. 305). He observed that the victim had multiple recent injuries. (R. Vol. III, p. 305-7). Following his interaction with both Mr. Mincey and Mr. Thomas, Officer Levy

he added a charge to Mr. Mincey for "Battery upon an inmate in the Duval County jail." (R. Vol. III, p. 307).

Marcus Thomas: Mr. Thomas, the alleged victim, is a nine-time convicted felon with two additional misdemeanor crimes of dishonestly. (R. Vol. III, p. 308-9). During the trial, he was incarcerated in Duval County Jail. (R. Vol. III, p. 309). On November 20, 2016, he stated he was attacked "by some guys in the room" when he "was asleep." (R. Vol. III, p. 310). He stated that he woke up with "multiple guys in the room with their shirt[s] off" and "we started fighting and I was struck in the back of the head, and I blacked out. I woke up in the hospital. Then I don't recall nothing after that. I woke up again, I was back at the jailhouse." (R. Vol. III, p. 310-11) Mr. Thomas could not testify that Mr. Mincey was one of the individuals in his room nor could he testify that hit him at all. (R. Vol. III, p. 317).

Mr. Thomas described that his injuries included that his face was swollen, neck was hurting, and his back was hurting. (R. Vol. III, p. 311) Additionally, prior to being attacked, he had gold teeth, but those were missing after he woke up in the hospital. (R. Vol. III, p. 311)

Mr. Thomas stated that prior to being attacked he did not strike anyone first and he had no reason to hit Mr. Mincey. (R. Vol. III, p. 313). Additionally, he does not know a Mr. Antonio Atwater or Kevin Rushing. (R. Vol. III, p. 316).

Officer Simon: Officer Simon is a correctional officer at the Duval County Jail. (R. Vol. III, p. 320). On the day of the incident, she was working on the floor of the incident, (R. Vol. III, p. 320-1), and saw Mr. Thomas bloody and banging on the door to get out of the dorm. (R. Vol. III, p. 322-3). Thereafter, Mr. Thomas was taken to the hospital and the Jacksonville Sheriff's Office was called to the scene. (R. Vol. III, p. 323) She did not participate in the investigation at all regarding this incident. (R. Vol. III, p. 326).

Officer V. Anderson: Officer Anderson is employed at the Jacksonville Sheriff's Office and is assigned to the Duval County Jail. (R. Vol. III, p. 327) Officer Anderson was dispatched on the day of the incident for a medical emergency. (R. Vol. III, p. 328). He observed Mr. Thomas sitting on a bench with blood on his face. (R. Vol. III, p. 328). After observing him, he and the other responding officers went into the dorm and locked it down. (R. Vol. III, p. 329). When going through the dorm he found blood in Mr. Mincey's cell and observed Mr. Mincey washing blood off his hands. (R. Vol. III, p. 329-30).

Jail Calls: Following these witnesses, the Stated offered recorded jail calls into evidence via a stipulation between the parties. (R. Vol. III, p. 340). The trial court informed the jury that there was a stipulation between the parties regarding the admission of phone calls from the Duval County Jail from Mr. Mincey to another person. (R. Vol. III, p. 340). During this phone conversation, Mr. Mincey stated:

"Man, I ain't (inaudible) he gone about a week. One of his brothers snitched on me in my room and I had to fuck him up and all that shit there." (R. Vol. III, p. 341). The State rested following its publishing of the phone call. (R. Vol. III, p. 342).

B. Defense's First Motion for Judgment of Acquittal

Mr. Mincey's defense counsel argued a motion for judgment of acquittal as to the identity of Mr. Mincey being the person who caused the injuries because the alleged victim testified that there were multiple men in his room at the time, and he could not testify that Mr. Mincey ever struck him. (R. Vol. III, p. 343). The trial court denied the motion based on the phone call recording that established the State has established a *prima facie* case of guilt as to the charge in the information. (R. Vol. III, p. 343-44).

C. Appellant's Case-in-Chief

Mr. Mincey called to witnesses to support a claim that he acted in self-defense. Their testimony at trial was as follows:

Kevin Rushing: Mr. Rushing was incarcerated with Mr. Mincey on the day of the incident. On the day of the incident, Mr. Rushing and Mr. Atwater were walking around the dorm of the Duval County Jail together. (R. Vol. III, p. 351). He overheard an argument between Mr. Mincey and Mr. Thomas. (R. Vol. III, p. 352). Mr. Rushing knew who Mr. Mincey was but did not know who Mr. Thomas was before that day, nor does he know him know. (R. Vol. III, p. 352). He observed Mr.

Thomas yelling at Mr. Mincey and then saw Mr. Thomas hit Mr. Mincey with a closed fist in the face. (R. Vol. III, p. 352-53). After seeing Mr. Thomas hit Mr. Mincey, he observed them beginning to fight each other. (R. Vol. III, p. 353). He said Mr. Thomas was not asleep when he threw the first punch. (R. Vol. III, p. 354). After seeing the fight, both he and Mr. Atwater ran to get the correctional officer's attention and then the officers locked down the dorm. (R. Vol. III, p. 354). He was never interviewed by any Jacksonville Sheriff's Office officers about what he observed. (R. Vol. III, p. 354).

Antonio Atwater: On the date of the incident Mr. Atwater he was in the same dorm as Mr. Mincey and Mr. Thomas. (R. Vol. III, p. 362). Mr. Atwater stated that he was walking with Mr. Rushing and they were walking to Mr. Mincey's dorm room to look out his window. (R. Vol. III, p. 363). He overheard Mr. Thomas telling Mr. Mincey that he killed his cousin and Mr. Mincey was trying to step out of the room. (R. Vol. III, p. 363). He observed that Mr. Thomas was acting very aggressively. (R. Vol. III, p. 363-64). He then observed Mr. Thomas hit Mr. Mincey. (R. Vol. III, p. 364). He did not see Mr. Mincey swing first. (R. Vol. III, p. 365). He was never spoken to by anyone in the Jacksonville Sheriff's Office after the incident. (R. Vol. III, p. 366). Following Mr. Atwater's testimony, the defense rested. (R. Vol. III, p. 372).

D. Second Motion for Judgment of Acquittal

Following the defense's-case-in-chief, Mr. Mincey's counsel argued its second motion for judgment of acquittal. (R. Vol. III, p. 373). Defense counsel relied on *Fowler v. State*, 921 So. 2d 708 (Fla. 2d DCA 2011), for the proposition that "when self-defense has been established it's up to the State to prove beyond a reasonable doubt that it was not self-defense." (R. Vol. III, p. 373). The following argument then occurred:

> [MR. CARLISLE defense counsel:] [T]he State cannot carry that burden in this case, and in fact, their alleged victim in the case testified that there was at least four or five guys with their shirts off in the room, he can't testify that Mr. Mincey ever struck him at all. And now we have two witnesses who were never interviewed by the Jacksonville Sheriff's Office, that testified that Mr. Thomas was the aggressor, that he was accusing Mr. Mincey of killing his cousin, and that Mr. Thomas struck Mr. Mincey in the face, they tussled around was the testimony. And so, the case, on page 4, which would be the second full paragraph, we recognize that the question of whether a defendant committed a homicide in justifiable self-defense is ordinarily one for the jury to decide. However, when the State evidence is legally insufficient to rebut the defendant's testimony, in this case the defendant's witnesses' testimony, establishing self-defense the Court must grant a motion for judgment of acquittal. It's not even an option.
>
> So, Your Honor, we have established through our witnesses that Mr. Mincey was acting in self-defense, and the State has presented no evidence to rebut the testimony of Mr. Atwater and Mr. Rushing. The only evidence that they've presented is evidence that Mr. Thomas was beaten up, obviously. But I guess they're relying on the jail call where he said he had to F a person up. Well, obviously that's what he did. He's not talking to his lawyer, he's not talking to the officers, he's taking to somebody on the outside that is his buddy, and he's telling him what happened.

But as far as establishing self-defense, we've done that, and the State cannot prove beyond a reasonable doubt that Mr. Mincey did not act in self-defense by rebuttal, which they may offer a rebuttal case, or by inference in its case in chief.

So, You Honor, based on that we would ask the Court to grant the judgment of acquittal.

THE COURT: Couldn't one not take the jail call in the light most favorable to the State, and infer that Mr. Mincey was the aggressor. It's an argument for the jury to determine, I suggest to you anything more than that. But when you combine the injuries, which were not insignificant, the jail call, is that not enough to get passed the JOA? I haven't read the case and I'm going to.

MR. CARLISLE: You Honor, in our opinion, and our positions is that it's not legally sufficient based on two witnesses who have established that they have a minimal relationship with Mr. Mincey in the jail, they had no relationship with Mr. Thomas in the jail, they testified without – well, a stringent cross-examination of their testimony, that they saw Mr. Thomas as the aggressor, that he struck Mr. Mincey first, and that Mr. Mincey was defending himself So, according to the case, once we have established a defense of self-defense, the Court must grant a motion for judgment of acquittal when the State has not proven beyond every single doubt, and we don't feel that any jury can find beyond a reasonable doubt that Mr. Mincey was not acting in self-defense based on the evidence presented in the case.

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THE COURT: You may have a lack of proof that the State hasn't carried their burden of proof, that's a different issue, and that's clearly up to the jury to decide. The jury may find for a whole bunch of reasons the State hasn't proven their case.

MR. CARLISLE: And Judge, the way I'm reading the case is that there can never be a judgment of acquittal granted, if that is the logic that the Court would use. Because then it would be asking the Court to make a determination on whether the witnesses are credible. We're making the argument that as presented it is legally insufficient

> to rebut what we've established as self-defense, that the evidence that they presented is legally insufficient.
>
> THE COURT: All right. Ms. Smith, clearly the law is this, they presented a self-defense case now it becomes the State's burden to prove that's not right, do you agree?
>
> MS. SMITH [prosecutor]: I would read the case over lunch, Your Honor.
>
> THE COURT: Well, that's what self-defense is. You've got the burden shifted to you, and Mr. Carlisle is saying you haven't carries that burden. It's a legal question.
>
> MS. SMITH: Yes, Your Honor. I would agree, Your Honor. However, based on the jail call in which he stated that he had to F someone up, he never stated anything self-defense. Additionally, I mean, self-defense is only allowed to use the force reasonably necessary to defense yourself. Here everyone that testified for the State, except for Mr. Thomas, that there were no injuries visible on the defendant whatsoever. In fact, there were no signs that the defendant had been struck by Mr. Thomas in any way. However, Mr. Thomas, as we saw, was put in the hospital with extensive injuries, therefore the force that Mr. Mincey used, even if, for argument's sake, Mr. Thomas did strike him first, was not reasonably necessary to defense himself, he was not acting in self-defense.

(R. Vol. III, p. 373-78).

Thereafter, the trial counsel took a recess to review Fowler and make a decision on Mr. Mincey's second motion for judgment o acquittal. (R. Vol. III, p. 379).

When the trial court returned, he inquired whether the State or Mr. Mincey had any additional arguments. (R. Vol. III, p. 381). The State relied on its previous arguments that "the wording in the jail call, as well as the injuries to Mr. Thomas, as well as the lack of injuries, that self-defense wasn't established." (R. Vol. III, p. 381).

The trial court then stated, "Well, self-defense was established." (R. Vol. III, p. 381).

The trial court then denied the motion stating the following:

> THE COURT: Well, I've read carefully the *Fowler v. State* case that the defense presented, and if there is a reasonable hypothesis of innocence that is not rebutted by the State, then I should and must grant the judgment of acquittal. Not so much based on the jail call, that's part of it, and not so much based on the injuries and lack thereof. But really Mr. Thomas did testify and Mr. Thomas testified, I did not strike anybody, I was attacked while I was asleep. That is inconsistent with the defendant's claim of self-defense. They both can't be true. So, the State has presented to me a theory that is completely inconsistent and would exclude all reasonable hypothesis of innocence regarding self-defense.
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> ***
>
> But I do think under the standard at issue, which is the judgment of acquittal in the light most favorable to the State, the defense accepts all facts as true for the purposes of this motion, and I'm to read those facts, again, in the light most favorable to the State, I do think they have presented a *prima facie* case and have excluded, through Mr. Thomas' testimony, that he was attacked while sleeping. So, I'll deny the renewed motion for judgment of acquittal, although it was a very good motion and argument, Mr. Carlisle.

(R. Vol. III, p. 382).

Thereafter, the parties began discussing the jury instructions during the charge conference. (R. Vol. III, p. 382).

E. Charge Conference: Request for justifiable use of deadly force instruction

Prior to the charge conference, Mr. Mincey's counsel stated that he was requesting an instruction for the justifiable use of both deadly and nondeadly force. (R. Vol. III, p. 379). The State objected to Mr. Mincey's request for the deadly force

instruction. (R. Vol. III, p. 384). Mr. Mincey's counsel made the following argument in support of this instruction:

> [MR. CARLISLE:] If we're looking at the standard instructions for justifiable use of deadly force, it says give if applicable. Under Florida Statute, 776.012, defendant was justified in using, or in this case Mr. Mincey was justified in using deadly force if he reasonably believed that such was force was necessary to prevent, and then it gives all the different options. And I would actually rely on the imminent commission of applicable, forcible felony listed in 776.08, and that forcible felony would be a battery in a detention facility.
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> THE COURT: So, if that battery in a detention facility is an enumerated offense listed in 776.08, you'd be right.
>
> MR. CARLISLE: And Your Honor, the last sentence in that statute is any other felony which involves the use or threat of physical force or violence against any individual, battery in a detention facility is a violent felony. It is a felony that involves the use of force, as described by the statue.
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> ***
>
> MS. SMITH: … While battery in a detention facility is, indeed a felony, I would argue that would go against legislative intent as the other felonies are listed. This is a simple battery, a misdemeanor outside of the jail. It's simply that because it was in the detention facility that it is now enhanced to a felony. So, for example, if Mr. Mincey or Mr. Thomas has two prior batteries, just because it would not be a felony battery doesn't mean that that would also, if they could show that he knew Mr. Thomas had two prior batteries, I don't think that would then allow them to get it under the forcible felony catchall. Because it would still be a simple misdemeanor battery, but for the fact he had two prior batteries. And this is the same, if but for the fact that it was in the jail, it would not be a felony, certainly not a forcible felony.
>
> THE COURT: All right, Mr. Carlisle, your argument is?

> MR. CARLISLE: Judge, I'm just looking to the plain language of the statute, any other felony which involves the use or threat of physical force or violence against any individual. Battery in a detention facility is a felony, it involved the use of physical force or violence, plain language of the statute.

(R. Vol. III, p. 385-87).

Thereafter, the trial court granted Mr. Mincey's request based on the plain language of the statute. (R. Vol. III, p. 393). However, the State then requested the trial court revisit the issue based on the decision of *State v. Hearns*, 961 So. 2d 211 (Fla. 2007). (R. Vol. III, p. 395).

The State argued that in *Hearns* the State was trying to enhance the defendant's sentence as a violent career criminal based on a conviction for battery on a law enforcement officer arguing it was a forcible felony. (R. Vol. III, p. 395). However, the Florida Supreme Court held it was not. (R. Vol. III, p. 395-96). The State argued that the location of the battery cannot be the basis for finding that the battery in a detention facility is a forcible felony for purposes of receiving this instruction. (R. Vol. III, p. 396). Mr. Mincey's counsel argued in response that the "evidence that was presented at trial is that Mr. Thomas committed a battery in the classical sense, in that he punched Mr. Mincey in the face. We're not talking about a touching, we're talking about a strike to the face." (R. Vol. III, p. 396-97). In response the State said, "regardless of what the facts are, that would still be the intent, whether it's a punch in the face or a push in the lunch line. So it would still

be qualifying a simple battery as something that now allows the other party to use deadly force." (R. Vol. III, p. 397). Based on the argument of the parties, and *Hearns,* the trial court reversed its decision and denied Mr. Mincey's request for this instruction but noted that Mr. Mincey's counsel had preserved the issue for appeal. (R. Vol. III, p. 398-99).

F. Jury Verdict

Following closing arguments, the jury returned a guilty verdict to the lesser included offense of battery in a detention facility. (R. Vol. III, p. 467).

G. Motion for New Trial

Following the jury's verdict, Mr. Mincey's defense counsel filed a motion for new trial. (R. Vol. I, p. 63-5), In that motion he cited to Rule 3.600, Florida Rule of Criminal Procedure, and argued the "verdict is contrary to the weight of the evidence". (R. Vol. I, p. 65). In that motion, he argued that, as he similarly argued during Mr. Mincey's second judgment of acquittal, the State failed to rebut Mr. Mincey's self-defense claim beyond a reasonable doubt. (R. Vol. I, p. 63-5). Prior to sentencing, the trial court heard argument on this motion. (R. Vol. I, p. 104-7).

At that hearing, defense counsel stated that his argument was "essentially the same argument [he] made at the close of the defense case"; namely, that the "the State did not prove beyond a reasonable doubt Mr. Mincey did not act in self-defense." (R. Vol. I, p. 104). Following argument, the trial court stated the following:

> THE COURT: All right. Well, at the time I thought it was a good argument. The State certainly presented a *prima facie* case of guilt, taking the evidence in the light most favorable to the State, which is the standard that I'm to use.
>
> And also was sufficient to get beyond the case of the State versus Law (phonetic) and the reasonable hypothesis of innocence, so that the matter should be properly presented to the jury and it was presented to the jury, and the jury return a verdict that it did. So, for those reasons I'll deny the motion for new trial.

(R. Vol. I, p. 106-7).

Thereafter, the trial court entered an order denying Mr. Mincey's motion for a new trial. (R. Vol. I, p. 77).

SUMMARY OF ARGUMENT

The trial court erred in three ways: (i) the trial court erred in denying Mr. Mincey's second motion for judgment of acquittal; *infra* Argument, § I at 17-21**;** (ii) the trial court erred in denying Mr. Mincey's request for a justifiable use of deadly force instruction; *infra* Argument, § II, at 22-30 and (iii) the trial court erred in denying Mr. Mincey's motion for a new trial. *Infra* Argument, § III at 30-34. Accordingly, Mr. Mincey's arguments can be summarized as follows:

1. The trial court should have granted Mr. Mincey's second motion for judgment of acquittal because the State failed to overcome his self-defense claim beyond a reasonable doubt. The trial court erred in three ways by denying this motion. First, the trial court applied the incorrect standard of a reasonable hypothesis of innocence when evaluating this motion which only applies when there is an issue

of circumstantial evidence. This is the incorrect standard to apply since there were two witnesses that offered direct evidence that Mr. Thomas was the aggressor. Second, the State failed to offer a sufficient evidence to rebut the testimony of the two witnesses because, even in viewing its argument *de novo*, neither demonstrate Mr. Mincey was the primary aggressor. Third, the trial court's reliance on Mr. Thomas' testimony as the sole basis to deny the motion was not a legally sufficient reasons because Mr. Thomas said he could not testify that Mr. Mincey struck him at all.

2. The trial court should have allowed the justifiable use of deadly force instruction because the requested instruction accurately stated the applicable law, the facts in the case supported giving the instruction, and the instruction was necessary to allow the jury to properly resolve all issues in the case. The trial court erred by erroneously finding that the battery in a detention facility cannot be a forcible felony pursuant to section 776.08, Florida Statutes based on *Hearns*. However, *Hearns* does not apply because it applies to whether an offense can be a forcible felony for purposes of a sentencing enhancement, not whether the factual basis for an instruction should be given at trial. These are two different issues all together.

3. The trial court erred in denying Mr. Mincey's motion for a new trial in two ways. First, the record makes clear the trial court failed to exercise its unique

discretion to assess the weight of the evidence. Second, the trial court erred because the evidence was legally insufficient to rebut Mr. Mincey's self-defense claim as a matter of law.

Based on the foregoing, Mr. Mincey's conviction and sentence should be reversed and remanded for further proceedings in accordance with this Court's direction.

ARGUMENT

Issues presented.

I. **Whether the trial court erred in denying Mr. Mincey's second motion for judgment of acquittal?**

II. **Whether the trial court erred in denying Mr. Mincey's request for the standard jury instruction regarding the justifiable use of deadly force?**

III. **Whether the trial court erred in denying Mr. Mincey's motion for a new trial?**

Merits.

I. THE TRIAL COURT ERRED BY NOT GRANTING MR. MINCEY'S SECOND MOTION FOR JUDGMENT OF ACQUITTAL

A. Standard of Review

The standard of review on the denial of a motion for judgment of acquittal is *de novo*. *Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002).

B. Trial court erred in denying Mr. Mincey's second motion for judgment of acquittal because the State failed to overcome his self-defense claim beyond a reasonable doubt.

The State must prove the defendant's guilt beyond a reasonable doubt, and when the defendant presents a *prima facie* case of self-defense, the State's burden includes "'proving beyond a reasonable doubt that the defendant did not act in self-defense.'" *Thompson v. State*, 552 So. 2d 264, 266 (Fla. 2d DCA 1989) (quoting *Hernandez Ramos v. State*, 496 So. 2d 837, 838 (Fla. 2d DCA 1986)). "While the

defendant may have the burden of going forward with evidence of self-defense, the burden of proving guilt beyond a reasonable doubt never shifts from the State, and this standard broadly includes the requirement that the State prove that the defendant did not act in self-defense beyond a reasonable doubt." *Brown v. State*, 454 So. 2d 596, 598 (Fla. 5th DCA 1984), *superseded by statute on other grounds as stated in Thomas v. State*, 918 So. 2d 327 (Fla. 1st DCA 2005).

The question of whether a defendant was justified in using force to defense one's self is ordinarily one for the jury; however, when the State's evidence is legally insufficient to rebut the defendant's testimony establishing self-defense, the court must grant a motion for judgment of acquittal. *Fowler v. State*, 921 So. 2d 708 (Fla. 2d DCA 2006); *State v Rivera*, 719 So. 2d 335, 337 (Fla. 5th DCA 1998); *Sneed v. State*, 580 So. 2d 169, 170 (Fla. 4th DCA 1991). Here, the trial court erred in denying Mr. Mincey's second motion for judgment of acquittal.

Critically, Mr. Thomas never identified Mr. Mincey as one of the individuals in his room at the time of the battery, nor did he testify that he hit him at all. (R. Vol. III, p. 317). The only evidence presented by the State that Mr. Mincey was involved at all was Officer V. Anderson's testimony that he observed Mr. Mincey washing blood off of his hands immediately after the incident, (R. Vol. III, p. 329-30), and the phone call in which Mr. Mincey stated he had to "fuck him up[.]" (R. Vol. III, p. 342). Mr. Mincey offered two witnesses that offered direct evidence that Mr.

Thomas was the primary aggressor. (R. Vol. III, p. 352-53; 364-65). The trial court found that Mr. Mincey offered a sufficient basis to establish a self-defense claim. (R. Vol. III, p. 373-78; 381). The parties all agreed that the burden shifted to the State to establish beyond a reasonable doubt that Mr. Mincey did not act in self-defense. (R. Vol. III, p. 373-78). To rebut the motion, the State offered no further testimony or evidence. Rather, the State relied on "the jail call in which he stated that he had to F someone up, he never stated anything self-defense" and the fact the force was allegedly not proportional. (R. Vol. III, p. 378; 381).

In denying the motion, the trial court stated that, "if there is a reasonable hypothesis of innocence that is not rebutted by the State, then I should and must grant the judgment of acquittal." (R. Vol. III, p. 382). In denying the motion, the trial court stated its was "[n]ot so much based on the jail call … [and] and not so much based on the injuries and lack thereof. But really Mr. Thomas … [testified] I did not strike anybody, I was attacked while I was asleep. That is inconsistent with the defendant's claim of self-defense. They both can't be true. So, the State has presented to me a theory that is completely inconsistent and would exclude all reasonable hypothesis of innocence regarding self-defense." (R. Vol. III, p. 382). The trial court further stated that "I do think [the State has] presented a *prima facie* case and have excluded, through Mr. Thomas' testimony, that he was attacked while sleeping. So, I'll deny the renewed motion for judgment of acquittal, although it was

a very good motion and argument, Mr. Carlisle." (R. Vol. III, p. 382). Based on the foregoing reasoning, the trial court erred by denying this motion in three ways.

First, the trial court applied the incorrect standard. The reasonable hypothesis of innocence standard applies when there is an issue of circumstantial evidence and the defendant's theory is not rebutted by the State's theory of guilt. *State v. Law*, 559 So. 2d 187 (Fla. 1989). This is the incorrect standard to apply since there were two witnesses that offered direct evidence that Mr. Thomas was the aggressor. (R. Vol. III, p. 352-53; 364).

Second, the State failed to offer sufficient evidence to rebut the testimony of the two witnesses. The trial court specifically rejected the State's two bases for how it rebutted the motion for judgment of acquittal, i.e., the jail calls and allegedly disproportionate force. (R. Vol. III, p. 373-78; 382). Even if it accepted the jail calls as a means to rebut this self-defense claim, this would be insufficient because there was no testimony that Mr. Mincey was the primary aggressor, only that he "F'ed" someone up. This is neither evidence of self-defense, nor that he was the primary aggressor. One can still win a fight even if one did not start the fight. Further, the proportionality of the force used is a different question than who was the primary aggressor. Even if that was considered, again, the evidence was that Mr. Thomas struck Mr. Mincey in the face first. (R. Vol. III, p. 352-53; 364). There was no evidence offered that Mr. Mincey did anything else but Mr. Mincey defending

himself after Mr. Thomas struck him in the face. (R. Vol. III, p. 352-53; 364). While Mr. Thomas had some injuries, the proportionality of the force should have been a question for the jury to decide if the self-define claim was rebutted.

Third, the trial court's reliance on Mr. Thomas' testimony does not rebut Mr. Mincey's claim of self-defense. The trial court stated that "I do think [the State has] presented a *prima facie* case and have excluded, through Mr. Thomas' testimony, that he was attacked while sleeping." (R. Vol. III, p. 382). In essence, the trial court is solely relying on Mr. Thomas' testimony for the basis of rebutting Mr. Mincey's claim of self-defense. However, this cannot be a legally sufficient basis to rebut the testimony because Mr. Thomas stated that he cannot testify that Mr. Mincey was one of the individuals that struck him, nor was even in the room when he was attacked. (R. Vol. III, p. 317). Because the trial court, and the State, acknowledged that Mr. Mincey's case-in-chief shifted the burden to the State, (R. Vol. III, p. 373-78), the evidence had to rebut his witnesses' testimony. It did not.

Therefore, based on the foregoing grounds, and reviewing this issue *de novo*, the trial court erred in denying Mr. Mincey's second motion for judgment of acquittal. Accordingly, this court should reverse and remand vacating Mr. Mincey's judgment and sentence.

II. THE TRIAL COURT ERRED WHEN IT DENIED MR. MINCEY'S REQUEST FOR A STANDARD JURY INSTRUCTION

A. Standard of Review

In cases involving the withholding of requested jury instructions, the First District Court of Appeals has explained its standard of review as follows:

> A trial court's decision on the giving or withholding of a proposed jury instruction is reviewed under the abuse of discretion standard of review. On appeal, the trial court's ruling on a jury instruction is presumed correct. Appellant has the burden to demonstrate reversible error in the lower court's refusal to give the requested instruction. Each party has the right to have the court instruct the jury on the law applicable to the evidence under the issues presented. A trial court's mere failure to give a requested instruction, if erroneous, does not constitute per se reversible error.

Langston v. State, 789 So. 2d 1024, 1026 (Fla. 1st DCA 2001) (internal citations and quotations omitted). However, the failure of the trial court to provide a charge which lays down standards for the jury to follow under the varying permissible views of the evidence constitutes reversible error. *See Barnes v. State*, 93 So. 2d 863 (Fla. 1957); *Glenn v. State*, 78 So. 3d 675, 677 (Fla. 5th DCA 2012). This issue is preserved when an oral request for a standard jury instruction is denied by the trial court and there is evidence that supports a theory the defendant acted in self-defense. *Holley v. State*, 423 So. 2d 562, 563 (Fla. 1st DCA 1982).

B. The trial court erred in denying Mr. Mincey's request for a standard jury instruction regarding the justifiable use of deadly force.

The following test is applied to cases where the trial court refuses to instruct the jury in the manner requested by a defendant:

> [T]he failure to give a requested jury instruction constitutes reversible error where the complaining party establishes that: (1) The requested instruction accurately states the applicable law, (2) the facts in the case support giving the instruction, and (3) the instruction was necessary to allow the jury to properly resolve all issues in the case.

Truett v. State, 105 So. 3d 656, 658 (Fla. 1st DCA 2013) (quoting *Alderman v. Wysong & Miles Co*., 486 So. 2d 673, 677 (Fla. 1st DCA 1986)). It is well-settled that "[a] defendant has the right to a jury instruction on the law applicable to his theory of defense where *any trial evidence* supports that theory." *Gardner v. State*, 480 So. 2d 91, 92 (Fla. 1985) (emphasis added).

(1) The requested instruction accurately stated the applicable law.

Mr. Mincey requested the standard jury instruction for the justifiable use of deadly force. Fla. Std. Jury Instr. (Crim.) 3.6 (f). This instruction derives from Florida's self-defense law. Self-defense is "an affirmative defense that has the effect of legally excusing the defendant from an act that would otherwise be a criminal offense." *Mosansky v. State*, 33 So. 3d 756, 758 (Fla. 1st DCA 2010). The "justifiable use of force is recognized as a somewhat complex area of law that will

necessarily yield complex jury instructions." *State v. Floyd*, 186 So. 3d 1013, 1022 (Fla. 2016).

The laws concerning justifiable use of force are mostly codified in Chapter 776 of the Florida Statutes. Section 776.012, "Use of force in defense of person," discusses the use of force, both deadly and non-deadly, in defense of one's self:

> 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[.]

§ 776.012, Fla. Stat. (2017).

The Florida Supreme Court promulgated approved standard jury instructions in support of the justifiable use of force law as enacted by the Florida Legislature. *See, e.g.*, Fla. Std. Jury Instr. (Crim.) 3.6 (f) (Justifiable Use of Deadly Force) and (g) (Justifiable Use of Nondeadly Force).

Here, as stated above, Mr. Mincey requested the standard jury instruction for the justifiable use of deadly force as promulgated in Florida Standard Jury Instruction 3.6 (f). (R. Vol. III, p. 379). Therefore, because this instruction was promulgated by the Florida Supreme Court, the requested instruction accurately stated the applicable law. *Truett*, 105 So. 3d at 660 ("Truett's requested alibi

instruction accurately reflects the law, because he was requesting the Florida Supreme Court approved standard alibi instruction.").

(2) The facts in the case support giving the instruction.

The question of whether the facts supported giving the instruction became a mixed question of fact and law during the charge conference. The trial court unequivocally stated Mr. Mincey offered a sufficient factual basis to support a self-defense claim. (R. Vol. III, p. 381). During the charge conference, there was no objection to his requested non-deadly force standard jury instruction. However, the State objected to Mr. Mincey's request for the deadly force standard jury instruction. (R. Vol. III, p. 384). Mr. Mincey's argument relied on a plain reading of sections 776.012 and 776.08, (R. Vol. III, p. 385-7), but the trial court relied *Hearns* to deny this request. 961 So. 2d at 211. The trial court erred in its reliance on *Hearns*. The question for the trial court when denying a request for a jury instruction is only whether the *facts* at trial support the giving the instruction. *Gardner*, 480 So. 2d at 92 ("[a] defendant has the right to a jury instruction on the law applicable to his theory of defense where *any trial evidence* supports that theory."). As discussed more fully below, the facts (and the law) supported giving this instruction.

The Florida Legislature has defined a "forcible felony" to include a series of enumerated offenses, including sexual battery and aggravated battery. § 776.08, Fla. Stat. The statute includes a catchall provision that defines a forcible felony as "any

other felony which involves the use or threat of physical force or violence against any individual." *Id.* The Florida Legislature has defined an assault or battery that occurs while in a detention facility as follows:

> Whenever a person who is being detained in a prison, jail, or other detention facility is charged with committing an assault or aggravated assault or a battery or aggravated battery upon any visitor to the detention facility or upon any other detainee in the detention facility, the offense for which the person is charged shall be reclassified as follows:
>
> (1) *In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.*
>
> (2) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
>
> (3) *In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.*
>
> (4) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

§ 784.082(1)-(4), Fla. Stat. (2017) (emphasis added).

This particular statute does not further define the offenses of aggravated battery or battery. *Id.* Rather, the Florida Standard Jury Instructions directs that the applicable standard jury instructions for these offenses should be used to define the crimes. Fla. Std. Jury Instr. (Crim.) 8.21 (referencing Fla. Std. Jury Instr. (Crim.) 8.3 (battery) and 8.4and/or 8.4(a) (aggravated battery)).

When viewing these referenced instructions, both cite the respective statues of each offense as basis for each instruction on each offense. *Id.* (citing §§ 784.03

and 784.045, Fla. Stat.). Accordingly, a battery is defined as occurring when an individual either: "1. [a]ctually and intentionally touches or strikes another person against the will of the other; or 2. [i]ntentionally causes bodily harm to another person." § 784.03(1)(a)1.-2., Fla. Stat. (2017). In pertinent part, an aggravated battery is defined as occurring when a person, "in committing battery [either:] 1. [i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or 2. [u]ses a deadly weapon." § 784.045(1)(a)1.-2., Fla. Stat. (2017).

For purposes of sentencing, when determining whether a certain offense is a forcible felony courts must consider only the statutory elements of the offense, "not whether in the particular case the evidence showed that force or violence had been used." *Ellis v. State*, 135 So. 3d 478, 480 (Fla. 2d DCA 2014); *Terry v. State*, 207 So. 3d 1037, 1038 n. 1 (Fla. 1st DCA 2017) (noting that as "[c]ounter-intuitive [as] it may be, felony battery is not a forcible felony since a battery can be committed by touching another against the person's will.") (citing to *Hearns*, §§ 776.08 and 784.03, Fla. Stat.); *c.f., Johnson v. United States*, 559 U.S. 133, 140-141, 130 S. Ct. 1265, 1271, 176 L. Ed. 2d 1, 9 (2010) (disagreeing with *Hearns* and holding "We think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force--that is, force capable of causing physical pain or injury to another person. … When the adjective 'violent' is attached to the noun

'felony,' its connotation of strong physical force is even clearer." (internal citations omitted) (emphasis maintained).

Based on *Hearns*, the trial court denied Mr. Mincey's request for the standard jury instruction. (R. Vol. III, p. 398-99). However, whether the facts support a jury instruction, or whether that same offense supports a sentencing enhancement pursuant to a special sentencing statute, are two different issues. The second question to be answered when the trial court refuses to instruct the jury in the manner requested by a defendant is whether the "facts in the case support giving the instruction," not whether the offense can enhance a defendant's sentence under a special sentencing statute. *See, e.g., Truett*, 105 So. 3d at 658 (quoting *Alderman*, 486 So. 2d at 677). Here, the facts in the case support giving the instruction. The standard jury instruction should have been given. *See* Fla. Std. Jury Instr. (Crim.) 3.6 (f).

Pursuant to section 776.08, Florida Statutes, a forcible felony under the catchall is "any other felony which involves the use or threat of physical force or violence against any individual." *Id.* Here, either type of battery committed is a felony under section 784.082, Florida Statutes. § 784.082(1) (aggravated battery becomes a felony of the first degree); § 784.082(3) (battery becomes a felony of the third degree), Fla. Stat. Further, these felonies include both the use, and the threat of physical force or violence against any individual. *See* §§ 784.03(1)(a)1.-2.; §

784.045(1)(a)1.-2., Fla. Stat. The elements support this instruction, but more importantly, so do the facts presented at trial.

Factually, the testimony that was presented demonstrated that the alleged victim clearly used physical force and violence when he punched Mr. Mincey in the face. Thus, looking at both the elements, and critically, the facts of this case, the testimony in this case supported giving this instruction. Because there is a critical legal difference between designating a defendant as eligible for an enhanced sentence, and a defendant's request for a jury instruction, the trial court erroneously relied on *Hearns* as a basis for denying the defendant's requested instruction, and the trial court should have provided this instruction based on the facts at trial.

(3) The instruction was necessary to allow the jury to properly resolve all issues in the case.

This instruction was necessary to allow the jury to properly evaluate the issues in the case because Mr. Mincey had introduced evidence that he was acting in self-defense. The trial court found this evidence was sufficient to support a self-defense claim. As stated above, factually, the offense of either battery or aggravated battery in a detention facility is a "forcible felony" under the plain language of section 776.08, Florida Statutes. Although the deadly force and nondeadly force instructions are similar in many ways, the instructions are different in both the type of force that may be used, and the duty to retreat. The deadly force instruction does not require the defendant to retreat, Fla. Std. Jury Instr. (Crim.) 3.6 (f), whereas the nondeadly

force instruction is silent as to this issue. Fla. Std. Jury Instr. (Crim.) 3.6 (g). Here, Mr. Mincey was prevented from relying on this instruction, and this further defense that he did not have a duty to retreat because of the trial court's denial. Therefore, it was harmful error for the trial court to refuse to give Mr. Mincey's requested deadly force instruction to the jury.

III. THE TRIAL COURT ERRED IN DENYING MR. MINCEY'S MOTION FOR NEW TRIAL

A. Standard of Review

The trial court must determine whether or not "a greater amount of credible evidence supports" the verdict when ruling on a motion for new trial on grounds the verdict is against the manifest weight of the evidence. *Hartzog v. State*, 133 So. 3d 570, 573 (Fla. 1st DCA 2014). Generally, on appeal from an order denying a motion for new trial, the appellate court reviews for an abuse of discretion. *See Brown v. Estate of Stuckey*, 749 So. 2d 490, 497-98 (Fla. 1999). However, where it is alleged the evidence was insufficient as a matter of law, the proper standard of review is *de novo*. *See Mistretta v. Mistretta*, 31 So. 3d 206, 208 (Fla. 1st DCA 2010) (recognizing "'when a motion for new trial addresses only issues of law, the standard of review is essentially *de novo*'") (quoting *State Farm Mut. Auto. Ins. Co. v. Williams*, 943 So. 2d 997, 999-1000 (Fla. 1st DCA 2006)).

B. Trial court erred in denying Mr. Mincey's motion for a new trial because the trial court failed to exercise its unique discretion to assess the weight of the evidence claim.

Florida Rule of Criminal Procedure 3.600(a)(2) provides that the trial court shall grant a new trial if it is established "that the verdict is contrary to law or the weight of the evidence. . . ." Regarding the weight of the evidence analysis, this rule "enables the trial judge to weigh the evidence and to determine the credibility of witnesses so as to act, in effect, as an additional juror." *Tibbs v. State,* 397 So.2d 1120, 1123 n. 9 (Fla. 1981), *aff'd, Tibbs v. Florida*, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). Where "the record leaves no doubt that the trial court failed to exercise its unique discretion to assess a weight of the evidence claim, reversal and remand for appropriate findings are required." *Uprevert v. State*, 507 So. 2d 162, 163-164 (Fla. 3d DCA 1987) (citing *Adams v. State*, 417 So.2d 826 (Fla. 1st DCA 1982) (where order denying defendant's motion for new trial raising *weight* of evidence issue is worded in such a way as to indicate that trial court may have limited itself to *sufficiency* of evidence issue, reversal and remand are required)); *see also Jordan v. State*, 470 So.2d 801 (Fla. 4th DCA 1985).

There is a critical distinction between the "sufficiency of the evidence" standard and the "weight of the evidence" standard. *Moore v. State*, 800 So. 2d 747 (Fla. 5th DCA 2001). "Sufficiency of the evidence" is a test of whether the evidence presented is legally adequate to permit a verdict. *Id.* Alternatively, the "weight of the

evidence" tests whether a greater amount of credible evidence supports one side of an issue or the other. *Id.*; *see also State v. Hart*, 632 So. 2d 134, 135 (Fla. 4th DCA 1994).

In deciding to grant or deny a motion for new trial on the basis that the verdict is contrary to the weight of the evidence, the trial court acts as a "safety valve" by granting a new trial where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not support the jury verdict. *Moore*, 800 So. 2d at 749; *see State v. Brockman*, 827 So. 2d 299, 303-304 (Fla. 1st DCA 2002). Thus, this rule "enables the trial judge to weigh the evidence and to determine the credibility of witnesses so as to act, in effect, as an additional juror." *Uprevert*, 507 So. 2d at 163 (quoting *Tibbs*, 397 So. 2d at, 1123 n. 9). This process of determining whether the verdict is consistent with the weight of the evidence "necessarily requires the trial judge to invade the fact-finding arena." *Gonzalez v. State*, 449 So.2d 882, 888 (Fla. 3d DCA 1984) (quoting *Tibbs*, 397 So.2d at 1123 n. 9). The trial court has the sole province to assess weight of the evidence claims. *Id.* In this context, the First District stated:

> The Supreme Court has made it abundantly clear that the only avenue for judicial review of the weight of the evidence is by motion for new trial at the trial court level. Thus, the rules of criminal procedure and the courts continue to recognize the critical need for some form of discretionary judicial review to serve as a safety valve in those cases where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict. *Tibbs* simply removes the appellate courts from playing any

> significant role in that process and places sole responsibility for that discretionary decision upon the trial judge.

Robinson v. State, 462 So. 2d 471, 476-77 (Fla. 1st DCA 1984).

When the trial court denies a motion for new trial and "the record leaves no doubt that the trial court failed to exercise its unique discretion to assess a weight of the evidence claim, reversal and remand for appropriate findings are required." *Uprevert*, 507 So. 2d at 163-164 (citing *Adams*, 417 So.2d at 826). This is such a case.

Here, Mr. Mincey's counsel argued the verdict was contrary to the weight of the evidence. (R. Vol. I, p. 53-65). The trial court relied on three reasons why it was denying the motion: (1) the state presented a "*prima facie*" case, (2) the evidence presented by the state overcame the *Fowler* which discussed a reasonable hypothesis of innocence when it denied the motion for judgment of acquittal, and (3) the case was presented to the jury that "returned the verdict that it did." (R. Vol. I, p. 106-7). The trial court then entered an order denying Mr. Mincey's motion for a new trial. (R. Vol. I, p. 77). The trial court erred in denying the motion.

In this case, the trial court did not act as the "safety valve" as required by Rule 3.600. *Moore*, 800 So. 2d at 749. The trial court did not "weigh the evidence" nor "determine the credibility of witnesses so as to act, in effect, as an additional juror." *Uprevert*, 507 So. 2d at 163 (quoting *Tibbs*, 397 So. 2d at 1123 n. 9). Thus, the trial court did not "invade the fact-finding arena" to assess the weight of the evidence as

it was required to do. *Gonzalez*, 449 So.2d at 888. The "critical need" for the trial court's "discretionary judicial review to serve as a safety valve" did not occur in this case. *Robinson*, 462 So. 2d at 476-77. Because the "the record leaves no doubt that the trial court failed to exercise its unique discretion to assess a weight of the evidence claim, reversal and remand for appropriate findings are required." *Uprevert*, 507 So. 2d at 163-164 (citing *Adams*, 417 So.2d at 826). Therefore, the trial court abused its discretion in denying this motion and reversal is required.

C. Trial court erred in denying Mr. Mincey's motion for a new trial because the evidence was legally insufficient to rebut Mr. Mincey's self-defense claim.

As stated above, the evidence was insufficient as a matter of law to rebut Mr. Mincey's self-defense claim. *Supra* Argument, § I, at 17-21. Florida Rule of Criminal Procedure 3.600(a)(2) provides that the trial court shall grant a new trial if it is established "that the verdict is contrary to law. . . .". Here, the verdict was contrary to the law, and legally insufficient as discussed regarding the trial courts denial of Mr. Mincey's motion for a judgment of acquittal. Therefore, in reviewing this matter *de novo*, this Court should hold the trial court erred in denying this motion for new trial.

CONCLUSION

Appellant, ANTHONY JAVON MINCEY, based on the foregoing grounds, requests this Court reverse and remand his judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the Office of the Attorney General at crimapptlh@myfloridalegal.com on this the 15th day of September 2017.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

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