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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

PERRY TYRONE PARKER, *Petitioner*.

No. 1 CA-CR 14-0213 PRPC
FILED 9-29-2016

Petition for Review from the Superior Court in Coconino County
No. CR2004-1241
The Honorable Mark R. Moran, Judge

**REVIEW GRANTED; RELIEF GRANTED IN PART AND DENIED IN
PART**

COUNSEL

Coconino County Attorney's Office, Flagstaff
By Heather A. Mosher
Counsel for Respondent

David Goldberg Attorney at Law, Fort Collins
By David Goldberg
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Chief Judge Michael J. Brown joined.

T H O M P S O N, Judge:

¶1 Petitioner Perry Tyrone Parker petitions this court for review from the denial of the petition for post-conviction relief he filed on April 8, 2013. We have considered the petition for review and, for the reasons stated, grant review, grant relief in part and deny relief in part.

BACKGROUND

¶2 The state charged Parker with one count of first degree murder and two counts of aggravated assault in 2004. The two counts of aggravated assault identified the same victim but alleged different theories of guilt. Parker's defense at trial was the assault victim and the murder victim had a fight in which the assault victim inflicted the injuries that later caused the death of the murder victim. Parker claimed he simply walked in on the fight and the assault victim attacked him. Parker raised a number of justification defenses to the counts of aggravated assault and argued he fought with the assault victim to defend himself, to defend the murder victim, to defend his property and to prevent a crime. Parker never claimed he fought with the murder victim and never presented any justification defenses for the count of murder.

¶3 Parker's first trial ended in a mistrial on March 21, 2006. At that time, Arizona Revised Statute (A.R.S.) section 13-205(A) (2005) provided that a defendant who raised a justification defense bore the burden to prove the defense by a preponderance of the evidence. Effective April 24, 2006, and before Parker's retrial began, the legislature amended A.R.S. § 13-205(A) to provide that if a defendant presents any evidence of justification, the state must prove beyond a reasonable doubt that the defendant did not act with justification. A.R.S. § 13-205(A) (2006); 2006 Ariz. Sess. Laws, ch. 199, § 2 (2d Reg. Sess.). The legislature did not expressly state whether the change was retroactive.

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¶4 Parker's retrial began on May 2, 2006. Parker argued the new law was retroactive and submitted final jury instructions that placed the burden on the state to prove Parker did not act with justification. The trial court held the change in the law was not retroactive and declined to give the instruction. The final instructions did not explain to the jury which party bore the burden to prove or disprove justification. Parker's closing argument, however, informed the jury that in the context of the counts of aggravated assault, he bore the burden to prove he acted with justification by a preponderance of the evidence. The trial court submitted the case to the jury on May 17, 2006.

¶5 The jury found Parker guilty of first degree murder and two counts of aggravated assault. The trial court sentenced Parker to imprisonment for natural life for murder and imposed concurrent sentences of fifteen years' imprisonment for each count of aggravated assault. We affirmed Parker's convictions and sentences on direct appeal. *State v. Parker*, 1 CA-CR 06-0589 (Ariz. App. May 22, 2007). In our decision, we relied on the supreme court's decision in *Garcia v. Browning*, 214 Ariz. 250, 254, ¶ 20, 151 P.3d 533, 537 (2007), to reject Parker's claim that the amendments to A.R.S. § 13-205(A) were retroactive. *Parker*, 1 CA-CR 06-0589, at *3-4, ¶¶ 7-8.

¶6 Effective September 30, 2009, the legislature passed Senate Bill 1449, which clarified that the legislature had always intended the changes to A.R.S. § 13-205 to be retroactive. Section 1 of S.B. 1449 provides, "Laws 2006, chapter 199 applies retroactively to all cases in which the defendant did not plead guilty or no contest and that, as of April 24, 2006, had not been submitted to the fact finder to render a verdict." 2009 Ariz. Sess. Laws, ch. 190 § 1 (1st Reg. Sess.). In August 2010, we held S.B. 1449 did not violate the separation of powers clause of the Arizona Constitution. *State v. Rios*, 225 Ariz. 292, 295, ¶ 1, 237 P.3d 1052, 1055 (App. 2010). In doing so, we expressly disagreed with the opinion of another panel of this court in *State v. Montes*, which held S.B. 1449 did violate the separation of power clause and, therefore, the defendant bore the burden to prove he acted with justification. *State v. Montes*, 223 Ariz. 337, 340, ¶ 15, 223 P.3d 681, 684 (App. 2009). Our supreme court took review of *Montes* and reversed the defendant's convictions and sentences and vacated this court's opinion. In doing so, the supreme court agreed with our decision in *Rios* and held S.B. 1449 did not violate the separation of powers clause of the Arizona Constitution. *State v. Montes*, 226 Ariz. 194, 197-98, ¶¶ 16-19, 245 P.3d 879, 882-83 (2011).

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¶7 In response to the supreme court's decision in *Montes*, Parker filed a successive petition for post-conviction relief. Parker argued S.B. 1449 and the supreme court's interpretation of S.B. 1449 in *Montes* were significant changes in the law. He argued the changes to A.R.S. § 13-205 were, therefore, applicable to his case because the trial court did not submit the case to the jury until May 17, 2006, twenty-three days after the changes became effective. The trial court denied relief. The court held the changes to A.R.S. § 13-205(A) applied to Parker's case, but only to the counts of aggravated assault. The court further held that given the evidence admitted at trial, the failure to instruct the jury pursuant to the new law was harmless because the error did not contribute to or affect the verdicts.¹ Parker now seeks review. We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c) and A.R.S. § 13-4239(C) (2010).

DISCUSSION

¶8 In his petition for review, Parker argues the jury probably would not have found him guilty if the trial court had correctly instructed the jury on the correct burden of proof for the justification defenses. Parker argues this includes the count of first degree murder, even though he never presented a justification defense to the murder charge. He contends that had the jury found the state failed to prove Parker did not act with justification as to the counts of aggravated assault, it is likely the jury would have also acquitted Parker of murder because the jury would have doubted all of the assault victim's testimony about the entire incident. Finally, Parker argues the error was constitutional, structural error that required no proof of prejudice. We review the denial of post-conviction relief pursuant to Rule 32 for abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶9 We grant relief on the two counts of aggravated assault. "S.B. 1449 'is a valid exercise of the Legislature's power to retroactively grant new rights to criminal defendants.'" *Montes*, 226 Ariz. at 197, ¶ 16, 245 P.3d at 882 (quoting *Rios*, 225 Ariz. at 306, ¶ 52, 237 P.3d at 1066). The plain language of S.B. 1449 makes the amended version of A.R.S. § 13-205 applicable to Parker's case because Parker was awaiting retrial on April 24, 2006. Therefore, at the time of his retrial, the state bore the burden to prove beyond a reasonable doubt that Parker was not justified when he committed the aggravated assaults. Like the defendant in *Montes*, Parker is

¹ Parker agreed it was not necessary to hold an evidentiary hearing. Therefore, the trial court only heard oral argument.

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entitled to a retrial on those two counts because the trial court did not instruct the jury that the state had the burden to disprove the justification defenses.

¶10 *Montes* is not the first time our supreme court has held that the failure to properly instruct the jury on the burden of proof for justification defenses is reversible error. In *State v. Denny*, the court reversed a conviction for manslaughter after the trial court failed to properly instruct the jury on the burden of proof for self-defense. The court held, “It is vital that the jury not misunderstand the concept of the defendant’s burden of proof on self-defense; the jury must be instructed with great care to prevent the misunderstanding of his concept.” *State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978). In *State v. Hunter*, the court reversed a conviction for first degree murder because “The instructions did not make it clear that appellant’s burden as to self-defense was limited to raising a reasonable doubt and that the burden on the state was then to disprove beyond a reasonable doubt that appellant acted in self-defense.” *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The court found the failure to properly instruct the jury was fundamental, reversible error. *Id.* In *State v. Slemmer*, the court held the failure to adequately instruct the jury that the State bore the burden to disprove self-defense constituted fundamental error pursuant to *Hunter*.² *State v. Slemmer*, 170 Ariz. 174, 178, 823 P.2d 41, 45 (1991). The court did not ultimately reverse, however, because it found *Hunter* was not retroactive to convictions that had become final. *Id.* at 184, 823 P.2d at 51. It is important to note that in none of the above cases, including *Montes*, did the supreme court conduct an analysis to determine whether the error was harmless in light of the evidence admitted at trial.³

² At the time the court decided *Hunter* and *Slemmer*, the burden was on the state to disprove a defendant acted in self-defense. *Hunter*, 142 Ariz. at 90, 688 P.2d at 982; *Slemmer*, 170 Ariz. at 178, 823 P.2d at 45. The burden of proof did not shift to the defendant until 1997. See A.R.S. § 13-205 (1997); 1997 Ariz. Sess. Laws, ch. 136, § 4 (1st Reg. Sess.).

³ In *Slemmer*, the supreme court analyzed whether the error was harmless in light of the general burden of proof instruction that placed the burden on the state to prove every element of every offense beyond a reasonable doubt. The court held the general instruction did not render the error harmless. *Slemmer*, 170 Ariz. at 178, 823 P.2d at 45.

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¶11 The state argues S.B. 1449 and *Montes* do not apply to Parker's case because his convictions became final long before the legislature passed S.B. 1449 in 2009.⁴ "A conviction is final when 'a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.'" *State v. Febles*, 210 Ariz. 589, 592, ¶ 9, 115 P.3d 629, 632 (App. 2005) (quoting *State v. Towerly*, 204 Ariz. 386, 389-390, ¶ 8, 64 P.3d 828, 831-832 (App. 2003)). If the legislature wished to limit the changes to the burden of proof in A.R.S. § 13-205 to cases that were not yet final, the legislature could have done so. There is, however, nothing in the language of S.B. 1449 to suggest the legislature meant to do so. The legislature instead chose to make the changes retroactive to "all cases" in which the defendant did not enter a plea of guilty or no contest and which had not been submitted to the factfinder as of April 24, 2006. Parker's case is one of those cases.

¶12 Finally, the trial court relied on our decision in *State v. Buggs* for the proposition that not every case in which a court gives an incorrect instruction on the burden of proof for justification defenses results in fundamental, prejudicial error. *Buggs*, 167 Ariz. 333, 337, 806 P.2d 1381, 1385 (App. 1990). The court's reliance on *Buggs* is unavailing. We held the flawed instruction in *Buggs* was harmless because the defendant was not entitled to any instruction on self-defense. *Id.* at 337, 806 P.2d at 1385. Here, Parker submitted evidence he acted with justification in the context of the two counts of aggravated assault. He was, therefore, entitled to instructions that correctly placed the burden of proof on the state to prove beyond a reasonable doubt that Parker did not act with justification.

¶13 We deny relief on the count of first degree murder. Any justification instruction, correct or otherwise, had no application to the murder charge because Parker never raised any justification defense to the murder. Parker's claim that the jury would probably have acquitted Parker of the murder of one victim if the state failed to prove Parker lacked justification when he committed aggravated assault against a second victim is tenuous speculation. Further, while we recognize the supreme court's opinion in *Montes* reversed all of the defendant's convictions against multiple victims even though, according to the opinion, the defendant claimed he "killed one victim" in self-defense, the court's reference requires additional context. *Montes*, 226 Ariz. at 195, ¶ 3, 245 P.3d at 880. The

⁴ The supreme court in *Montes* declined to address how S.B. 1449 and the changes to A.R.S. § 13-205 might apply to post-conviction relief proceedings. *Montes*, 226 Ariz. at 197 n.3, ¶ 16, 245 P.3d at 882 n.3.

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defendant in *Montes* shot three victims but killed only one of them. *State v. Montes*, 2 CA-CR 2008-0148, 2009 WL 2998931, at 1, ¶ 2 (Ariz. App. Sep. 18, 2009) (mem. decision) (*rev'd on other grounds, State v. Montes*, 226 Ariz. 194, 245 P.3d 879 (2011)).⁵ While the defendant in *Montes* may have ultimately killed one victim in self-defense, his defense to the charges was that he shot all three victims in self-defense. *Id.* at 2, ¶ 10. Therefore, it was necessary for the supreme court to reverse all of the defendant's convictions in *Montes* because the defective jury instructions on justification applied directly to all the convictions. The defective instructions here had no application to the count of first degree murder.

CONCLUSION

¶14 We grant review and grant relief in part and vacate Parker's convictions and sentences for the two counts of aggravated assault and remand for proceedings consistent with this decision. We deny relief on the remainder of Parker's claims.



AMY M. WOOD • Clerk of the Court
FILED: AA

⁵ This court issued both a published opinion and a memorandum decision in its consideration of *Montes*.