IN THE SUPREME COURT OF FLORIDA

ROBERT BROWN, also known as DARRYL THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: 63,793

RESPONDENT'S BRIEF ON THE MERIT

JIM SMITH
ATTORNEY GENERAL

Barbara Ann Butler
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

Attorney for Respondent

TOPICAL INDEX

TABLE OF CITATIONS

Other Authority:

IN THE SUPREME COURT OF FLORIDA

ROBERT BROWN, also known as DARRYL THOMAS, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO.: 63,793

RESPONDENT'S BRIEF ON THE MERIT

PRELIMINARY STATEMENT

Respondent accepts the preliminary statement set forth in the initial brief and will use the designations set out therein.

The opinion of the Court of Appeal, First District, in this cause is now reported as:

Brown v. State
431 So.2d 247
(Fla 1st DCA 1983)

Respondent also wishes to inform this Court that the issue raised herein is currently pending before this Court in Taylor v. State, 401 So.2d 812 (Fla 5th DCA 1981) review sought July 1, 1981, Taylor v. State, No. 61,143.

STATEMENT OF THE CASE AND FACTS

Petitioner has reprinted the Statement of Facts and Case as contained in his initial brief before the First District Court of Appeal. Facts relevant to the issue presented were set out in the opinion of the District Court as follows:

> Appellant was charged with attempted murder of Officer Rein, a ten year veteran of the sheriff's department who also worked after hours as a security officer at the Greyhound bus station. The charges resulted from an incident in which Officer Rein chased appellant through the bus station and a neighboring restaurant before apprehending him, at which time during a struggle, Officer Rein's revolver was fired. The testimony differed primarily regarding the events which preceded the chase and the circumstances of the firing of the gun. Appellant testified at trial and his version of the facts preceding the chase was essentially that after he had purchased a bus ticket and asked Officer Rein where he could buy a sandwich, Rein began acting strangely and, for no apparent reason, drew his revolver and began cocking the hammer back and forth and told appellant to "Get down before I blow your f. . . brains out," and when appellant attempted to show that he was not armed and asked Rein what was wrong, Rein merely continued this behavior, so appellant ran and the chase ensued.

Brown v. State at 247-248.

QUESTION CERTIFIED

IS THERE A CRIME OF ATTEMPTED MANSLAUGHTER UNDER THE STATUTES OF THE STATE OF FLORIDA.

Brown v. State, 431 So.2d 247, 249 (Fla 1st DCA 1983).

The question presented as issue one herein was certified as being of great public importance. Id at 249. The second issue raised was not certified and is not properly before this court. (See argument infra, pp. 8-10).

POINT ON APPEAL

WHETHER ATTEMPTED MANSLAUGHTER IS A CRIME UNDER FLORIDA LAW

ARGUMENT

Petitioner argues that there cannot be a crime of attempted manslaughter because an "attempt" inherently requires specific intent and manslaughter has no such intent requirement. Manslaughter, the argument continues, may be accomplished through negligent conduct. Petitioner submits that one cannot attempt to be negligent. The Court of Appeal, Fifth District, did not agree in Taylor v. State, 401 So.2d 812, 815-816 (Fla 5th DCA 1981) pet. for review filed July 1, 1981, Taylor v. State, No. 61,143, nor did the Court of Appeal, First District, in the instant cause. Brown v. State at 249. Likewise, a federal appellate court has rejected a similar challenge to the crime of attempted manslaughter by culpable negligence. Charlton v. Wainwright, 588 F.2d 162 (5th Cir.1979).

In support of the claim that attempted manslaughter is a non-existent offense, Appellant relies upon Robinson v. State, 338 So.2d 1309 (Fla. 4th DCA 1976) wherein the Fourth District Court of Appeal suggests that pursuant to the definition of manslaughter attempted manslaughter is an absurdity. Id. at 1311, fn.1. Respectfully, the comment in Robinson is merely dictum. See, Taylor v. State at 816. The question before the Fourth District Court of Appeal in Robinson was whether reversible error resulted from the trial court's refusal to give requested jury instructions on third degree murder and attempted manslaughter. Id. at 1311.

Under Florida law, a Manslaughter is defined as:

> The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter. . . .

Section 782.07, Florida Statutes. Therefore manslaughter may be committed in three ways: by act[1]; by procurement[2]; and by culpable negligence[3].

Culpable negligence has been equated to an intentional act. In McCreary v. State, 371 So.2d 1024, 1026 (Fla. 1979), manslaughter was held to involve conscious acts which are "indifferent to the consequences" or "wanton," to the extent that they are "equivalent to an intentional" act. In the recent case of Dominique v. State, No. 83-87 (Fla 3d DCA August 9, 1983) [8 FLW 2065], the Third District states:

> Culpable negligence, which replaces the element of criminal intent, Hulst v. State, 123 Fla. 315, 166 So. 828 (1936), means action of such a gross and flagrant character that it evidences a reckless disregard for human life or safety equivalent to an intentional violation of the rights of others. McCray v. State, 350 So.2d 1126 (Fla 2d DCA 1977).

Id. at 2065. The court continues in its analysis to state that culpable negligence must be determined from the peculiar facts of a case. Id.

---

[1] The statute does not specify an "unintentional" act.

[2] Procurement is defined in Black's Law Dictionary (5th Ed.1979) as "The act of obtaining, attainment, acquisition, bringing about, effecting." Procure is defined therein: "To initiate a proceeding to cause a thing to be done; to instigate; to contrive, bring about, effect or cause."

[3] The key word is "culpable" as opposed to simple negligence.

In the civil case of Caraway v. State, 112 So.2d 71 (Fla.1st DCA 1959), the First District recognized that punitive damages could only be awarded for intentional torts rather than negligent ones, and held that "culpable negligence" was the equivalent of an intentional act. Culpable negligence is thus distinguished from simple negligence. See also, Getsie v. State, 193 So.2d 679 (Fla. 4th DCA 1966); Gustine v. State, 97 So. 207 (Fla.1923); Manuel v. State, 344 So.2d 1317 (Fla. 2d DCA 1977); Savage v. State, 11 So.2d 778 (Fla.1943).

In Charlton v. Wainwright, the Fifth Circuit concluded that a Florida manslaughter conviction based on culpable negligence, like those based on act or procurement, demanded proof of a level of intent greater than that of ordinary negligence. The federal appellate court stated

> Florida courts have long recognized the crimes of assault with intent to commit manslaughter and accessory before the fact to manslaughter. Both of these crimes, assault with intent and accessory before the fact, involve specific intent. The Florida Supreme Court has stated that assault with intent to commit manslaughter is a crime where the mode of assault constitutes 'culpable negligence.' In addition to recognize that a person can have the specific intent to commit manslaughter, Florida courts have implicitly recognized the crime of attempted manslaughter. Devoe v. Tucker, 113 Fla. 805, 152 So. 624, 626 (1934).
>
> Florida courts have given a special definition to 'culpable negligence.' Instead of construing it to emphasize involuntary and unintentional behavior, they have construed it to emphasize culpability which rests on intentional, or quasi-intentional behavior.

Id. at 164.

The confusion surrounding manslaughter stems from the saying that manslaughter does not require intent. Like any general rule,

this statement has exceptions. Florida courts have created exceptions by expanding manslaughter to include culpably negligent acts, "acts" in general, and "procurement" - a specific, intentional act. Moreover the crime of assault with intent to commit manslaughter has been recognized by the Florida Supreme Court in at least four cases. Devoe v. Tucker, 113 Fla. 805, 152 So. 627 (1934); Lassiter v. State, 98 Fla. 370, 123 So. 735 (1929); Kelly v. State, 78 Fla. 636, 83 So. 506 (1919).

The Fifth District Court of Appeal recognized that one of the requisite elements of "attempt" to commit a crime is the formation of intent to commit that crime. Taylor at 816 citing Florida Standard Jury Instruction in Criminal Cases 2.03. The court stated:

> There is a certain appeal to appellant's position that one cannot form an intent to commit an involuntary act, but if we start with the premise that there can be an assault with intent to commit the same [involuntary] act (manslaughter), then it must follow that there can be an attempt (the formation of an intent) to commit the crime, when the other elements of attempt are present.

Id. The Fifth District concluded that precedent, if not logic, requires that attempted manslaughter be a criminal offense in Florida. We submit that such a finding is appropriate in this cause where counsel for Appellant did not object to the instruction, but affirmatively subscribed to its accuracy. Counsel objected, even on re-instruction, only to the trial court's failure to also instruct on aggravated assault (T.253-255, 335, 342).

POINT II

THE MARITAL DIFFICULTIES OF THE VICTIM POLICE OFFICER WERE NOT RELEVANT TO THIS CAUSE

ARGUMENT

Respondent submits that this issue is not properly before this Court. As the record reflects, the District Court of Appeal certified only one question for review, the issue presented under Point I. The appellate court addressed the instant argument in its opinion and did not determine the question presented to be of great public importance or to warrant further review on the basis of conflict. Brown at 249.

Further, Petitioner filed notice to invoke discretionary review of this cause on June 8, 1983. In said notice, he sought review on the basis of a "question certified to be of great public importance." No mention was made of review of the issue now argued herein. Under the governing rules of appellate procedure, Petitioner would have to seek discretionary review on the basis of conflict among decisions in order to obtain review of this second argument. Rules 9.030(2)(A), 9.120 and 9.900, Florida Rules of Appellate Procedure.

Respondent submits that raising this second argument in this particular manner is highly irregular. Admittedly once review is accepted by this Court, any and all aspects of the case before may be addressed. See Hillsborough Association for Retarded Citizens Inc v. City of Temple Terrace[4], 332 So.2d 610 (Fla 1976); But see, also,

[4] Opinion does not comport with Headnote No. 1.

In re Emergency Amendments to Rules of Appellate Procedure, 381 So.2d 1370 (Fla 1980). It is not mandatory however that this Court address the entire lower court decision or answer questions which are not germane to the certified question. Cleveland v. City of Miami, 263 So.2d 573, 576 (Fla 1972).

We emphasize that jurisdiction of this cause, on even the certified question, has not yet been accepted by this Court. On a certified question, jurisdiction is determined at or prior to the time of review on the merit.[5] Even though jurisdictional briefs are omitted on a certified question, this Court may still decline to accept jurisdiction.

Should this Court elect to review the second argument presented by Petitioner, the State relies upon its brief filed in the First District Court of Appeal and upon the reasoning set forth in the opinion.

> [1] During cross-examination of Officer Rein, the defense attempted to inquire into Rein's alleged domestic difficulties which supposedly occurred just a few days prior to the incident giving rise to the charges against appellant. After extensive argument by counsel regarding what she expected Officer Rein's testimony to include and the relevancy thereof, the trial judge declined to allow even a proffer of that testimony based on his determination that it was not relevant. It is error to refuse to allow a proffer of evidence, which is necessary to ensure full and effective appellate review, see Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982); Piccirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976); Francis v. State, 308 So.2d 174 (Fla. 1st DCA 1975). This court has also held, however, that the error in failing to permit a proffer can be harmless, see Johnson v. State, 338 So.2d 252 (Fla. 1st DCA 1976), in which, '[f]rom the statements made on the record by appellant's counsel, it appears that he desired to show that because

---

[5] Based upon prior conversations between the undersigned and employees of the Clerk's office of this Court.

appellant's mother had accused Davis of stealing her silver, Davis was giving false testimony against appellant. This is rather remote, as the trial judge pointed out and, in addition, appellant when he took the stand testified to it. Thus the jury had the inference before it for such weight as it considered should be given to it.'

[2,3] The primary purpose of a proffer is to include the proposed answer and expected proof in the record so the appellate court may understand the scope and effect of the question and proposed answer in considering whether the trial court's ruling was correct, Phillips v. State, 351 So.2d 738 (Fla. 3d DCA 1977). In the present case, the jury did not hear the information regardless of the lack of a proffer as in Johnson, however, as in that case we are able to determine from defense counsel's detailed argument and explanation of the evidence expected to be offered and its alleged relevance to the correctness of the trial court's ruling that the information sought to be offered was not relevant. Allegedly, the cross-examination would bring out the specifics of Officer Rein's recent marital difficulties, particularly an event which generated some publicity and which defense counsel explained in detail to the trial court, in order to show that he was under emotional strain at the time of the incident. The alleged relevance of this information was that it supported the defense theory of Rein's alleged use of excessive force and his erratic behavior. There is sufficient detail as to the attempted proffer to determine that here, as in Johnson, the connection between the evidence sought to be proffered as to marital difficulties and the behavior suggested to have resulted is too remote and speculative to be considered probative.

Brown at 248.

CONCLUSION

Based on the foregoing arguments and the authorities cited herein, Petitioner, the State of Florida, respectfully urges this Honorable Court answer the certified question in the affirmative thereby removing all doubt that attempted manslaughter is a crime in this State.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Barbara Ann Butler
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to David J. Busch, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 7th day of September, 1983.

Barbara Ann Butler
Assistant Attorney General

BAB/par
#1/P-Q