IN THE SUPREME COURT OF FLORIDA

MITCHELL O. LINEHAN, :

Petitioner, :
Cross-Appellee. :

vs. : Case No. 64,609

STATE OF FLORIDA, :

Respondent, :
Cross-Appellant. :

:

ANSWER TO CROSS-APPELLANT'S BRIEF ON CERTIFIED QUESTION No. 3

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX

CITATION OF AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

The Petitioner will rely on the Statement of the Case and Facts as stated in the Petitioner's initial brief.

ISSUE

WHETHER A JURY INSTRUCTION ON SECOND DEGREE (DEPRAVED MIND) MURDER IS NECESSARY IF SUPPORTED BY THE EVIDENCE, WHEN DEFENDANT IS CHARGED WITH FIRST DEGREE (FELONY) MURDER?

Appellant requested an instruction on Second Degree Murder (depraved mind). (R266). The court denied Appellant's request stating that Second Degree Murder (depraved mind) was not one of the Category I, offenses required to be given, under the new Florida Standard Jury Instructions for felony murder. (R271)

Rule 3.490 of the Florida Rules of Criminal Procedures requires:

> "If the indictment or information charges an offense divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence. The jury shall not instruct on any degree as to which there is no evidence."

Under the evidence concerning the nature of the actions of the defendant in setting the building afire, the jury, if so instructed, could have found defendant guilty of second degree, depraved mind murder under section 782.04(2), Florida Statutes (1981), which provides:

> The unlawful killing of a human being, when perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any

> premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

Appellant obviously had no premeditated design to kill the victim, whose presence he was unaware of, or even Theresa Ward, who he knew was not in the building. (R211) The proof of premeditation necessary to convict Appellant of first degree murder was supplied solely by his commission of the arson, not by any other evidence. Appellant's setting fire to the curtains of Ward's unoccupied apartment could constitute an imminently dangerous act done without the intent to cause anyone's death.

As Second Degree Murder was but one step removed from the offense charged, and no instruction was given on it, the jury was denied the opportunity to exercise its inherent "pardon" power by returning a verdict of guilty as to the next lower offense. Rollins v. State, 369 So.2d 950 (3d DCA 1978), State v. Abreau, 363 So.2d 1063 (Fla. 1978). The failure to instruct on an offense one step removed constitutes error that is per se reversible. Abreau, supra.

The so-called pardon power is well recognized under Florida law and means that a jury may convict a defendant of a lesser offense when the jury finds that the acts of the defendant fit the statutory definitions of more than one offense. Abreau, supra.

F.R.Cr.P. 3.490 does not require that the defendant be specifically charged with the lesser offense in order to be entitled to an instruction on it, if the evidence would support a conviction on the lesser offense.

The table of lesser included offenses which is appended to the current Florida Standard Jury Instructions in Criminal Cases does not list second degree depraved mind murder as a lesser included offense under first degree (felony) murder. Also the Florida Supreme Court opinion approving the standard jury instructions, stated that, "After its effective date of July 1, 1981 [modified to October 1, 1981], this schedule will be an authoritative compilation upon which a trial judge should be able to confidently rely." However, later in its opinion the Supreme Court also said, "[N]o approval of these instructions by the Court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him." Obviously the court anticipated that the table might not be applicable in every situation and put trial judges on notice that they should not blindly follow it when the circumstances of an individual case warranted different treatment. The trial court has the duty to fully instruct on the entire law governing the case in respect to all facts proven or claimed by counsel to have been proved, provided there is competent evidence to support such a claim. Polk v. State, 179 So.2d 236 (2d DCA 1965).

Petitioner disagrees with the conclusion that the table is inconsistent with rule 3.490. Instead it would be more appropriate to say that the table could not anticipate every possible factual circumstance that could be raised under the rule. Obviously the table was meant to include instructions that probably would be appropriate in every felony murder case, but could not include instructions for all cases where the evidence might warrant additional instructions. The Bragg case cited by cross-appellant is the opposite situation where the court gave an instruction listed as a Category I lesser included offense in the table over the objections of defense counsel. On appeal the Second District reversed saying the instruction was not a Category I necessarily included offense nor was it warranted by the information, therefore, it did not constitute a Category II instruction. This is further proof that the table should not be followed blindly.

As the requested instruction was supported by the evidence and was but one degree removed from the offense charged, the court erred by denying the jury the opportunity to exercise its pardoning power. The decision of the Second District on this question should be affirmed.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner, Cross-Appellee, respectfully asks this Honorable Court to affirm the decision of the Second District Court on this question.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William I Munsey, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to Mitchell O. Linehan, No. 085498, PO Box 221, Raiford, FL 32083, this 27th day January, 1984.

Respectfully submitted,

Allyn Giambalvo

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