IN THE SUPREME COURT OF FLORIDA

ALTHA B. GILLESPIE,

Petitioner,

vs. CASE NO. 64,682

STATE OF FLORIDA

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the First District Court of Appeal and the defendant in the Circuit Court of Duval County. Respondent, State of Florida, was the Appellee in the First District Court of Appeal and the prosecuting authority in the Circuit Court of Duval County.

Citations to the Record on Appeal will be made by use of the symbol "R," followed by the appropriate page number(s) in parentheses. Citations to the transcript will be made by use of the symbol "T," followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with the offense of sexual battery under §794.011(3), Fla. Stat., in that in the process thereof he "used or threatened to use a deadly weapon, to wit: a knife ...." (R 58) At trial, the victim positively identified Petitioner (T 448) as the man who confronted her in the girls bathroom at the junior high school on the day the attack occurred. She testified that "he had a knife in one hand, you know, kind of like that. (Indicating.)" (T 448) She described the knife in detail and stated that she was "scared, very scared." (T 449) On cross-examination, defense counsel's questions emphasized certain details about the knife (T 469, 470).

Detective Moneyhun of the Jacksonville Sheriffs Office testified that after Petitioner was arrested and after Petitioner was given his constitutional rights, Petitioner denied any connection with the attack (T 770). However, after reflecting upon the matter and after reading the arrest warrant, Petitioner confessed--he admitted that he had waited in the restroom until a young, white girl came in at which time he "stepped out of the stall with my knife in my right hand." He specifically mentioned that it was a steak knife (T 774).

During the charge conference, defense counsel asked for a jury instruction on §794.011(4)(b), Fla. Stat., which concerns sexual battery by "threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute these threats." However, the court declined to give the instruction because he did not feel it was a lesser included offense--first, those elements had not been alleged in the information, and second,

there had been no proof of those elements (T 1187). Defense counsel explained that the reason they had asked for the instruction was that if the definition of deadly weapon found in the standard jury instruction for §794.011(3) was substituted then the offense would be defined similarly to the offense found in §794.011(4)(b) (T 1188). The trial court found that logic "imaginative and resourceful," but he declined to give the instruction because of the "void" of evidence of any element of §794.011(4)(b).

On appeal, Petitioner complained that the instruction should have been given. The First District rejected this claim, and a two judge majority explained that the new Fla.R.Crim.P. 3.510 was amended specifically to provide that an instruction on a lesser included offense would not be given if there had been no evidence of such offense introduced at the trial. Gillespie v. State, 440 So.2d 8, 9 (Fla. 1st DCA 1983). The court further explained that this Court had made it clear by approving the new procedural rule "that no instruction should be given on a lesser included offense that is not a necessarily lesser included offense of the crime charged when there is no evidence of the lesser included offense." Id, at 440 So.2d 10. Judge Ervin dissented and found that in his opinion the offenses proscribed by §794.011(3) and §794.011(4)(b) constituted the same conduct--despite the fact that each offense contains elements that the other does not and despite the fact that the Legislature provided different penalties. This petition followed.

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE FIRST DISTRICT CORRECTLY FOUND THAT UNDER FLA.R.CRIM.P. 3.510 THE TRIAL COURT DID NOT HAVE TO GIVE AN INSTRUCTION ON A LESSER OFFENSE WHICH HAD NOT BEEN ALLEGED IN THE INFORMATION AND FOR WHICH NO EVIDENCE HAD BEEN ADDUCED AT TRIAL.

This is yet another case in which the Court is asked to delve into the area of law spawned by the Category I through IV lesser included offense analysis of Brown v. State, 206 So.2d 377 (Fla. 1968). However, the State submits that certiorari is inappropriate in this case because the issues have been put to rest by the Court's approving the new standard jury instruction which specifically noted that a trial court "shall not instruct on any lesser included offense as to which there is no evidence." Fla.R.Crim.P. 3.510; Gillespie v. State, supra at 440 So.2d 9.

The victim in this case clearly testified that a knife was used during the sexual battery incident. Petitioner confessed to the police officer that he had used a "steak knife" during the incident. Although Petitioner later took the stand and denied any knowledge of the incident, he never put in issue that he had not used a knife; in other words, Petitioner did not admit committing the crime while using something other than a knife. Therefore, it is abundantly clear, as the majority of the First District found, that there was no evidence that a knife was not used during the offense. Accordingly, since there was no evidence that a deadly weapon was not used, under Rule 3.510, an instruction on §794.011(4)(b) was not proper. In that regard, it should be noted that the trial court did give an instruction on §794.011(5) (T 1188, 1321). It should also be noted that Petitioner's

jury was instructed on the lesser offenses of aggravated assault (T 1322) and battery (T 1323).

Petitioner has cited a number of cases which he contends are in express and direct conflict. However, to the extent that any of these alleged conflict cases were decided prior to the effective date of the new rules of criminal procedure, they simply are irrelevant. This Court specifically noted when it approved Rule 3.510 that the change was specifically designed to "eliminate the need to give a requested lesser offense, not necessarily included in the charged offense, when there is a total lack of evidence of the lesser offense." In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases and the Standard Jury Instructions in Misdemeanor Cases, 431 So.2d 594, 597 (Fla. 1981). Counsel for Petitioner has argued in a footnote (Brief of Petitioner at 4) that Rule 3.510 did not really change the existing law concerning whether an instruction on a lesser offense should be given. However, this argument is unpersuasive in light of Justice Sundberg's dissent when the rule was approved by the rest of the Court:

> I concur in all parts of the majority opinion except that part which approved reduction of lesser included offenses from four to two categories. Such a practice, I believe will result in taking "a most critical evidentiary matter from the proper province of the jury and vest[ing] it improperly as a matter of law with the trial judge. Hand v. State, 199 So.2d 100, 102 (Fla. 1967); see Lomax v. State, 345 So.2d 719 (Fla. 1977). To distinguish between "ample evidence to support a guilty verdict on the higher offense" on the one hand and a "total lack of evidence of the lesser offense" on the other simply is not meaningful to me. Hence, I dissent to the proposed change in rules 3.510 and 3.490, Florida Rules of Criminal Procedure.

Id. If Petitioner were correct that the law never changed, then why did Justice Sundberg feel that he needed to dissent from the new rules?

The State submits that notwithstanding the fact that Rule 3.510 did not require an instruction on §794.011(4)(b), such an instruction is not required under Wagner v. State, 356 So.2d 867 (Fla. 4th DCA 1978). In that case, the court explained that if the accusatory pleading and the evidence would support a jury finding of guilt for §794.011(4)(b), such an instruction would have to be given--the court then found that under the facts of that case such a finding of guilt could have been made by the jury. However, in Petitioner's case, the majority specifically considered that issue and concluded that based on the accusatory pleading and the evidence adduced at trial, such a finding was not possible. There is no conflict.

Similarly, Petitioner's reliance on Lake v. State, 380 So.2d 1120 (Fla. 2d DCA), cert. denied, 388 So.2d 1115 (Fla. 1980), is misplaced. In that case, the defendant had been charged with a violation of §794.011(3) and the trial court gave an appropriate instruction for that offense. The trial court also gave an instruction on the lesser offense of involuntary sexual battery with a weapon, and although there was no such offense, the trial court's instruction complied with an instruction on §794.011(4)(b), Fla. Stat. The First District found that under the facts of that case, the instruction on the crime equivalent to §794.011(4)(b) was proper. In Petitioner's case, however, the trial court specifically found that there had been no evidence that the crime was committed without a deadly weapon i.e., the steak knife.

Petitioner has also attempted to raise a justification for the giving of the instruction which was not first presented to the trial court, i.e., that the steak knife used by Petitioner could have been found by the jury not to be a deadly weapon. However, since this ground was not raised before the trial court, it is not cognizable during these proceedings. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Petitioner's final jurisdictional allegation is that his case conflicts with Lomax v. State, 345 So.2d 719 (Fla. 1977) and State v. Abreau, 363 So.2d 1063 (Fla. 1978). Those cases stand for the proposition that the failure to instruct on a lesser included offense which is one step removed from the charged offense is per se reversible error. However, the First District never disapproved those decisions, and the opinion merely follows what this Court itself said about Lomax and Abreau when the Court approved the new standard jury instruction of Rule 3.510.

The State submits that what Petitioner is really quarreling about concerns what is a necessarily lesser included offense. This Court has recently stated that a necessarily included lesser offense is one for which when looking to the statutory elements, proof of all the elements of one also constitutes proof of all the elements of the other. See State v. Carpenter, 417 So.2d 986 (Fla. 1982), Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and §775.021(4), Fla. Stat. (supp. 1983). Since proof of §794.011(3) does not require force or a threat to use force, while proof of §794.011(4)(b) does require proof of force, §794.011(4)(b) is not a

necessarily lesser included offense. Therefore, there is no express and direct conflict with Lomax and Abreau or any other case.

In summary, all the First District did in Petitioner's case was to agree with the trial court that under the facts of the case, Rule 3.510 did not require an instruction on a potentially lesser included offense for which no evidence had been adduced at trial.

CONCLUSION

Based on the facts and foregoing argument, the State submits that certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Glenna Joyce Reeves, Assistant Public Defender, Tallahassee, Florida, on this 25th day of January, 1984.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL