IN THE SUPREME COURT OF FLORIDA

ALTHA B. GILLESPIE,

Petitioner,

vs. CASE NO. 64,682

STATE OF FLORIDA,

Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Appellant in the First District Court of Appeal and the defendant in the Circuit Court of Duval County. Respondent, the 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 and the transcript will be made by use of the symbols "R," and "T," respectively, followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's statement of the case and facts with the following additions and clarifications. The information which charged Petitioner with the offense of sexual battery was filed under §794.011(3), Fla. Stat., and it specifically alleged that in the process of committing the sexual battery, Petitioner "used or threatened to use a deadly weapon, to wit: a knife . . . ." (R 58)

During the trial, the victim did not state that Petitioner used a pocket-knife, but rather she stated that "[i]t looked like a pocket-knife, the blade was, you know, metal, silver in color, and it was about one and a half to two inches long." (T 449) During cross-examination by the defense, the victim emphasized certain details about the knife (T 469, 470).

Petitioner testified in his own behalf and denied all involvement with the crime (T 1067). According to Petitioner, he was forced to sign his confession (T 1069). On cross-examination by the State, Petitioner denied having seen the rape victim before that date, and he denied ever having been in the stall of the ladies bathroom in which his palm print had been found. He also specifically denied ever having been at the school where the victim was raped (T 1125).

During the charge conference, the defense asked for an instruction on §794.011(4)(b), Fla. Stat., which

involves sexual battery through threats "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 trial court declined to give the instruction because he did not feel it was a lesser included offense--first, he remarked that the elements of that offense had not been alleged in the information, and second, there had been no proof of those elements (T 1187). Specifically, the trial court stated:

> THE COURT: I don't believe -- I don't believe Paragraph Four-B is a lesser included offense, and I'll tell you why, generally speaking, in order for it to be a lesser included offense, the elements of the offense, the lesser included offense that you're urging, the elements must be alleged in the information, and there must be some proof of those elements.
>
> Now, the elements of the offense that is charged in the Information alleges a sexual battery, and in the process, no force is alleged, but they say that a deadly weapon was used. And I don't think that you have got the elements alleged in the information that are required in Four-B which requires sexual battery when the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury to the victim.

(T 1187, 1188)

The reason defense counsel gave to support the requested instruction was that if the definition of deadly weapon found in the standard jury instruction for §794.011(3) was substituted

for the term deadly weapon, then the offense would be defined similarly to the offense found in §794.011(4)(b) (T 1188). However, the trial court disagreed and declined to give the instruction because of the "void" of evidence of any element of §794.011(4)(b).

Petitioner's jury was specifically instructed that before Petitioner could be found guilty of the life felony of sexual battery by using or threatening to use a deadly weapon, the State must prove that a deadly weapon was either used or threatened to be used (T 1320). The trial court specifically defined the term "deadly weapon" as a weapon which is "used or threatened to be used in a way likely to produce death or great bodily harm." (T 1320) The trial court gave the jury instructions on the lesser offenses of §794.011(5) (sexual battery involving physical force and violence not likely to cause serious personal injury, a second degree felony), aggravated assault, and battery (T 1321-1323).

Petitioner was found guilty as charged. The jury specifically found Petitioner was "guilty of sexual battery by using or threatening to use a deadly weapon." (R 110)

Petitioner was sentenced to a term of 150 years (R 116), and the trial court retained jurisdiction for the first third of that sentence. The trial court entered a written order in which he found that the offense on the 15 year old victim was "particularly aggravated." (R 118) The court noted that Petitioner had stuffed tissue paper

into the victim's mouth and that the victim had had difficulty breathing (R 119). The court also noted that the victim was a complete stranger to Petitioner and that she was totally defenseless and had not contributed to the circumstances resulting in the rape. Also relevant was the fact that only four days after the rape for which Petitioner had been found guilty in this case, he raped a 12 year old student in a similar fashion at another school. The court recognized that Petitioner had not exhibited any remorse and that there had been no reason offered to convince the court that Petitioner would not rape again if given the opportunity (R 120).

Petitioner appealed his judgment and sentence to the First District Court of Appeal which rejected his argument that the instruction on §794.011(4)(b) should have been given. A two judge majority explained that under the new version of Fla.R.Crim.P. 3.510, jury instructions on lesser included offenses did not have to be given if there had been no evidence of such offense introduced at the trial. See Gillespie v. State, 440 So.2d 8, 9 (Fla. 1st DCA 1983). Judge Ervin dissented and found that in his opinion the offenses defined by §794.011(3) and §794.011(4)(b) constituted the same conduct--despite the fact that each offense contained elements that the other did not and despite the fact that the Legislature provided different penalties.

ARGUMENT

ISSUE I

THE FIRST DISTRICT CORRECTLY FOUND THAT THE TRIAL COURT HAD PROPERLY INSTRUCTED THE JURY.

This is not a case in which the defendant's guilt or innocence is in issue. Rather, this is a case in which a defendant is asking for a new trial based upon a technical argument that the jury was improperly instructed despite the fact that the defendant himself confessed that he wielded a steak knife while butally raping the 15 year old victim in a toilet stall in the girls restroom in a junior high school.

The information filed in Petitioner's case charged him with the life felony offense of sexual battery which, "in the process thereof used or threatened to use a deadly weapon, to wit: a knife, contrary to the provisions of Section 794.011(3), Florida Statutes." (R 58) Petitioner's jury was given the standard jury instruction for that offense (T 1320), and the jury was also charged on the second degree felony of §794.011(5), Fla. Stat., which is sexual battery which "in the process thereof uses physical force and violence not likely to cause serious personal injury . . . ."

Petitioner's apparent contention in this case is that the jury also should have been instructed on the first

degree felony of §794.011(4)(b) which is sexual battery "by threatening to use force or violence likely to cause serious personal injury . . . ." Petitioner's argument is that this is a now category two lesser included offense and that since Brown v. State, 206 So.2d 377 (Fla. 1968), and In Re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981), require a jury to be instructed on that offense if it is both alleged in the charging document and supported by the evidence at the trial, the jury should have been so instructed in this case.

While the State fully agrees that §794.011(4)(b) might under some circumstances be a lesser included offense of §794.011(3), an instruction on the former offense was neither required nor proper in this case. First, it should be obvious even to the most casual observer that the information in this case charged Petitioner with using or threatening to use a deadly weapon, i.e., a knife. There is no mention of threats to use force or violence likely to cause serious personal injury, which, of course, is required under §794.011(4)(b). Moreover, there was no evidence of such force introduced at the trial--rather, the evidence demonstrated that Petitioner merely held the knife while directing the victim to go to the toilet stall.

Petitioner's argument at trial, and the argument to which his present lawyer is bound in this Court, Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982), was that if the standard jury instruction on deadly weapon was

substituted for the term deadly weapon in §794.011(3), the offense would read similarly to §794.011(4)(b) (T 1188). The trial court commented that Petitioner's argument used "imaginative and resourceful logic," but he found that it was not applicable to the facts which had been proved at trial and alleged in the information. Therefore, the only question which is properly before this Court is whether the trial court should have been required to substitute the standard jury instruction definition of deadly weapon in §794.011(3) in order to make the offense into a violation of §794.011(4)(b).

The State submits that the trial court was correct for several reasons. First, as the First District found, Petitioner did not argue on appeal that a deadly weapon was not used in the offense. See Gillespie v. State, 440 So.2d 8, 9 (Fla. 1st DCA 1983). Therefore, Petitioner cannot now be heard to advance a different argument, i.e., that the jury should have been allowed to determine as a question of fact whether a deadly weapon was used. Steinhorst, supra; Castor v. State, 365 So.2d 701, 703 (Fla. 1978).

Second, notwithstanding the fact that the argument was not properly preserved in the trial court, Petitioner's argument must fail in light of the fact that Petitioner's jury was in fact instructed under §794.011(3) concerning the need to find that a deadly weapon was used before the jury could convict Petitioner of the life felony. Of course, had the jury found that a deadly weapon was not used, then

the jury would have found Petitioner guilty of the second degree felony of §794.011(5). In other words, Petitioner's argument must fail because we already know that the jury in this case found that a deadly weapon was used since Petitioner was convicted of sexual battery involving the use or threat to use a deadly weapon. In that regard, an examination of Petitioner's trial counsel's closing argument reveals that it was never argued to the jury that a deadly weapon was not involved. This is because Petitioner's defense was that he wasn't there (despite his confession and despite the eyewitness identification).

Petitioner's reliance on several cases to support his contention that §794.011(4)(b) is a lesser included offense of §794.011(3) is misplaced. For example, in Smith v. State, 340 So.2d 1216 (Fla. 4th DCA 1976), the Court held that under the facts of that case, §794.011(4)(b) was a lesser included offense because of the accusatory pleading and proof adduced at trial--"In this case both the accusatory pleading and the evidence would support the jury finding the defendant guilty of one of the lesser offenses." Id., at 340 So.2d 1218. In McClanahan v. State, 377 So.2d 240, 241 (Fla. 2d DCA 1979), the Court held that "[a] charge of sexual battery by threatening to use a deadly weapon would include as a lesser offense in this case sexual battery by threatening to use force likely to cause serious personal injury." (Emphasis added).

Petitioner's reliance on Lake v. State, 380 So.2d 1120 (Fla. 2d DCA), cert. denied, 388 So.2d 1115 (Fla. 1980), is equally misplaced. In that case, the defendant had been charged with a violation of §794.011(3), and the trial court gave an appropriate instruction on that offense. At the defendant's behest, the trial court also gave an instruction on the allegedly lesser offense of involuntary sexual battery with a weapon--although there was no such offense, the trial court's instruction under §794.011(4)(b) was upheld on appeal under the facts of that case. See Judge Grimes' specially concurring opinion in which he noted that there was no harmful error because the defendant had asked for such an instruction. It should be noted that the Second District stated in its opinion "[i]n the context of the trial, the use of a weapon to commit the sexual battery was the equivalent of the threat of using force and violence likely to cause serious personal injury." Id., at 380 So.2d 1121, emphasis added. However, under the facts of Petitioner's case, the trial court specifically found that there was no evidence that a deadly weapon was not used.

Finally, Petitioner's reliance on Wagner v. State, 356 So.2d 867 (Fla. 4th DCA 1978), also is misplaced. In that case, the Court held that §794.011(4)(b) was a category four (now category two) lesser included offense of §794.011(3), because under the facts of that case both the accusatory pleading and the evidence adduced at

trial would have permitted the jury to make a finding of guilt on the lesser offense. As was found by the trial court, and noted by the First District in Petitioner's case, neither the accusatory pleading nor the evidence adduced at trial would have permitted the jury to find §794.011(4)(b)-- and this is especially true in light of the fact that the jury was given the option of finding that a deadly weapon was not employed when they were instructed that they could find Petitioner guilty of §794.011(5).

Thus, none of the cases relied upon by Petitioner hold that §794.011(4)(b) is a now category one necessarily lesser included offense of §794.011(3). And in fact, counsel for Petitioner has recognized that §794.011(4)(b) is a now category two lesser included offense.

Although it is not really necessary in order for the Court to resolve this case, the State wishes to point out the fallacy behind Judge Ervin's dissenting opinion. First, contrary to Judge Ervin's conclusions, the information in this case did not allege a threat to use force or violence. Moreover, the proof at trial did not provide evidence of threats of force or violence--and such proof was not injected into the case by Petitioner because his defense was that he did not do the crimes at all.

Second, Judge Ervin's conclusion that the two offenses were sufficiently similar to make them interchangeable is simply untenable. In State v. Baker, 456 So.2d 419, 420 (Fla. 1984), the Court held that whether two statutory

offenses were the same (for double jeopardy purposes), depends upon the statutory elements of the various crimes. "If each crime, under the respective statutes, requires an element of proof that the other does not, then one is not an included offense of the other. They are separate offenses." Id. Thus, since the two crimes contain different elements, there is simply no way that the two crimes can be the same. (The State recognizes that §794.011(4)(b) could under some circumstances be a category two lesser included offense of §794.011(3), however that is for jury instruction purposes rather than whether the two crimes are separate offenses. State v. Baker, supra.)

While the State does not agree with the Court's analysis in Bell v. State, 437 So.2d 1057 (Fla. 1983), that case provides no support for Judge Ervin's argument. This is because it can't be presumed that the Legislature enacted separate subsections of Chapter 794 for no reason. In other words, it must be presumed that the Legislature intended separate offenses by providing different penalties and different elements of the various offenses. Surely, it is reasonable for the Legislature to provide that it is a life felony if a deadly weapon is used, a first degree felony if threat to use force or violence likely to cause serious personal injury are made on the victim, and a second degree felony if less violent force or threats are made. Thus, Judge Ervin's argument fails even under the less restrictive objective legislative intent analysis of Bell.

Although the State fully recognizes that the table found in the standard jury instructions is not dispositive, it is instructive that §794.011(4) is listed there as a category two lesser included offense of §794.011(3). Thus, as was stated previously, the only thing this Court has to do is to examine the accusatory pleading and the facts adduced at trial in order to determine whether an instruction on the category two offense should have been given in this case. Since as the First District correctly found, there was no dispute that a deadly weapon was not used, there was thus no evidence adduced at trial which would make §794.011(4)(b) applicable to the facts of Petitioner's case. See Fla.R.Crim.P. 3.510. Also, the elements of the first degree felony were not alleged in the accusatory pleading. State v. Baker, supra.

As a final note, assuming only for the sake of argument that the Court disagrees with the State's position, the State urges the Court to apply the harmless error doctrine. See Justice Boyd's opinion in State v. Wilson, 276 So.2d 45, 47 (Fla. 1973), in which it was specifically noted that even if there had been prejudicial error in the trial court's failure to charge on a lesser included offense, the case should not be reversed if the record before the Court "contains such substantial evidence in support of the jury's verdict that such a presumption would be overcome." The State submits that is precisely the situation in Petitioner's case should the Court

disagree with all that the State has argued to this point. This is because Petitioner himself admitted that he was wielding a steak knife at the time of the offense. Also, and even more importantly, the jury in this case was instructed that in order to find Petitioner guilty of §794.011(3), it would have to find that Petitioner used a deadly weapon. Since the jury did so find, Petitioner's counsel's argument that the jury should have been allowed to determine whether the knife was a deadly weapon simply is untenable. Accordingly, if any error occurred, it had to be harmless beyond a reasonable doubt. State v. Wilson, supra.

ISSUE II

THE ISSUE SHOULD NOT BE CONSIDERED BY THE COURT BECAUSE TO DO SO WOULD DEFEAT THE COURT'S JURISDICTION ON THE ISSUE UPON WHICH THE GRANTING OF CERTIORARI WAS BASED.

Petitioner's second argument is that his speedy trial motion for discharge should have been granted. However, the State contends that this issue should not be considered because if Petitioner were granted relief, the Court's jurisdiction upon which the granting of certiorari was based would be defeated. See State v. Hegstrom, 401 So.2d 1343, 1344 (Fla. 1981). In that case, the Court made it clear that it would not grant certiorari on one ground and then consider a second ground which would obviate the need for considering the ground upon which the certiorari jurisdiction had been based:

> Preliminarily, we dispose of the state's suggestion that the district court should be reversed inasmuch as Hegstrom's conviction can be sustained on the basis of premeditated, rather than felony, murder. Were we do [sic] so, of course, the double jeopardy issue raised by Pinder would not be reached, let alone resolved. We categorically decline to accept the case for review on one basis and then reweigh the evidence, once reviewed by the district court, in order to avoid a ruling on the legal issue which provoked our jurisdiction. As the 1980 constitutional amendment to our jurisdiction made clear, we will not provide a second record review of cases already resolved by the district courts of appeal.

Id., footnotes omitted.

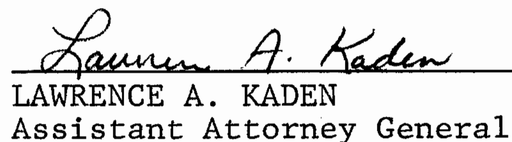
Accordingly, under State v. Hegstrom, supra, this issue should not be considered by the Court.

CONCLUSION

Neither side has disputed the fact that §794.011(4)(b) is a category two possibly lesser included offense in this case. The only dispute is whether an instruction should have been given--the defense contends that it should have, and the State obviously has argued to the contrary. The State respectfully submits that its position should prevail because even a liberal reading of the information does not provide the allegations necessary under §794.011(4)(b), and even the most liberal interpretation of the evidence provides no evidentiary support for finding threats of violence likely to cause serious bodily injury. Accordingly, the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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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, Post Office Box 671, Tallahassee, Florida, 32302, on this 3rd day of January, 1985.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL