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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
Petitioner,	)	
v.	)	Case No. 66,728
DAVID GREGORY JACKSON,	)	
Respondent.	)	

BRIEF ON THE MERITS

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TOPICAL INDEX

AUTHORITIES CITED

OTHER AUTHORITIES

STATEMENT OF THE CASE

Respondent was charged with fleeing a police officer, battery on a law enforcement officer, and resisting arrest with violence (R 397-398). The pertinent issue for purposes of this brief on the merits would be denial of a special jury instruction requested by respondent (R 326, 466). The jury found the respondent guilty as charged on all three counts (R 476-478).

Respondent appealed to the Fifth District Court of Appeal which issued its opinion reversing the convictions for a new trial pertaining to the charges of battery on a law enforcement officer and resisting arrest with violence. Jackson v. State, 463 So.2d 372 (Fla. 5th DCA 1985). Petitioner's motion for a rehearing was denied and petitioner sought jurisdiction in this court between the case of Jackson, supra, and the cases Lowery v. State, 356 So.2d 1325 (Fla. 4th DCA 1978), In the Matter of the Use by the Trial Court of the Standard Jury Instruction in Criminal Cases, 431 So.2d 594 (Fla. 1981), and Griffin v. State, 377 So.2d 864 (Fla. 1st DCA 1979). This court accepted jurisdiction and dispensed with oral argument on August 23, 1985. Petitioner's brief on the merits follows.

STATEMENT OF THE FACTS

Officer Wandell, on rountine patrol saw three black males together who quickly left in different directions as he approached them in his patrol car about 12:30 p.m. He wanted to talk to respondent but respondent entered his car and left at a high rate of speed. Officer Wandell then radioed Officer Borges to pursue and stop respondent in his automobile (R 95-108). Officer Borges, as well as Officer Brewster joined in the chase of respondent but respondent would not stop despite the fact that the police used their blue lights and sirens (R 122-127, 132). The chase ended when Brewster's patrol car collided with respondent's vehicle (R 124).

Borges testified that he saw Brewster approach respondent in his vehicle and saw Brewster draw his gun (R 137). Then Brewster holstered his gun. When Borges went to help Brewster removed respondent from the vehicle, the respondent grabbed the testicles of Officer Brewster (R 137, 139-140). Since respondent would not let go, Officer Borges struck the respondent with his flashlight. Finally respondent did release his grip on Officer Brewster's testicles, and Brewster punched respondent on his arm (R 141). As respondent was being cuffed and removed from his car, he kicked a number of times at Brewster (R 143). When respondent was being placed in the patrol car he also commenced to kick the officers again (R 144).

Officer Brewster testified that when he first approached respondent in his car after the collision, he saw respondent lying down in the car so he drew his revolver because he did not know

if respondent was reaching for a weapon (R 182). He confirmed Borges' testimony that respondent grabbed his gun but Brewster holstered the gun when he saw respondent had no weapon (R 182-183). When the officers approached respondent in his car, respondent initially flung his arms wildly and then grabbed the testicles of Brewster (R 183). Brewster told the jury it took ten punches to break the hold (R 184). Respondent also struggled when he was being placed in the vehicle and kicked Brewster at the police station a second time (R 209).

A police nurse was the first witness to testify for the defense. After the arrest, the respondent had minor lacerations under his lip and some scratches on his wrist, knuckle, and right elbow. He refused treatment (R 223-230). James Mike, a neighbor of the respondent saw the aftermath of the events leading to the stop of respondent's car. He was not sure if the officers struck respondent but he did indicate that the police brandished their clubs. He did not see respondent kick anyone (R 233-243). Delores Walker stated she saw the police striking respondent on his head (R 245). Another witness saw the police officers trying to handcuff the respondent and saw the respondent struggling and screaming. Yet this witness saw no hitting by respondent nor by the police officers (R 265). Two other witnesses testified to respondent's peaceful character (R 259, 270-271).

Respondent testifying on his own behalf, acknowledged that he did push the officer's gun back when the officer drew it (R 504). Although he told the jury that the officer punched him, he never fought the officer. He testified he never had a chance to strike the officers or fight at all (R 502-504). He exclaimed he never

hit a police officer, nor kicked a police officer, nor did he ever grab any officer on any part of the officer's body (R 508-510). Respondent testified, "...I don't resist no arrest. I respect the law." (R 510). Respondent continued to maintain that he never had a chance to resist at all, and that he did not get a chance to do anything (R 520).

Respondent submitted a written jury instruction supposedly based upon section 776.012, Florida Statutes (1983), and Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981). The requested instruction stated: "It is lawful to defend oneself against unlawful or excessive force, even when being arrested." (R 466). The court denied this special requested instruction (R 301). The court did say that it would instruct pursuant to Florida Standard Jury Instruction 3.04(d) (Criminal), which included the explicit language of section 776.012, pertaining to self-defense. During the course of the charge conference, the parties discussed this issue (R 313-314). Specifically, the defense attorney argued that his client had a right to use self-defense and "that's all we're asking this court to tell the jury." (R 321). Later on, the defense attorney explained that, "776.012 applies." (R 323).

Petitioner will quote verbatim the actual jury instructions read which are pertinent:

> Now, an issue in this case is whether David Jackson, Jr. acted in self-defense, that is, that his use of force is justified.
>
> David Jackson, Jr. was justified in using force if he reasonably believed that the use of force was necessary while he was acting in defense of himself against the imminent use of unlawful force by another person.

A person is never justified in the use of any force to resist an arrest. Therefore, you cannot acquit the Defendant on the grounds of self-defense if you find the following facts have been proved: First, the Defendant was being arrested by Officer E. Borges or Officer Brewster.

Two, that the Defendant knew that Officer E. Borges or Officer Brewster were law enforcement officers or that Officer E. Brewster...or Officer Guy...E. Borges or Officer Guy Brewster reasonably appeared under the circumstances to be a law enforcement officer.

A law enforcement officer is not required to retreat or give up his efforts to make a lawful arrest because there is resistance or a threat to resist the arrest. He is justified in the use of any force that he reasonably believes to be necessary to defend himself or another from bodily harm while making an arrest.

(R 359-360).

SUMMARY OF ARGUMENT

Respondent requested Florida Standard Jury Instruction 3.04(d) (Criminal) (R 464), as well as the instruction pursuant to Ivester, supra, (R 466). Both instructions read together would be incoherent and incomprehensible. In any event, respondent did not present argument to support his request for the Ivester instruction pursuant to Florida Rule of Criminal Procedure 3.390(d), but requested the self-defense instruction pursuant to Section 776.012, Florida Statutes (1983) (R 303, 321, 323).

Self-defense is an affirmative defense for which some evidence must be presented. Respondent presented no evidence of self-defense but, in fact, denied that he used any force whatsoever, and in doing so repudiated the self-defense issue.

The actual instructions read to the jury, which included not only a definition of self-defense pursuant to Section 776.012, but also informed the jury what constituted justifiable force in making the arrest were adequate to inform the jury of the issues in the case at bar.

The Ivester instruction requested by respondent specifically requested the words, "unlawful...force." These words would add confusion to the instructions to the extent that it is permissible for a defendant to resist an unlawful arrest. The jury could very well interpret the words, "unlawful force" to mean an unlawful arrest and thus, might believe that a defendant could resist an unlawful arrest with violence.

ARGUMENT

THE REQUESTED INSTRUCTION WAS IMPROPER IN LIGHT OF THE OTHER REQUESTED INSTRUCTIONS AND IN LIGHT OF THE DEFENSE PRESENTED, AND IN ANY EVENT, THE STANDARD JURY INSTRUCTIONS READ IN THEIR TOTALITY WERE ADEQUATE.

In Shannon v. State, 463 So.2d 589 (Fla. 4th DCA 1985), the defense requested that the trial court not read the Florida Standard Jury Instruction 3.04(d) (Criminal), i.e., "a person is never justified in the use of any force to resist an arrest..." The defense tendered a similar instruction to the one in dispute in the case at bar (R466), in place of the standard instruction. The trial court gave both instructions. The appellate court held that giving both made the instructions incoherent and incomprehensible. In the case at bar, respondent specifically requested jury instruction 3.04(d) (R 464). He did not request his instruction be read in lieu of the standard jury instruction. Defense counsel explained that Ivester, supra, stood for the proposition that section 776.051, Florida Statutes (1983) and Section 776.012 were not necessarily inconsistent (R 300). Later on the defense counsel argued that his client had the right to argue self-defense and that was all they were asking for (R 321). Defense counsel argued that section 776.012 applied (R 323). This instruction was actually read to the jury (R 359).

The defense counsel not only failed to give argument to support his requested jury instruction (R 301-303, 321-323), but affirmatively asked for the standard jury instruction 3.04(d) as well as the standard jury instruction quoting section 776.012

(R 321, 323). Petitioner submits respondent has failed to comply with rule 3.390(d) and affirmatively waived any putative right to have his requested Ivester instruction (R 466) read in lieu of the jury instruction 3.04(d). Even if he had complied with proper procedure, the two read in conjunction would be incomprehensible. The holding in Jackson v. State, supra, to the extent that it does not account for the latter procedural arguments, is in error.

At trial, respondent as well as his witnesses all testified that he offered no resistance whatsoever to the police. The decisions in Shannon, supra, Jackson, supra, and Allen v. State, 424 so.2d 101 (Fla. 1st DCA 1983), in holding that the respondent's Ivester, instruction should be read to the jury, focus on the police conduct.[1]

Petitioner submits that such a focus is incorrect. A review court should look to the defendant's conduct and assertions because self-defense is an affirmative defense. See, Bolin v. State, 297 So.2d 317, 320 (Fla. 3d DCA 1974), cert. denied, 304 So.2d 452 (Fla. 1974). Respondent could very well argue that the mere allegation of resisting arrest with violence should inherently establish a "self-defense" instruction when the defense adduces testimony showing that the policy used excessive force, but jury instructions must be based on testimony; not allegations. As an affirmative defense, the testimony must focus on the defendant's

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[1] Petitioner notes that the First District Court of Appeal has certified this issue as a question of great public importance to this court in Holley v. State, 464 So.2d 578 (Fla. 4th DCA 1983).

conduct; not what the law enforcement officers did. See, Williams v. State, 427 So.2d 331 (Fla. 3d DCA 1983), (holding that insufficient evidence was presented by the state to justify a jury instruction pertaining to flight). Respondent not only failed to present sufficient evidence of self-defense, but actually repudiated that theory by his testimony that he did not participate in the violence at all. Respondent's defense was essentially that he did nothing but that the police used excessive force, despite the fact that it was unnecessary. Jackson, supra, should be distinguished from Ivester, supra, because the defendant in Ivester, wanted to obtain discovery pertaining to a policeman's past history of violence to prepare for a potential defense. In contrast, Jackson not only failed to produce any evidence pursuant to self-defense, but actually repudiated that defense by maintaining that he was totally non-violent during the encounter.

In any event, respondent still was able to obtain a self-defense instruction pursuant to section 776.012 as he requested (R 329, 359). In light of the procedural default, the requesting of two instructions which would make the instructions incomprehensible, and the defense actually presented, petitioner submits that the failure to give the requested instruction pursuant to Ivester, would be harmless error. See, Allen, supra, (where the failure to give such an instruction was held harmless because the record was devoid of any evidence from which a jury could conclude that the instruction would be needed).

The trial court actually instructed the jury regarding the parameters of what constituted lawful conduct by an officer

during an arrest. He informed the jury: "A law enforcement officer is not required to retreat or give up his efforts to make a lawful arrest because there is resistance or threat to resist the arrest. He is justified in the use of any force that he reasonably believes to be necessary to defend himself or another from bodily harm while making an arrest." (R 360). As mentioned above, the trial court actually instructed the jury on self-defense (R 359). The instruction in part is as follows: "David Jackson, Jr. was justified in using force if he reasonably believed that the use of force was necessary while he was acting in defense of himself against the imminent use of unlawful force by another person." (R 359) (emphasis supplied). § 776.012.

So, the jury was told what constituted lawful force (R 360). The jury was then told that respondent could use self-defense if the police used unlawful force. The fact that the jury was also instructed that the defendant could never use force to resist an arrest, did not vitiate nor truncate respondent's basic contention that he could use self-defense against the use of unlawful force, in light of the self-defense instruction and in light of the instruction which defined what was lawful conduct by an officer making an arrest (R 359, 360).[2]

Finally, petitioner submits that respondent's request that instruction pursuant to Ivester, supra, would add further confusion with the holding in Lowery v. State, 356 So.2d 1325

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2 Petitioner is aware that jury instruction 3.04(d), uses the word "never" while section 776.051(1), Florida Statutes (1983), uses the word "not". Petitioner still submits that the standard jury instruction for purposes of this case should not call for a reversal of the conviction.

(Fla 4th DCA 1978). In Lowery, it was held that a defendant could resist an unlawful arrest without violence. Respondent's proposed instruction states: "It is lawful to defend oneself against unlawful or excessive force, even when being arrested" (R 466) (emphasis supplied). The jury could construe "unlawful... force" to mean an unlawful arrest. Therefore, based upon the requested instruction by respondent, a jury might be mislead into believing that a defendant could use violence to resist "unlawful force", i.e., an unlawful arrest.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida Fifth District.

Respectfully submitted,

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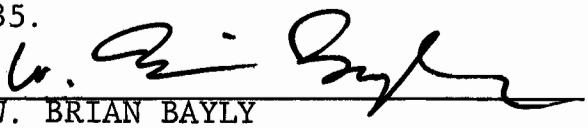
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief on the Merits, has been furnished, by mail, to James R. Wulchak, Assistant Public Defender for David G. Jackson, Jr., this 12th day of September 1985.



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