SUPREME COURT OF FLORIDA

VINCENT FRANCIS GALLO,	:	CASE NO. 67,254
Petitioner,	:	DCA CASE NO. 84-1618
vs.	:	
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF

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STATEMENT OF THE FACTS

The Petitioner, VINCENT FRANCIS GALLO, was charged by information dated December 03, 1982, with having, between November 6 and 7, 1982, committed the crimes of kidnapping with a deadly weapon, sexual battery with a deadly weapon, 2 Counts, and unlawful use of a firearm in the commission of a felony upon the complaining witness, CHRISTINE CURRID. (R.p.530)

The evidence shows that between 11:00 - 11:30 P.M. on November 06, 1982, the witness, CHRISTINE CURRID, decided to go to a Burger King. (R.p.67,L.15-19) While walking, she met a man who offered her a ride. (R.p.70,L.4-6) She was then bound and a hood was placed over her head. (R.p.72,L.7,14-17) and the man "made me have oral sex". (R.p.73,L.18) She claimed he had a gun. (R.p.94,L.9) When asked, however, if she went with him willingly, she stated, "At first, yes". (R.p.76,L.1) In addition to all this activity, she claims they were driving at the time. (R.p.74,L.14)

The witness further claims that she was then taken to a residence where the man allegedly had sexual intercourse with her. (R.p.80,L.14-22) After 45 minutes to an hour (R.p.84,L.18) she

was transported by car, with the hood on her head (R.p.89,L.2-10) and released.

She went to a house nearby and asked the people there to take her home. (R.p.91,L.6-7) She was taken to the police station (R.p.91,L.8) where she claimed to have gotten part of a license number, but she stated, "I didn't get a good look at it". (R.p.104,L.16) She clearly described her attacker as a young man, 25-35 years old. (R.p.103,L.4-5) From her tag description, the police came up with a tag registered to the Petitioner, with some similar letters in it. (R.p.267,L.4-8) The police then took Ms. CURRID to Mr. GALLO'S house to identify the Appellant. She said "she wasn't sure". (R.p.269,L.19) The police and the witness left. Later she accused Mr. GALLO. Mr. GALLO maintained his innocence and stated that, although he had gone out on a date with a friend (R.p.376,L.2-6) and had gone to his mother's house to drop off some personal property (R.p.377-L.13-18), until the police came to his house on November 07, 1982, he had never encountered the State's witness before.(R.p.366,L.15-18)

At the time of the charge conference, the Defense requested a waiver of lesser included offenses and the prosecution agreed. The Court refused. (R.p.411,L.19-25)

The Court then gave, over defense objection, instructions on what it deemed lesser included instructions. Although the Court gave instructions to the jury on attempted sexual battery, it neglected to give an instruction on attempted kidnapping.

The jury acquitted the Petitioner on all of the charges in the Information, but agreed on convictions for three (3)

lesser included offenses. After post-trial motions were denied, the Appellant filed his timely appeal.

On appeal, the Fourth District Court of Appeals affirmed the convictions and sentences, but had difficulty in determining the meaning of the Supreme Court's holding in Harris v. State, 438 So.2d 787 (Fla.1983), cert denied, __U.S.___, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984). They certified a question to the Supreme Court regarding the meaning of that case, whereby the Petitioner has filed his brief in response to that question.

SUMMARY OF ARGUMENT

In the first Issue, Petitioner asserts that every criminal defendant has rights that he can either retain or waive. Once he knowingly and intelligently elects to waive the right to have jury instructions on lesser included offenses, the State, by agreeing to such a waiver, also relinquishes its rights to have such instructions given. Any subsequent instructions that include those lesser offenses clearly violates the defendant's rights by forcing upon him the right which he has waived.

The second Issue reflects the harmful error which the trial court committed by giving instructions on the lesser offenses which had already been waived. When a defendant requests instructions on lesser offenses, the law is clear that the trial judge must so instruct, otherwise, reversible error is committed. But, when the defendant has waived those instructions and the State acquiesced, the trial judge must take notice of that waiver and the rights which have been relinquished and respect the decision of the parties. No instructions should be given because it will result in harmful error.

In the third Issue, Petitioner argues that the offense for which he was convicted was not a lesser offense of the crime charged by information. When a conviction occurs for any crime for which there are no prior allegations, there is fundamental error because the defendant has not had a full and fair opportunity to present his case.

In the fourth and last Issue, Petitioner argues that when an attempt to commit a crime is itself an offense, the trial

judge must relate that in the instructions. As the trial judge in the instant case took it upon himself to instruct on lesser offenses, he must properly instruct as to only the applicable offenses. He failed to give an instruction on attempted kidnapping, and cearly, this in and of itself must be deemed harmful error.

The totality of the circumstances of this case show that Petitioner GALLO did not receive due process and a fair trial. His identification, as a result of a show up, wherein the prosecutrix "wasn't sure" he was the perpetrator, led to a substantial likelihood of irreparable misidentification. The trial court refused to waive giving instructions on lesser offenses in spite of the proper waiver by the defendant and the State's agreement to waive the lessers. Only after the trial court told the State it would not waive the lessers did the State in effect say, "in that case, the State wants lessers". Lastly, when the court gave the lessers over the defense objections and proper waiver, it gave improper instructions. The law requires instructions on the next lower crime where lessers are properly given. By failing to give the attempted kidnapping instruction, the court commited per se reversible error. It should be noted that the defendant was acquitted of all charges in the information and only convicted of the lessers he had waived.

ARGUMENT

ISSUE I.

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE 4TH DISTRICT COURT OF APPEAL

"Is the state entitled to have jury instructions given on necessarily included lesser offenses in a case where the defendant requests that no such instructions be given and knowingly and intelligently waives his right to such instruction?"

"There are many basic rights that are secured to every defendant. He has the right to trial by jury. However, he may waive such right and submit the issues for determination by the judge ... We hold further, that he may waive his right to have the jury charged as to lesser and included offenses." (emphasis added) Black v. State, 279 So.2d 909, 910 (Fla.3rd DCA 1973). This is exactly what the Petitioner, VINCENT FRANCIS GALLO, requested at his trial. Both the Petitioner and his trial counsel objected to the inclusion of jury instructions regarding any lesser offenses and the record reflected the acquiescence by the State. (R.p.411)

An analogy can be drawn regarding the right to waive on lesser included offenses jury instructions, and the right to waive trial by jury. In State Ex Rel. Gerstein v. Baker, 339 So.2d 271 (Fla.3rd DCA 1976), the Court noted that, "...the state must consent to a waiver of a jury trial sought by a defendant." In the instant case, the State did consent to the defendant's request, whereby the right becomes inherent in the defendant and the State cannot take it away for fear of violating the defendant's rights. It is the state's prerogative and power to charge a defendant by

information or indictment and to include within that charging document any and all offenses which the state deems applicable. The defendant pleads guilty or not guilty to the charges as contained within that document. At trial, if the state has failed in its burden to prove the allegations contained within that document, the ability to request the inclusion of instructions on lesser offenses becomes the right of the defendant. "If requested by the defendant instructions must be given on all leser included offenses which are necessarily included in the offense charged ... "Jackson v. State, 355 So.2d 137 (Fla.3rd DCA 1978) (emphasis added)

Arguably, the right to request the instructions on lesser offenses can inure to either party, but once there is a valid waiver by one party and consent by the other, those instructions must not be given. The State controls the destiny of its case, and by agreeing to the defendant's request not to instruct on lesser offenses, they have acquiesced to the procedure whereby the jury's verdict must rest upon proof of the crimes as charged in the information.

ISSUE II.

"Where the defndant waives instructions on lesser included offenses, and the state consents to the waiver, it is reversible error when the court subsequently gives those instructions and the jury convicts on lessers only."

The main purpose for this cause coming before this Honorable Court is that the Fourth District Court of Appeals was unsure of the meaning of this Court's decision in Harris v. State, 438 So.2d 787 (Fla.1983). In Harris, supra, this Court dealt with the fact that the defendant had waived his right to instructions on lesser offenses, and on appeal, argued that there should have been the inclusion of certain lesser offenses. Although the facts are dissimilar to the ones presented in the instant case, the Harris holding is extremely important to the issue presented in this case. Petitioner GALLO knowingly waived his right to the lesser offense instructions and the state agreed to the waiver. (R.p.417) The trial judge instructed on lessers anyway over defendant's objections. (R.p.418) On appeal, the Petitioner sought reversal of his conviction as the trial judge's actions should be deemed fundamental and reversible error since GALLO was only convicted of lesser offenses.

In the Harris, supra, opinion, this Court has created a dichotomy whereby in one paragraph it states that "...a trial judge is required to instruct on necessarily included offenses because the law, particularly 919.16, requires it." Harris at 796, citing Brown v. State, 206 So.2d 377 (Fla.1968), and in another paragraph states, "[t]his procedural right to have instructions on

necessarily included lesser offenses given to the jury does not mean, however, that a defendant may not waive his right just as he may expressly waive his right to a jury trial." Harris, at 797.

If the defendant has such a right and has effectively waived it, what purpose does that waiver serve when the trial judge can note it, disregard it, and give instructions as he deems necessary?

"It is erroneous to give an instruciton whichis calculated to make the jury believe that they must find accused guilty in some degree, and that they cannot acquit him; ..." 23A C.J.S. Criminal Law §1288. Petitioner GALLO was not found guilty as charged, but rather, guilty of a lesser offense to which both he and his trial counsel objected.

The Harris, supra, decision contains one important distinquishable factor to the instant case, that being the reference to State v. Washington, 268 So.2d 901 (Fla. 1972), and its reaffirmation in Rayner v. State, 273 So.2d 759 (Fla. 1973) and Williams v. State, 285 So.2d 13 (Fla. 1973). This Court notes in Harris, at 796, that "[i]n none of these cases did the defendant expressly waive his right to have such an instruction given." Again, the trial record in the instant case reflects the fact that Petitioner GALLO knowingly and intelligently waived that right and the State consented. Upon this fact alone, it is imperative that this Court take notice and clarify the law regarding knowing, intelligent waiver of lesser included offenses. The rights of the accused must be preserved whereby those rights have true meaning and force

within all judicial proceedings. This is not a case where lessers were asked to be given and weren't, which we know is the law. Rather, it is a situation where there was a proper waiver by the defendant and consent by the State and a veto by the trial court of the waiver of lessers, followed by improper instructions on lessers and convictions of the defendant on lesser offenses only, making it clearly harmful error.

ISSUE III.

"The trial judge committed error by instructing the jury on a lesser offense which was not a proper lesser of the crime charged in the information."

In his instructions to the jury, the trial judge addressed the two counts of sexual battery with the use of firearm, charged pursuant to §794.011(3) Fla. Stat. (1982), by stating that lesser included crimes are attempted sexual battery with a firearm, sexual battery with force not likely to cause serious injury, and battery. (R.p.503-506) Not only were these instructions objected to by the Petitioner and his trial counsel, but they are clearly erroneous as they are not all lesser offenses of the crime charged.

The Petitioner was convicted under §794.011(5) Fla. Stat. (1982) of sexual battery with force not likely to cause serious injury (R.p.527). In Bragg v. State, 433 So.2d 1375 (Fla.2d DCA 1983), the court stated that

> "[i]n order for sexual battery under subsection (5) to be a category 1 necessarily included offense of subsection (3), it must be an essential aspect of the major offense, such that the burden of proof of the major crime cannot be discharged without proving the lesser crime as an essential link in chain of evidence. Harris v. State, 338 So.2d 880 (Fla. 3d DCA 1976). The court in Harris stated that when a defendant is charged under subsection (3) with the use or threat of use of a deadly weapon, it is unnecessary for the state to allege or prove the use of actual physical force in any degree. 'Want of consent under such circumstances stems from fear created by display of the deadly weapon, and not from physical force.' Harris 338 So.2d at 882. In other words, the major crime here could have been proved without the mention of either great or slight force. Thus, sexual battery using slight force is not a necessarily included

> offense of sexual battery under subsection (3), when the defendant is only charged with the use or threatened use of a deadly weapon." Bragg at 1377.

Petitioner GALLO has been acquitted of sexual battery under §794.011(3) Fla. Stat. (1982) and wrongfully convicted of sexual battery under §794.011(5) Fla. Stat. (1982), as the offense for which the Petitioner was convicted was not charged in the information, fundamental harmful error has been committed and the conviction must be reversed. See Smith v. State, 365 So.2d 405 (Fla.3d DCA 1978).

ISSUE IV.

"The Court committed error by failing to instruct the jury on attempted kidnapping as a lesser included offense."

In Brown v. State, 206 So.2d 377 (Fla. 1968), this Court has established the basic criteria for instructions to the jury. In Brown, supra, there is a general rule that an instruction on attempt to commit the offense should be given to the jury when in fact, an attempt is itself an offense. In Florida, attempted kidnapping is an offense and as such was necessary to be included in the trial judge's instructions.

In his instructions, the trial judge included the charged offense (kidnapping with the use of a firearm), kidnapping without the use of a firearm, and false imprisonment. (R.p.502-503) Petitioner GALLO was convicted of the lesser offense, kidnapping without the use of a firearm. (R.p.526-527) These instructions are dreadfully lacking and rife with error. In Cabe v. State, 408 So.2d 694 (Fla.1st DCA 1982), the Court reasoned that it is reversible error not to instruct on an offense which is one step removed from the crime which the defendant has been convicted. In the instant case, the attempted kidnapping instruction would be a proper instruction under lesser offenses, but the failure to give such instruction is harmful error and the conviction must not be allowed to stand.

CONCLUSION

Petitioner, VINCENT FRANCIS GALLO'S due process rights were violated in that he did not receive a fair trial. The identification was highly suspect, yet his motion to suppress it was denied. Petitioner and the State agreed at the charge conference to waive instructions on lesser included offenses. The waiver was knowingly and intelligently waived by the Defendant. The lower court refused to waive lessers and gave lessers over the objections of the Petitioner and his counsel. The trial court committed reversible error when it failed to give an instruction on attempted kidnapping once it had decided that it would not honor the waiver of Petitioner.

By overriding the clear waiver of lessers, the trial court committed error which was not harmless because the Petitioner was convicted of lesser offenses only. He was acquitted of the charges in the information.

The Fourth District Court of Appeal was troubled by the trial court's actions by virtue of this Court's ruling in Harris v. State, 438 So.2d 787 (Fla. 1983). Hence, the certified question presented.

It is Petitioner GALLO'S position that this Court has held that a defendant may waive his right to have instructions on lesser included offenses. This is precisely what Petitioner GALLO did! In Harris, this Court held, "This procedural right to have instructions on necessarily included lesser offenses given to the jury does not mean, however, that a defendant may not waive his

right just as he may expressly waive his right to a jury trial. (Citations) Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930) Davis v. States, 159 Fla. 838, 32 So.2d 827 (1947) Fla.R.Crim.P. 3.260. But, for an an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant and the record must reflect that it was knowingly and intelligently made. We hold that, upon the facts in this case, Petitioner knowingly and intelligently waived his right to instructions on necessarily included lesser offenses ... The Fourth District Court of Appeal found that Petitioner made knowing and intelligent waiver. Under the circumstances of this case, the lower court committed reversible error. Clearly, under the holding of Harris, Petitioner GALLO is entitled to a reversal of his conviction.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to ROBERT S. JAEGERS, Assistant Attorney General, 111 Georgia Ave., Suite 204, West Palm Beach, Florida 33401 and the original and 7 copies have been furnished by special courier to SID J. WHITE, Clerk of the Supreme Court of Florida, Tallahassee, Florida this 17th day of July, 1985.

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