IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,847

JEFFREY WIMBERLY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecuting authority in the trial court and the appellee in the District Court of Appeal, First District. Respondent, Jeffrey Wimberly, was the defendant in the trial court and appellant in the court below. References to the parties will be as they appear before this Court.

References to the record on appeal, which contains the legal documents filed in this cause and the transcript of testimony and proceedings at trial will be designated "(R)."

All emphasis is supplied by Petitioner.

STATEMENT OF THE CASE AND FACTS

By information filed April 24, 1984, Respondent was charged with possession of contraband, two counts of battery on a correctional officer, and one count of resisting an officer with violence (R 1-4). The case proceeded to a jury trial on August 23, 1984, before Circuit Judge John J. Crews.

Correctional Officer Terry Lee Krueger testified that on September 29, 1983, he and Officer Martin D. Dockery were conducting a shakedown search of inmates returning from work. Both were uniformed (R 87-89). Respondent ran away before being searched and the officers gave chase into a building. Respondent threw a metal object into a cell before he was caught by Officer Krueger. During a struggle he hit Krueger in the face (R 86-99).

Officer Dockery testified that Respondent ran from the officers before the search and threw an object into a cell. He was struck in the mouth by Respondent when he tried to help Officer Krueger subdue the prisoner. He recovered a knife from inmate Samuel Gilbert's cell and identified it in court. The weapon was entered into evidence without objection (R 103-114). Inmate Gilbert testified that he heard a disturbance outside his cell and then found a knife on his bunk (R 100-103).

Respondent's motion for judgment of acquittal was granted as to the battery on Officer Krueger, and partially granted in that the resisting charge was reduced to resisting without vio-

lence (R 116-123).

Respondent's counsel requested that the jury be instructed on simple battery as a lesser offense to battery on a law enforcement officer. The request was denied (R 125-126).

The jury returned a verdict of guilty of possession of contraband, battery of a law enforcement officer and resisting arrest without violence (R 138-139). Respondent filed a notice of appeal on August 28, 1984 (R 56).

In the opinion rendered October 2, 1985, the lower court held that the trial judge erred in not instructing the jury on simple battery, but certified the question to be resolved here.

QUESTION PRESENTED

IF THE EVIDENCE AT TRIAL IS SUFFICIENT TO CONVICT OF A NECESSARILY LESSER INCLUDED OFFENSE, AND THE SAME EVIDENCE ALSO INCONTROVERTIBLY SHOWS THAT THE NECESSARILY LESSER INCLUDED OFFENSE COULD NOT HAVE BEEN COMMITTED WITHOUT ALSO COMMITTING THE GREATER CHARGED OFFENSE, DOES RULE 3.510(b) FLA.R.CRIM.P., REQUIRE THE TRIAL JUDGE TO INSTRUCT THE JURY OF THE NECESSARILY LESSER INCLUDED OFFENSE?

SUMMARY OF ARGUMENT

The plain meaning of the language of Florida Rule of Criminal Procedure 3.510 reveals the rule makers' intention that instructions on necessarily lesser included offenses, as well as those on lesser included offenses, are improper where there is a total lack of evidence of the lesser offense. Rule 3.510(b) must be read in conjunction with Rule 3.510(a) and Rule 3.490. Fla.R.Crim.P. Such an interpretation does not infringe upon a jury's right to exercise its pardon power in that an acquittal is always possible.

ARGUMENT

WHEN THE EVIDENCE AT TRIAL IS SUFFICIENT TO CONVICT OF A NECESSARILY LESSER INCLUDED OFFENSE, AND THE SAME EVIDENCE ALSO INCONTROVERTIBLY SHOWS THAT THE NECESSARILY LESSER INCLUDED OFFENSE COULD NOT HAVE BEEN COMMITTED WITHOUT ALSO COMMITTING THE GREATER CHARGED OFFENSE, RULE 3.510(b), FLA.R. CRIM.P., DOES NOT REQUIRE THE TRIAL JUDGE TO INSTRUCT THE JURY ON THE NECESSARILY LESSER INCLUDED OFFENSE.

Petitioner contends that the lower court has misread the plain language of Fla.R.Crim.P. 3.510 which reads, in part, as follows:

> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> * * * *
>
> (§b) <u>any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence</u>. The judge shall not instruct on <u>any</u> lesser included offense as to which there is no evidence.

This language clearly indicates that a trial judge need not instruct the jury on a lesser-included offense, necessarily included or otherwise, for which there is no evidence. The phrase "and is supported by the evidence" includes a compound verb whose subject is "any offense." The conjunction "or" in

the phrase "is a necessarily included offense or a lesser included offense" connects two nouns for the subject "any offense." Thus, it is clear that a jury may not convict a defendant for a necessarily included offense or a lesser included offense for which there is no evidence.

It is equally clear that the word "any" in the last sentence refers to both necessarily included and lesser included offenses. The Supreme Court Committee on Standard Jury Instructions in Criminal Cases certainly meant for the last sentence to complement the first. The lower court's interpretation leads to the irrational conclusion that the Committee wanted to prevent a jury from convicting a defendant for a lesser offense for which there was no evidence while at the same time requiring the judge to instruct on one type of lesser offense regardless of the evidence.

This Court has recently stated in dicta that an instruction on lesser offenses should not be given where there is no evidence to support a conviction for that offense:

> Amended Florida Rule of Criminal Procedure 3.490, which became effective October 1, 1981, requires the giving of instructions on lesser included offenses only where supported by the evidence. Prior to October 1, 1981, rule 3.490 provided that when the offense charged was divided into degrees the trial court had to give instructions as to all degrees of the offense charged, regardless of whether there was any evidence to support the lesser degrees. The court was obligated under this rule to instruct the jury on first- and second-degree murder, manslaughter, and third-degree murder. See Martin v. State, 342 So.2d 501 (Fla. 1977);

Brown v. State, 124 So.2d 481 (Fla. 1960). Further, under former rule of criminal procedure 3.510, the court was required to instruct on all degrees and all necessarily included lesser offenses, regardless of the evidence.

Rule 3.490 now provides for the determination of the degree of offense for which a defendant may be convicted and reads as follows:

> 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 judge shall not instruct on any degree as to which there is no evidence.

(Emphasis added.) Rule 3.510, as it is presently written, provides for the determination of lesser included offenses for which a defendant may be convicted and reads, in part, as follows:

> Upon an indictment or information upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> . . . .
>
> (b) any offense which as a matter of law is a necessarily included offense or a lesser included offense of the offense charged in the indictment or information and is supported by the evidence. The judge shall not instruct on any lesser included offense as to which there is no evidence.

(Emphasis added.)

Under these rules, as noted by the Second District Court of Appeal in Williams, a defendant charged with first-degree premeditated murder is entitled to an instruction on the lesser included offense of third-degree felony murder if there is evidence to support such a charge. See also Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982). If there is no evidence to support a third-degree felony murder conviction, an instruction on the crime is

> not required. See Williams, 427 So.2d at 776.

Green v. State, 10 F.L.W. 467, 468 (Fla. August 30, 1985, Case No. 65,804). Moreover, Rule 3.510(a) also prevents the trial judge from instructing the jury on attempt if the only evidence proves a completed offense. Thus, it is logical to read Rule 3.510(b) as being consistent with Rule 3.490 and Rule 3.510(a): instruction on lesser offenses, be they degrees, attempts or necessarily lesser included offenses, are inappropriate where there is no evidence to support a conviction.

In certifying the question, the lower court cited the conflicting cases, including In Re: Florida Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 597 (Fla. 1981), where this Court stated that the language of revised Rule 3.510 would "eliminate the need to give a requested lesser offense [instruction], not necessarily included in the charged offense, when there is a total lack of evidence of the lesser offense." Wimberly v. State, 10 F.L.W. 2288, 2289 (Fla. 1st DCA, October 2, 1985). However, the District Court also noted the "potentially conflicting language" in In Re: Florida Standard Jury Instructions in an apparent reference to the following:

> We agree with the recommendation of the committee to change these rules. The present rules have required instructions to the jury for offenses for which there is no support in the evidence and no argument by counsel, and as a result have caused jury confusion.
>
> 431 So.2d at 597.

Petitioner submits that the benefits of instructing a jury on necessarily included offenses for which there is no evidence in

order to preserve a jury's "pardon power" is greatly outweighed by the risk of confusion, especially when a jury can always exercise its pardon power with an acquittal. See Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

In Sansone v. United States, 380 U.S. 343, 13 L.Ed.2d 882, 85 S.Ct. 1004 (1965), the U.S. Supreme Court stated as follows:

> . . . A lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Berra v. United States [351 U.S. 131]; Sparf v. United States, [156 U.S. 51].
>
> (380 U.S. at 349-350).

This Court came to the same conclusion in Gilford v. State, 313 So.2d 729 (Fla. 1975). There, the defendants were charged with breaking and entering with intent to commit a felony. At trial, their request for an instruction on breaking and entering with intent to commit a misdemeanor was denied. The Court ruled there was no error and explained:

> If there is no evidence to support a lesser-included offense, then it is a mockery to tell the jury that they can convict on such a lesser-included charge, just as it would be wrong to do so if such a charge were not within the 'accusatory pleading.' [Citing State v. Anderson, 270 So.2d 353 (Fla. 1972) and State v. Wilson, 276 So.2d 45 (Fla. 1973)].
>
> 313 So.2d at 731.

See also Bell v. State, 437 So.2d 1057, 1060-61 (Fla. 1983) and Watson v. State, 439 So.2d 1050 (Fla. 2d DCA 1983).

In the instant case, Respondent was a prisoner at the Union Correctional Institution on the day in question, and both correctional officers were in full uniform. Respondent made no claim at trial that he was unaware the victim was a law enforcement officer, and no evidence was presented that could have led a jury to so conclude. Petitioner submits that neither the Florida Rules of Criminal Procedure nor common sense calls for an instruction on simple battery under these circumstances.

In conclusion, it is submitted that the word "any" in the last sentence of Rule 3.510(b) must be read to encompass necessarily included offenses. Had the rule makers not been referring to necessarily included offenses, the indefinite article "a" would have been used instead of "any." This reading of the rule is consistent with Rules 3.490 and 3.510(a), and with Green, supra, Gilford, supra and Sansone, supra. See also Martin v. State, 342 So.2d 501 (Fla. 1977) (where this Court held that an aggravated assault instruction was unnecessary because the crime culminated in the death of the victim).

Thus, this Court should answer the question certified in the negative based upon the plain language of Rule 3.510 and the obvious intent of the Supreme Court Committee on Standard Jury Instructions in Criminal Cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been forwarded by hand delivery to Counsel for Respondent, P. DOUGLAS BRINKMEYER, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 2nd day of December, 1985.

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