67,888

IN THE SUPREME COURT OF FLORIDA

ERINEO ACENSIO, :

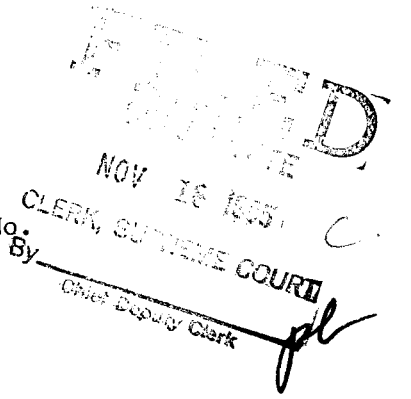
Petitioner, :

vs. : Case No.

STATE OF FLORIDA, :

Respondent. :

:



DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

PAUL C. HELM
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE DIVISION

Hall of Justice Building
455 North Broadway
P.O. Box 1640
Bartow, FL 33830-3798
(813) 533-1184 or 0931

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State filed an information in the Circuit Court for Polk County on April 19, 1984, charging the Petitioner, ERINEO ACENSIO, with the attempted first degree murder of Alec Carmichael by shooting him with a pistol on March 30, 1984. (R3,4) [1/]

Petitioner was tried by jury on August 16 and 17, 1984. (R60,62) The evidence established that Petitioner intentionally shot Carmichael, although Petitioner said he was acting in self-defense. (R64-68,74-78,86-89,94-97,105-112,200,208-210,214-217,291-298) Defense counsel objected to the trial court's failure to instruct the jury on the lesser included offense of battery. (R219) The court gave the jury instructions on attempted first degree murder, attempted second degree murder, attempted manslaughter, and aggravated battery. (R244-249) The jury found Petitioner guilty of aggravated battery with a firearm. (R262,266)

On September 20, 1984, the trial court adjudicated Petitioner guilty of aggravated battery with a firearm and sentenced him to a three year mandatory minimum term of imprisonment. (R269-272)

On appeal to the District Court of Appeal, Second District, Petitioner argued that the trial court erred by refusing to instruct the jury upon the lesser included offense of battery. The District Court rejected this argument and affirmed Petitioner's conviction and sentence. Acensio v. State, No. 84-2132 (Fla. 2d DCA Oct. 18, 1985). (A1-3)

Petitioner filed a timely notice invoking this Court's jurisdiction.

1/ References to the record on appeal are designated by the letter "R" followed by the appropriate page number. References to the appendix to the brief are designated by "A" and the page number.

SUMMARY OF ARGUMENT

Petitioner was charged with attempted first degree murder and convicted of aggravated battery. The District Court of Appeal, Second District affirmed, holding that the trial court's refusal to instruct the jury on the lesser included offense of battery was harmless error. The District Court ruled that battery was two steps removed from aggravated battery because the trial court instructed on attempted manslaughter.

The decision on Petitioner's appeal expressly and directly conflicts with this Court's decision in State v. Bruns, 429 So.2d 307 (Fla. 1983). In Bruns, this Court ruled that an attempt instruction should not be considered in deciding whether a trial court's refusal to give a lesser included offense instruction was reversible or harmless error. This Court has jurisdiction and should grant review of Petitioner's case to maintain uniformity in the law and to preserve the jury's perogative to decide whether a defendant should be convicted of a lesser included offense.

ARGUMENT

THIS COURT HAS JURISDICTION BECAUSE THE DECISION ON PETITIONER'S APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S PRIOR DECISION IN STATE v. BRUNS, 429 So. 2d 307 (Fla. 1983).

Petitioner was charged with attempted first degree murder. (R3, 4,53,54) The allegations included premeditation, intent to kill, and shooting Alec Carmichael with a pistol. (R3,53) The evidence at trial established that Petitioner intentionally shot Carmichael, although Petitioner said he was acting in self-defense. (R64-68,74-78,86-89,94-97,105-112,200,208-210, 214-217,291-298) Thus, both the allegations and the evidence established all the elements of a battery, i.e., Petitioner intentionally caused bodily harm to another individual. §784.03(1)(b), Fla. Stat. (1983).

Despite the presence of both allegations and proof of a battery, the trial court refused to instruct on battery, and defense counsel objected to this refusal. (R219) The court instructed the jury on attempted first degree murder, attempted second degree murder, attempted manslaughter, and aggravated battery. (R244-249) The jury found Petitioner guilty of aggravated battery. (R262,266)

On appeal, Petitioner argued that the trial court was required to instruct on battery because it was a lesser offense included in the allegations of the charging document and proven at trial. See State v. Terry, 336 So.2d 65, 68 (Fla. 1976); Brown v. State, 206 So.2d 377, 383 (Fla. 1968). The District Court of Appeal, Second District agreed that battery was a lesser included offense but found the court's failure to instruct harmless because the trial court had instructed on attempted manslaughter, so battery was two steps removed

from aggravated battery. [2/] Acensio v. State, No. 84-2132 (Fla. 2d DCA Oct. 18, 1985). (A1-3)

Generally, the failure to instruct on a lesser included offense which is but one step removed from the offense for which the defendant is convicted is per se reversible error, Reddick v. State, 394 So.2d 417, 418 (Fla. 1981); Jackson v. State, 449 So.2d 411 (Fla. 2d DCA 1984), while failure to instruct on a lesser included offense two steps removed from the offense for which the defendant is convicted may be regarded as harmless error. State v. Abreau, 363 So.2d 1063 (Fla. 1978).

However, this Court has ruled that the two steps removed doctrine of Abreau does not apply where the only intervening offense upon which the court instructs is an attempt:

> The application of the Abreau 'step' analysis should only be made in cases where both the instruction that was given and the omitted instruction relate to a lesser-included offense. An attempt instruction does not provide a 'step' within the meaning of Abreau.

State v. Bruns, 429 So.2d 307, 309 (Fla. 1983). (A6) Bruns was charged with and convicted of robbery. The trial court instructed on attempted robbery but refused to instruct on petit larceny. The Fourth District Court of Appeal found this refusal to be prejudicial error and reversed. This Court rejected the State's harmless error argument, approved the decision of the District Court, and remanded for a new trial.

In Petitioner's case, the Second District Court of Appeal distinguished Bruns on the ground that Petitioner was charged with attempted first degree murder, and concluded that attempted manslaughter should be counted as a "step" under Abreau. Acensio v. State. (A2,3) This distinction should make no difference in the result. Petitioner was convicted of a completed offense,

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2/ Aggravated battery is a felony of the second degree. §784.045(2), Fla. Stat. (1983). Attempted manslaughter is a felony of the third degree. §§77.04(4)(c) and 782.07, Fla. Stat. (1983). Battery is a misdemeanor of the first degree. §784.03(2), Fla. Stat. (1983).

aggravated battery, not an attempt. Battery was the next completed lesser included offense to aggravated battery, so failure to instruct on battery was reversible error under Bruns. See Foster v. State, 448 So.2d 1239 (Fla. 5th DCA 1984).

The District Court's decision on Petitioner's appeal expressly and directly conflicts with this Court's decision in State v. Bruns, so this Court has jurisdiction to review Petitioner's case. Art. V, §3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(iv). This Court should exercise its discretion to grant review to maintain uniformity in the law and to preserve the jury's pardon power. See State v. Bruns, 429 So.2d at 310. (A7)

> [I]t is the jury's perogative to resolve questions of fact as to the degree of offense committed. The authority of a jury includes its ability to find a defendant guilty of the lesser included offense even where the evidence might warrant a verdict of guilt on the greater offense charged. The trial court should not usurp the jury's role by failing to give instructions on lesser included offenses.

State v. Thomas, 362 So.2d 1348, 1349-1350 (Fla. 1978)(footnote omitted).

CONCLUSION

Petitioner respectfully requests this Honorable Court to grant review of the decision on his appeal.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

Paul C. Helm

PAUL C. HELM
Assistant Public Defender

Hall of Justice Building
455 North Broadway
P.O. Box 1640
Bartow, FL 33830-3798
(813) 533-1184 or 0931

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Bldg., 2d Floor, 1313 Tampa Street, Tampa, FL 33602, by mail this 14th day of November, 1985.

Paul C. Helm

PAUL C. HELM

PCH:rkm