OIA 6-9-86

IN THE SUPREME COURT OF FLORIDA

DANIEL R. BUTLER,

Petitioner,

v.

CASE NO.: 68,021

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent accepts the Statement of the Case provided by Petitioner.

STATEMENT OF THE FACTS

Respondent accepts the Statement of the Facts provided by Petitioner on pages 5-7 of his brief.

SUMMARY OF ARGUMENT

The district court ruled correctly in finding no reversible error in Petitioner's trial below. The instruction was irrelevant at most, and can only be harmless error since the jury would have returned the same verdict even without hearing the instruction. The jury rejected Petitioner's claim of self-defense and with it the contention that the victim was armed. Since the jury believed the State's witnesses that the victim was not armed, the giving of the instruction must be harmless error. The instruction in itself could not have persuaded the jury to believe the State's witnesses over the Petitioner's witnesses.

ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT ERRED IN FINDING NO REVERSIBLE ERROR ON THE PART OF THE TRIAL JUDGE IN GIVING THE JURY INSTRUCTION ON JUSTIFIABLE USE OF FORCE.

Petitioner's theory of defense espoused throughout the trial by Petitioner's trial counsel was that Petitioner shot Mr. Jones in self-defense because Mr. Jones came out of his bedroom still half asleep allegedly toting a shotgun, as testified to by Petitioner's witnesses. Mr. Jones, the "head" of the household, had been awakened by his son at approximately 4:00 a.m. due to the disturbance caused by Petitioner's presence inside of Mr. Jones' home. Petitioner's defense of self-defense was, in effect, that he shot Jones before Jones could shoot him. However, the evidence was conflicting on whether Jones was holding a gun; the State's witnesses testified that Jones was not holding a gun when Petitioner shot him. Thus, if the jury believed the State's witnesses, i.e., that Jones did not have a gun when shot by Petitioner, then Petitioner's theory of self-defense would necessarily be nonexistent. If the jury believed Petitioner's witnesses, i.e., that Jones did have a gun, then Petitioner's theory of self-defense would be viable and instructions fully explaining the type of self-defense applicable when the victim is the homeowner is certainly

relevant to whether or not Petitioner's claim of self-defense is justified. The instruction was merely an explanation to the jury of the law regarding the victim's right to be toting a gun (if indeed he was) under these circumstances, which necessarily was inherent in Petitioner's claim of self-defense. Otherwise, if this instruction had not been given, the jury could have inferred that the victim, Mr. Jones, unlawfully provoked Petitioner into shooting Jones. The instruction correctly stated the law regarding the right of Mr. Jones to stand his ground and use force to defend the sanctity of his home. As a correct statement of law and being warranted by the evidence, the instruction was properly given. This is true especially because Petitioner emphasized that he shot Jones because he was afraid Jones would shoot him (Petitioner) first (R 255). It is ludicrous to suggest that a correct statement of law, whether relevant or irrelevant, could ever result in prejudicial error. The jury is certainly entitled to be informed as to the legal rights of the victim when the defendant claims the victim was the aggressor. Here, the instruction contained an accurate statement of law, as a person (whether he be the defendant or the victim) has no duty to retreat from his home when confronted by a hostile aggressor. The privilege of defending one's home applies to everyone, and thus the instruction was not an incorrect statement of law. Respondent disagrees with any characterization of the instruction as irrelevant;

certainly it could not have been irrelevant for the jury to be informed as to the rights and duties of the victim where the defendant claims the victim was a hostile aggressor.

Assuming arguendo that the district court correctly termed the instruction as being irrelevant, the giving of the instruction did not constitute fundamental error. The instruction did not mislead or confuse the jury as to the law of self-defense, especially since the trial judge charged the jury fully upon the law of self-defense. See Lindsey v. State, 53 Fla. 56, 43 So. 87 (1907). A challenged jury instruction or portion of the instruction must be considered with the whole instruction or other instructions bearing on the same subject in determining whether the law was fairly presented or whether the instruction might have misled the jury. Diez v. State, 359 So.2d 55 (Fla. 3d DCA 1978); Waters v. State, 298 So.2d 208 (Fla. 2d DCA 1974). In reviewing a challenge to the propriety of a given instruction, an appellate court should exercise the entire charge and determine whether the charge as a whole fairly and correctly reflects the issues and law. United States v. Bosby, 675 F.2d 1174, 1184 n.17 (11th Cir. 1982). The propriety of a given instruction is not reviewed in the abstract; rather, the adequacy of the entire charge taken in the context of the whole trial is the proper scope of inquiry. United States v. Pool, 660 F.2d 547 (5th Cir. 1981). The instructions are to be taken

as a whole, and even if an isolated passage might be error if standing by itself, that alone is not a sufficient ground for reversal. Stanley v. State, 357 So.2d 1031 (Fla. 3d DCA 1978); Diez v. State, supra.

The court's instructions on self-defense were:

> There has been raised as a defense that Daniel R. Butler was justified in the use of force likely to cause death or great bodily harm against William E. Jones. Daniel R. Butler was justified in the use of that force if he reasonably believed that its use was necessary to prevent imminent death or great bodily harm to himself or another at the hands of William E. Jones.
>
> In deciding whether the defendant was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could have been avoided only through the use of that force based upon appearances the defendant must have actually believed that the danger was real.
>
> The defendant cannot justify his use of force likely to cause death or great bodily harm unless he used every reasonable means within his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that the defendant was wrongfully attacked can justify his use of force

likely to cause death or great bodily harm if by retreating he could have avoided the need to use that force; however, if the defendant was placed in the position of imminent death or great bodily harm and it would have increased his own danger to retreat, then his use of force likely to cause death or great bodily harm was justifiable.

If a person is attacked in his own home, or on his own premises, he has no duty to retreat and has a lawful right to stand his ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to himself or another.

If you find that the defendant, who because of threats or prior difficulties with the victim had reasonable grounds to believe that he was in danger of death or great bodily harm at the hands of the victim, then the defendant had the right to arm himself; however, the defendant cannot justify the use of force likely to cause death or great bodily harm if after having armed himself he renewed his difficulty with the victim when he could have avoided the difficulty.

If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether or not the defendant was justified in the use of force, you should find the defendant not guilty; however, if from the evidence you are convinced that the defendant was not justified in the use of force, then you should find him guilty if all the elements of the charge have been proved.

(R 453-454).

If the jury believed the State's witnesses, then Jones

was not armed and the self-defense theory was correctly rejected. In that situation the instruction would be irrelevant. If, on the other hand, the jury believed the Petitioner that Jones was armed, the instruction was not misleading because it informed the jury that "if a person is attacked in his home he has no duty to retreat"; Petitioner contended he was attacked by Jones, not vice-versa, and thus the instruction could at most be irrelevant.

The instruction was not a comment on the evidence; Petitioner imagines that the instruction told the jury that if they believed Petitioner's version, then Jones was justified in having a gun and thus Petitioner was wrong in trying to defend himself. However, it is doubtful that a reasonable, rational juror would stack inferences to the point of believing that "if Jones had the gun, then Petitioner is guilty," which is the effect of Petitioner's simplistic argument.

Since Chapman v. California, 386 U.S. 18 (1967), the United States Supreme Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. The Court has recognized that given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee one.

United States v. Hastings, 961 U.S. 499,509 (1983). In engaging in the harmless error analysis, the question is whether, absent the instruction, it is clear beyond a reasonable doubt that the jury would have ruled as it did? The bottom line is that the jury was fully instructed on the law of self-defense; assuming that the complained-of instruction had not been given, it is quite clear that the jury would have returned the same verdict, in view of the evidence and the instructions on self-defense. It cannot be said that the complained-of instruction negated all the other instructions given in Petitioner's favor. Since the jury found Petitioner guilty, they must have rejected his claim of self-defense and his claim that Jones was armed. The jury rejected Petitioner's claim of self-defense and accepted the version given by the State's witnesses. Since the State's witnesses testified that Jones did not have a gun, the complained-of instruction could not have influenced the jury since the jury obviously believed Jones was not armed. The instruction itself could not have persuaded the jury to believe the State's witnesses over the Petitioner's witnesses. The instruction was irrelevant at most, and it was harmless error to give the instruction under these circumstances.

CONCLUSION

Based on the arguments set forth above, the judgment and sentenced should be affirmed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondent's Brief on the Merits was forwarded to Michael J. Minerva, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 30th day of April, 1986.

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