

7-3

IN THE SUPREME COURT OF FLORIDA

KENNETH SCURRY, :  
 :  
 Petitioner, :  
 :  
 vs. :  
 :  
 STATE OF FLORIDA, :  
 :  
 Respondent. :  
 :  
 \_\_\_\_\_ :

Case No. 70,525

FILED  
JUN 12 1987  
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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

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STATEMENT OF THE CASE

The Grand Jurors of the State of Florida returned an indictment to the circuit court for Lee County, Florida, which indictment was presented in open court on October 26, 1984, charging the Petitioner, KENNETH SCURRY, and his co-defendant, Danny E. Glover, with first-degree felony murder and armed robbery in violation of sections 782.04(2), and 812.13, Florida Statutes. (R488) Petitioner's co-defendant pled guilty as charged and agreed to testify against the Petitioner at trial in return for a promise from the prosecution not to recommend the death penalty. (R144,167-168) Sentencing of the co-defendant was postponed until he had fulfilled his part of the plea agreement by testifying for the State at Petitioner's trial. (R168)

Petitioner was tried by jury on July 17-19, 1985, before the Honorable R. Wallace Pack, Circuit Judge. The State proceeded against the Petitioner on the theory that he had aided and abetted his co-defendant who was the actual perpetrator of the armed robbery and felony murder. (R517,7-11,111,113,124-125,134-140, 148,167) Petitioner requested a jury instruction on the next lesser-included offense of first-degree felony murder as set forth in Furr v. State, 464 So.2d 693 (Fla. 2d DCA 1985). (R361) The trial court denied the request. (R363) The jury returned a verdict of guilty as charged in the information. (R480,499)

The trial court adjudicated Petitioner guilty of both offenses. (R481,541) He was sentenced on August 19, 1985, to life in prison with a mandatory 25 years on the capital felony. (R542) No sentence was imposed on the underlying felony of armed robbery. (R543-544,545-548)

On appeal to the District Court, Second District, Petitioner contended that the trial court erred in denying his request for a jury instruction on second-degree murder. The District Court agreed with Petitioner that second-degree murder is a lesser-included offense of first-degree felony murder, provided, however, there is evidence to support a second-degree murder conviction. The District Court further held with Petitioner that his request for the second-degree murder instruction and objection to the denial was timely. Nevertheless, the Court was unable to find that the evidence adduced in Petitioner's case justified a conviction for second-degree murder under section 782.04(2), Florida Statutes, and affirmed the conviction. (Appendix)

Petitioner filed a timely motion for rehearing and rehearing en banc contending that the evidence supported second-degree murder in light of similar facts described in its own decision in Manuel v. State, 344 So.2d 317 (Fla. 2d DCA 1977) and in the decision of this Honorable Court in State v. Bryan, 287 So.2d 73,76 (Fla. 1973). The District Court denied the motion without opinion, and Petitioner, thereafter, filed a timely notice invoking this Court's jurisdiction.

## STATEMENT OF THE FACTS

Petitioner's co-defendant, Danny Glover, and the co-defendant's girlfriend, Barbara Pearsey, testified against Petitioner at trial. Glover's testimony showed that Petitioner drove Glover to a 7-11 convenience store, handed him a gun, and drove around the block while Glover went inside the store to rob it. (R133-135,138,148,153-154) The store clerk offered no resistance, immediately placing money from the cash register on the counter. (R135-136) The gun went off, killing the clerk as Glover was leaving the premises. (R135-136,207) The testimony indicates that the firing was accidental. (R136,138,139,140,142,143,155,164,-165,167) There was no evidence offered at trial to suggest that the shooting was premeditated or to suggest that it was anything other than accidental. (R1-483) Glover claims he was drunk at the time of the robbery. (R135-136) He was surprised when the gun fired, did not look to see where the bullet struck, and left the store without knowing whether the clerk had been shot.(R136,138,139,140,142,155,164,165,167)

While the robbery was in progress, Petitioner drove around the block and picked Glover up when he came out. (R153-154) Petitioner removed the spent cartridge from the gun and threw it away. (R155) According to his own statement to police, Petitioner later hid the gun at his mother's house from where police eventually recovered it. (R336,349) The robbery netted \$40.00, which Glover and Petitioner split between them. (R139)

Petitioner and Glover drove to Barbara Pearsey's house several hours after the robbery. (R8,10,107) Glover was still

drunk and sobbed out the story to Barbara asking her to call the police to find out if he had shot the clerk as he feared. (R142-143,164) He announced to both Petitioner and Barbara that he was going to turn himself in. (R169) He next drove Petitioner home and returned to Barbara's house where the police arrested him. (R143) He related the whole story to police and pled guilty to the robbery and murder. (R144)

Barbara Pearsey confirmed Glover's testimony. He arrived at her house around 5:00 a.m., drunk and in tears, claiming he had shot someone. (R109,111) The Petitioner admitted to her that he had given Glover the gun and dropped him off but had warned him that the store would have no money. (R111-112) Glover declared he was going to turn himself in, and Petitioner replied that Glover was crazy and that he was not going to admit driving Glover to the 7-11 store. (R113-114) Glover returned to Barbara's house after taking Petitioner home and repeated his intention to turn himself in. (R115) Barbara telephoned the police, and they arrested Glover at her house. (R116-119)

SUMMARY OF ARGUMENT

Second-degree murder requires an act "imminently dangerous to another" and "evincing a depraved mind regardless of human life." An accidental shooting killing a store clerk in the course of a robbery supports a conviction for second-degree murder and entitles a defendant to a jury instruction on second-degree murder.



ARGUMENT

THIS COURT HAS JURISDICTION BECAUSE  
THE DECISION ON PETITIONER'S APPEAL  
EXPRESSLY AND DIRECTLY CONFLICTS  
WITH THIS COURT'S DECISION IN STATE  
V. BRYAN, 287 So.2d 73,76 (Fla.  
1973).

State v. Bryan, 287 So.2d 73,76 (Fla. 1973) holds that an accidental shooting when coupled with malice toward the victim constitutes second-degree murder. Thus, the intentional and forceful striking of the deceased in anger with a loaded pistol which accidentally discharged killing him constitutes an act "imminently dangerous to another" and "evincing a depraved mind regardless of human life." 287 So.2d at 76.

The facts in Petitioner's case also support a conviction for second-degree murder. Petitioner brandished a gun in a reckless and careless manner during the course of a robbery. The crime of armed robbery by definition requires depravity of mind because it requires an intent to kill or maim if resisted. Arnold v. State, 83 So.2d 105 (Fla. 1955). Therefore, an armed robber's state of mind can only be characterized as "depraved" or "malicious", which describes the mens rea necessary for second-degree murder. The act of brandishing a firearm during the course of a robbery while intoxicated is one that any ordinary person would know is reasonably certain to do serious bodily injury to someone or to kill. Thus Petitioner's act satisfies the "imminently dangerous" act necessary for second-degree murder.

The accidental discharge of Petitioner's firearm killing the store clerk in the course of robbing him supports a conviction

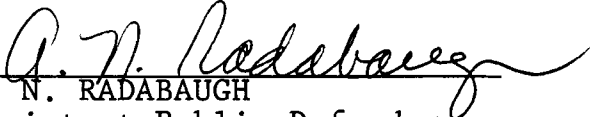
for second-degree murder and entitles Petitioner to a jury instruction on second-degree murder. The District Court's rejection of Petitioner's argument directly and expressly conflicts with the holding of State v. Bryan, 287 So.2d 73 (Fla. 1973).

CONCLUSION

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

Respectfully submitted,

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