

O/a 1-7-88

IN THE SUPREME COURT OF FLORIDA

KENNETH SCURRY, :  
 :  
 Petitioner, :  
 :  
 vs. :  
 :  
 STATE OF FLORIDA, :  
 :  
 Respondent. :  
 :  
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C  
COURT  
Case No. 70,525  
jpb

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

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2-3
STATEMENT OF THE FACTS	4-5
SUMMARY OF ARGUMENT	6
ARGUMENT	
THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON SECOND DEGREE MURDER AS A LESSER INCLUDED OFFENSE OF FIRST DEGREE FELONY MURDER.	7-11
CONCLUSION	12
APPENDIX	
1. Decision of the District Court of Appeal, Second District, on Petitioner's appeal. <u>Scurry v. State</u> , 506 So.2d 4 (Fla. 2d DCA 1987).	A1-2
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<u>Dellinger v. State</u> 495 So.2d 197 (Fla. 5th DCA 1986), <u>cert.den.</u> , 503 So.2d 326 (Fla. 1987)	11
<u>Furr v. State</u> 464 So.2d 693 (Fla. 2d DCA 1985)	7
<u>Furr v. State</u> 493 So.2d 432 (Fla. 1986)	8
<u>Gilbert v. State</u> 311 So.2d 384 (Fla. 3d DCA 1975)	11
<u>Goodwin v. State</u> 405 So.2d 170 (Fla. 1981)	10
<u>Harris v. State</u> 483 So.2d 787 (Fla. 1983)	8
<u>Hines v. State</u> 227 So.2d 334 (Fla. 1st DCA 1969)	11
<u>Hooker v. State</u> 497 So.2d 982 (Fla. 2d DCA 1986) <u>rev.den.</u> , 506 So.2d 1041 (Fla 1987)	11
<u>Larsen v. State</u> 485 So.2d 1372 (Fla. 1st DCA 1986), <u>affirmed</u> , 492 So.2d 1333 (Fla. 1986)	9
<u>Linehan v. State</u> 476 So.2d 1262 (Fla.1985)	8
<u>Marasa v. State</u> 394 So.2d 544 (Fla. 5th DCA 1981), <u>pet.for</u> <u>rev.den.</u> , 402 So.2d 613 (Fla. 1981)	10

TABLE OF CITATIONS  
(Continued)

PAGE NO.

<u>Scurry v. State</u> 506 So.2d 4 (Fla. 2d DCA 1987)	8
<u>State v. Bruns</u> 429 So.2d 307 (Fla. 1983)	9,11
<u>State v. Wimberly</u> 498 So.2d 929 (Fla. 1986)	9
<u>Wilcott v. State</u> No. 67-473 (Fla. May 21, 1987)[12 F.L.W. 248]	11
 <u>OTHER AUTHORITIES</u>	
§782.04(2), Fla.Stat. (1984 Supp.)	10

PRELIMINARY STATEMENT

This brief is filed on behalf of the Petitioner, KENNETH SCURRY. References to the record on appeal are designated by "R" and the page number. References to the appendix to this brief are designated by "A" and the page number.

STATEMENT OF THE CASE

On October 26, 1984, the Lee County Grand Jury indicted the Petitioner, KENNETH J. SCURRY, and his co-defendant, Danny E. Glover, for first degree felony murder and armed robbery in violation of sections 782.04(2), and 812.13, Florida Statutes. (R488) Glover pleaded guilty as charged and agreed to testify against Petitioner at trial in return for a promise from the prosecution not to recommend the death penalty. (R144,168-168) 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 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. (R443-447,453-458) Defense counsel requested a jury instruction on second degree murder. The trial court denied the request. (R361-363) 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) Petitioner 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 Petitioner's appeal, the District Court of Appeal,

Second District found that defense counsel's request for a second degree murder instruction preserved the question of the trial court's failure to give the instruction for appeal. However, the Second District held that the instruction was not required because it was not supported by the evidence. (A1,2) Scurry v. State, 506 So.2d 4 (Fla. 2d DCA 1987).

Petitioner filed a timely notice invoking this Court's discretionary jurisdiction. This Court accepted jurisdiction on September 15, 1987.

## 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. (R135,136,149-151) The gun went off, killing the clerk as Glover was leaving the premises. (R135,136,152,207) The testimony indicates that the firing was accidental. (R136,138,139,-140,155,164,165,167) 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. (R135,136,140,166) 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. (R136,138-140,155,164,165,167)

While the robbery was in progress, Petitioner drove around the block and picked Glover up when he came out. (R139,153,-154) Petitioner removed the spent cartridge from the gun and threw it away. (R140,155,166) According to his own statement to police, Petitioner later hid the gun at his mother's house from where police eventually recovered it. (R327-329,336,349) 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,-164,165) He announced to both Petitioner and Barbara that he was going to turn himself in. (R164,169) He next drove Petitioner home and returned to Barbara's house where the police arrested him. (R143,164) He related the whole story to police and pled guilty to 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. (R107-111) 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

The prosecutor misled the trial court into denying defense counsel's request to instruct the jury on second degree murder as a lesser included offense of first degree felony murder. The District Court of Appeal, Second District found that the issue was sufficiently preserved for appeal, but erroneously held that the instruction was not required because it was not supported by the evidence.

This Court has ruled that second degree depraved mind murder is a necessarily included lesser offense of first degree felony murder. The trial court was required to instruct the jury on a necessarily included lesser offense, regardless of the evidence.

Moreover, the Second District was wrong in finding that the evidence did not support a second degree murder instruction. Since Petitioner aided and abetted Glover in committing the robbery, Petitioner was also responsible for the homicide. By committing an armed robbery while intoxicated and shooting the store clerk, Glover killed a human being by an act imminently dangerous to another evincing a depraved mind regardless of human life.

The trial court committed reversible error by failing to instruct on the next-lower lesser included offense to the offense charged. The Second District's decision must be quashed, and Petitioner's conviction and sentence must be reversed for a new trial.

## ARGUMENT

THE TRIAL COURT ERRED BY FAILING TO  
INSTRUCT THE JURY ON SECOND DEGREE  
MURDER AS A LESSER INCLUDED OFFENSE  
OF FIRST DEGREE FELONY MURDER.

Petitioner was indicted for first degree felony murder and armed robbery. (R488) On the basis of a recent decision by the District Court of Appeal, Second District, defense counsel requested a jury instruction on second degree murder or second degree felony murder. She told the court she did not know the facts of the case and was having the case "pulled" so she could review it. (R361,362) The prosecutor responded that she was familiar with the case of Nicholas Vance Furr in which the Second District had ruled that second degree felony murder could be a lesser included offense of first degree felony murder depending on the facts and circumstances. (R362)

The trial court determined that second degree felony murder did not apply to this case because one of the elements is that the person who does the killing was not involved in the underlying felony. Defense counsel agreed that second degree felony murder did not apply. (R362,363) The court instructed the jury that the only lesser included offense of first degree felony murder was manslaughter. (R463,468)

The prosecutor's response to defense counsel's request for a second degree murder instruction was misleading. In Furr v. State, 464 So.2d 693 (Fla. 2d DCA 1985), the Second District had ruled that second degree depraved mind murder is a permissive

lesser included offense of first degree felony murder. The court reversed Furr's first degree murder conviction because the trial court denied a request for a second degree depraved mind murder instruction supported by the evidence. In Furr v. State, 493 So.2d 432 (Fla. 1986), this Court affirmed the Second District's holding because it was consistent with the decision in Linehan v. State, 476 So.2d 1262 (Fla. 1985). In Linehan, this Court ruled that second degree depraved mind murder is a necessarily included lesser offense of first degree felony murder and that failure to instruct on second degree depraved mind murder in a first degree felony murder case was error. Id., at 1265.

On Petitioner's appeal, the Second District found that defense counsel's request for a second degree murder instruction was sufficiently specific to constitute a timely objection to the trial court's failure to instruct on second degree depraved mind murder. (A2) Scurry v. State, 506 So.2d 4,5 (Fla. 2d DCA 1987). However, the Second District held that the evidence failed to support second degree depraved mind murder, so the trial court was correct in refusing to give the instruction. (A2) Id., at 5.

The Second District's decision on Petitioner's appeal was incorrect. Second degree depraved mind murder is a necessarily included lesser offense of first degree felony murder. Linehan v. State, 476 So.2d at 1265. See Harris v. State, 438 So.2d 787,796 n.3 (Fla. 1983)(the necessarily included lesser offenses of first degree murder are second degree murder and manslaughter). The trial court had no discretion in deciding

whether to instruct on the necessarily included lesser offense; the instruction must be given. State v. Wimberly, 498 So.2d 929,932 (Fla. 1986); State v. Bruns, 429 So.2d 307,309 (Fla. 1983).

Instructions on necessarily included lesser offenses are required because the determination of whether the accused is guilty of the offense charged or the lesser offense is a matter for the jury. "Whether the evidence is susceptible of inference by the jury that the defendant is guilty of a lesser included offense than that charged is a critical evidentiary matter exclusively within the province of the jury." State v. Bruns, 429 So.2d at 309-310. Particularly in a homicide case, the degree of the offense and the intent with which the act was committed are questions of fact to be resolved by the jury. Larsen v. State, 485 So.2d 1372,1373 (Fla. 1st DCA 1986), affirmed, 492 So.2d 1333 (Fla. 1986).

Even if the Second District had been correct in holding that no instruction on second degree murder was required unless supported by the evidence, the evidence in this case supported and therefore required the instruction. The State prosecuted Petitioner on the theory that he aided and abetted his co-defendant Danny Glover in committing robbery and first degree felony murder. (R443-447,453-458) Glover testified that Petitioner drove him to a convenience store, handed him a gun, and drove around the block while Glover went inside and robbed the store. (R133-136,-138,148-151,153,154) The gun fired and killed the clerk as Glover

was leaving. (R135,136,152,207) Glover claimed he was drunk and the shooting was accidental. (R135,136,138-140,155,164,165,167) Petitioner picked Glover up in the car. (R139,153,154) Petitioner removed the spent cartridge from the gun and threw it away. (R140, 155,166) He concealed the gun at his mother's house (R327-329,336, 349) and shared in the proceeds of the robbery. (R139)

One who participates in an underlying felony by aiding and abetting the perpetrator is equally responsible for a homicide committed by the perpetrator during the course of the underlying felony. Goodwin v. State, 405 So.2d 170,172 (Fla. 1981) Since Petitioner aided and abetted Glover in the commission of the robbery by driving the car, supplying the gun, concealing the gun, and sharing in the proceeds, he was equally responsible for both the robbery and the homicide.

The evidence of Glover's killing of the store clerk would support a finding of guilt of second degree depraved mind murder. Second degree murder is the killing of a human being by an act imminently dangerous to another and evincing a depraved mind regardless of human life, but without a premeditated design to effect the death of any particular individual. Marasa v. State, 394 So.2d 544,545 (Fla. 5th DCA 1981), pet.for rev.den., 402 So.2d 613 (Fla. 1981); §782.04(2), Fla.Stat. (1984 Supp.). By committing an armed robbery while intoxicated and firing the gun at the clerk, Glover committed an act imminently dangerous to another and evincing a depraved mind regardless of human life. Although the killing was not premeditated, a human being died as the result of Glover's act.

Second degree murder convictions have been sustained under circumstances no more egregious than those in this case. E.g., Hooker v. State, 497 So.2d 982 (Fla. 2d DCA 1986), rev.den., 506 So.2d 1041 (Fla. 1987)(defendant with group of men looking for Mexicans to run out of town fired gun into occupied trailer and killed occupant); Dellinger v. State, 495 So.2d 197 (Fla. 5th DCA 1986), cert.den., 503 So.2d 326 (Fla. 1987)(defendant argued with wife, pointed rifle at her thinking it was unloaded, shot and killed wife, claiming accident); Gilbert v. State, 311 So.2d 384 (Fla. 3d DCA 1975)(two men robbed victim and wife, one of them shot and killed victim); Hines v. State, 227 So.2d 334 (Fla. 1st DCA 1969)(defendant unbreached shotgun and partially removed shell, told girlfriend to act like a squirrel and if he killed her it would not be an accident, the gun fired and killed girlfriend when defendant closed the breach of the gun).

The trial court's failure to instruct on the next-lower lesser included offense to the offense charged was reversible error. Wilcott v. State, No. 67-473 (Fla. May 21, 1987)[12 F.L.W. 248]; State v. Bruns, 429 So.2d at 309-310. Petitioner's conviction and sentence must be reversed the the cause remanded with directions to grant him a new trial.

CONCLUSION

Petitioner respectfully requests this Honorable Court to quash the decision of the District Court of Appeal, Second District and remand with directions to reverse Petitioner's conviction and sentence and remand for a new trial.

Respectfully submitted,

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