IN THE SUPREME COURT OF FLORIDA

JAMES OTIS HERRINGTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO: 72,452

ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. HELLMAN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit and appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution in the trial court and the appellee in the Fourth District Court of Appeal.

In this Brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case as found in his Initial Brief on page two and adds the following:

1. The trial court instructed the jury on second degree murder as Respondent was charged (R 769-770) and also instructed the jury on manslaughter, a lesser included offense of second degree murder (R 770-772).

STATEMENT OF THE FACTS

Respondent submits the following additions and/or clarifications to Petitioner's Statement of the Facts as found in his Initial Brief on page three (3):

1. Petitioner and his family were celebrating his birthday at the neighboring apartment of Dwayne Hicks. (R 507). During the course of the party, Petitioner took his children back to his apartment. (R 568). While he was there, he remembered that a gun was in the house. (R 568). He took the gun with him because he did not want the children to find it. (R 659). Petitioner normally kept the gun in his truck. (R 529).

Later, Petitioner's wife decided that she wanted to leave. (R 663). After Petitioner's wife left the Hick's apartment, Petitioner heard the victim make certain insulting comments about Petitioner's wife. (R 663-664).

2. Neither Dwayne Hicks nor Veda Hicks observed anything in the victim's hand. (R 300, 306). Esau Brown, who was returning upstairs when he heard the gunshot, did not see a gun located in the area. (R 324).

3. Petitioner stated in a taped statement and to the police at the scene that he had shot the victim. (R 366, 440-443, 404, 424, 518). Petitioner told a police officer at the scene that he shot the victim because the latter had insulted his wife. (R 424).

4. Petitioner stated that the gun had a history of misfiring (R 662). Petitioner never contended that the gun misfired until he testified that he did not know what made the gun go off. (R 675).

5. Petitioner's wife testified that Petitioner had said to her that he shot the victim for her. (R 578).

6. Dr. Ronald Wright testified that the gun was not likely to have been more than a foot away from the victim's face. (R 472).

SUMMARY OF THE ARGUMENT

The trial court correctly refused to instruct the jury on third degree murder, where Petitioner was charged with second degree depraved mind murder and neither the information nor the evidence adduced at trial supported the instruction.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THIRD-DEGREE MURDER.

Petitioner contends that there was evidence to support the proposition that he was engaged in the commission of a felony when he killed the victim and that the trial court erred in failing to instruct the jury on third-degree murder. Petitioner further alleges that the Fourth District's decision stating that where the charging document does not allege the elements of third-degree murder in a prosecution for second-degree murder, that the defendant is not entitled to a category two instruction on third-degree murder, conflicts with Green v. State, 475 So.2d 235 (Fla. 1985), Rodriguez v. State, 443 So.2d 286 (Fla. 3rd DCA 1983), and Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982). Respondent maintains that the Fourth District's decision was correct in holding that the information did not support an instruction on a category two lesser offense.

Respondent maintains that the trial court correctly refused to instruct the jury on third-degree murder, a permissive lesser included offense (category two). At bar, during the charge conference, the trial court declined to instruct on third-degree murder because he found nothing in the charging

document or in the evidence which would support such an instruction. (R 589-591). In State v. Baker, 456 So.2d 419 (Fla. 1984), this Court stated:

> The inclusion of category four in Brown [v. State, 206 So.2d 377 (Fla. 1968)] extended this principle of law to the elements contained in the accusatory pleading. As the Court stated in Brown: Section 919.16, [sic][5] makes provision for offenses which are necessarily included in the offense charged. It is applicable to that group of offenses which includes lesser offenses as essential elements. This suggests a further type of "lesser included" situation. This fourth category comprehends those offenses which may or may not be included in the offense charged, depending upon, (a) the accusatory pleading, and (b) the evidence at the trial. In this category, the trial judge must examine the information to determine whether it alleges all of the elements of a lesser offense, albeit such lesser offense is not an essential ingredient of the major offense alleged. If the accusation is present, then the judge must determine from the evidence whether it supports the allegation of the lesser included offense. If the allegata and probata are present then there should be a charge on the lesser offense. 205 So.2d at 383 (emphasis in original).

State v. Baker, 456 So.2d at 421.

In State v. Daophin, No. 70,995 (Fla. Oct. 20, 1988), this Court reaffirmed that in order to be entitled to instructions on category two offenses, both the accusatory pleadings and the evidence must support the commission of the permissive lesser included offense. See also, In the Matter of

the Use By the Trial Courts of the Standard Jury Instructions in Criminal Cases and the Standard Jury Instructions in Misdemeanor Cases, 431 So.2d 594, 596 (Fla. 1981); Brown v. State, 206 So.2d 377, 383 (Fla. 1968).

In the instant case, the information charged Petitioner with second-degree (depraved mind) murder. While Petitioner now baldly contends that he committed aggravated assault, aggravated battery, and carrying a concealed firearm at the time of the homocide, he argued at trial that the jury could find him committing only aggravated assault. (R 587-589). In any event, he was not charged with these crimes nor was it in any way alleged that the murder occurred during the course of any of these crimes. In this case there was simply no accusation present to support an instruction on third-degree murder. Under Baker and Daophin, both the accusation and the evidence must be present to support an instruction on a category two offense. See, White v. State, 412 So.2d 28 (Fla. 2d DCA 1982) (To be a lesser included offense, the greater offense must allege all elements of the lesser offense and proof must support the allegations of the lesser offense); Stone v. State, 402 So.2d 1222 (Fla. 5th DCA 1981) (To determine whether an offense is a lesser included offense, it is necessary to look at the allegations of the information, and where appropriate, proofs at trial).

Even still, Respondent maintains that there was no basis in the evidence to support an instruction on third-degree

murder. Indeed, the evidence was inconsistent with Petitioner's hypothesis that the murder occurred during any underlying crime. None of the witnesses observed a weapon in the hand of the victim. (R 300, 306). Contrary to Petitioner's trial testimony that he observed a bulge in the victim's right pocket, State's Exhibit 6 which was taken shortly after the crime, revealed that there was no bulge in the victim's pocket. Moreover, Petitioner's second taped statement was contrary to his trial testimony. Petitioner stated in his taped statement and to police officers at the scene that he shot the victim. (R 366, 400-403, 404, 424, 518). Petitioner told Officer Hart that he shot the victim because he insulted his wife (R 424), and Petitioner's wife testified that Petitioner shot the victim for her. (R 578). Petitioner never contended the gun misfired until he testified to this at trial. (R 674-675). Petitioner testified the gun had a history of misfiring. (R 674-675). During Petitioner's taped statement, he stated in response to a question as to whether or not he normally carries a gun in his pocket that he usually kept it in his truck. (R 529). At trial, however, Petitioner testified he had the gun in his possession because it was located in his apartment and he did not want his children to get ahold of it. (R 659). Respondent maintains that there was no basis for an instruction on third-degree murder where it was clear that the murder did not occur during an aggravated assault, an aggravated battery, or while Petitioner was carrying a concealed firearm. The evidence reflects that Petitioner

deliberately got his gun, proceeded upstairs, and killed the victim because the victim made a pass at his wife. Moreover, assuming Petitioner's story that the gun misfired to be true, no reasonable person aims a loaded gun with a history of misfiring within 12 inches of a person's head. (R 472). This is an imminently dangerous act evincing a depraved mind. The trial court correctly refused to instruct on third-degree murder.

Petitioner further contends that the Fourth District's decision in the instant case conflicts with Green v. State, 475 So.2d 235 (Fla. 1985), Rodriguez v. State, 443 So.2d 286 (Fla. 3d DCA 1983), and Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982). In Green, this Court determined that a defendant charged with first-degree premeditated murder would only be entitled to an instruction on the permissive lesser included offense of third-degree murder where there was evidence to support that charge. In Green, the evidence did not show that the defendant had committed the underlying felony for which a third-degree murder charge would be based. In the present case, the evidence similarly did not show that Petitioner had committed an underlying felony to support a third-degree charge.

In Rodriguez, supra, the court held that an attempted manslaughter instruction was required to be given in an attempted first-degree murder prosecution. Unlike the present case, the Rodriguez opinion makes it clear that an instruction on attempted manslaughter was supported by the evidence where the defendant

attempted to commit a voluntary manslaughter. Rodriguez, 443 So.2d at 290-291, n.9. Simply stated, there is no conflict between a decision which holds that a lesser included offense instruction should have been given where there was evidence to support it, and the present case which held it was not required to be instructed on a permissive lesser included offense. Rodriguez does not expressly discuss whether the charging document supported such an instruction; thus there is no conflict between that decision and the present decision. Johnson v. State, supra, is distinguishable from the present case on the same basis. In Johnson, the court found that there was sufficient evidence to support giving an instruction on third-degree murder in a prosecution for second-degree murder in view of the defendant's repeated hitting and kicking the victim and the severity of the victim's injuries.

In any event, this Court has clarified any conflict when it reaffirmed in State v. Daophin, supra, that to be entitled to an instruction on a permissive lesser offense (category two), both the accusatory pleadings and the evidence must support the commission of the category two offense. On this basis, the Fourth District's decision is correct.

Since third-degree murder was a category two offense, Respondent submits that any error that may have occurred below, if at all, in not giving the requested jury instruction was harmless.

At bar, the trial court instructed the jury on second-degree (depraved mind) murder and the lesser included offense of manslaughter. (R 769-772). The jury returned a verdict of guilty of second-degree murder. (R 838). Even if there was evidence to support an instruction on third-degree murder, any failure to give it was harmless, since the trial court instructed on manslaughter which was only one step removed from the crime of which Petitioner was convicted. Perry v. State, 522 So.2d 817 (Fla. 1988); State v. Abreau, 363 So.2d 1063 (Fla. 1978).

In the instant case, it is clear that the jury was given a full opportuntiy to exercise its pardon power; and the jury rejected a pardon. In this instance, where despite being given an instruction on the lesser included offense of manslaughter, one step below the crime charged, the jury convicted Petitioner of the greater offense. Therefore, the trial court's failure to instruct on third-degree murder was harmless.

CONCLUSION

Based on the foregoing argument and authorities cited, Respondent respectfully requests this Court to uphold the decision of the Fourth District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

Michael J. Hellman

MICHAEL J. HELLMAN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (407) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief on the Merits" has been furnished, by courier, to GARY CALDWELL, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401 this 3rd day of November, 1988.

Michael J. Hellman
Of Counsel