IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,555

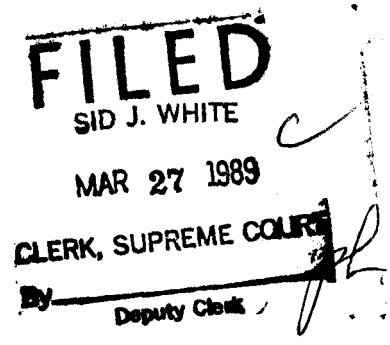
RIGOBERTO GARCIA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERTIS

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INTRODUCTION

Petitioner was the appellant in the Third District Court of Appeal and the defendant in the trial court. Respondent was the appellee and the prosecution. The record on appeal will be designated by "R," the transcript of the trial proceedings by "T," and the appendix to this brief by "A."[1] All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE

Petitioner was charged with second degree murder and use of the firearm in the commission of a felony. He was convicted as charged.

Petitioner appealed his conviction to the Third District Court of Appeal. That court affirmed his conviction but certified that its holding was in conflict with the decisions of Niblack v. State, 451 So.2d 539 (Fla. 2d DCA 1984) and Lowe v. State, 500 So.2d 578 (Fla. 4th DCA 1986). Garcia v. State, 535 So.2d 290 (Fla. 3d DCA 1988).

This appeal followed.

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[1] The district court's original opinion was amended on denial of rehearing. However, Petitioner included only the original in the appendix to his brief. The amended opinion is included in the appendix to this brief.

STATEMENT OF THE FACTS

The evidence showed that the Petitioner did not act in self-defense. He did nothing to avoid the instant fatal confrontation. Rather, he directly and purposefully precipitated the initial encounter by arming himself and returning to face an unarmed victim.

Marcella Fratus, an eyewitness to the homicide, testified as follows: During their argument, Petitioner and the victim were standing about three to four feet apart. (T. 84). Petitioner shot the victim as he walked away from the victim. (T. 78). As Petitioner walked away, the victim stood still; he said nothing; he did nothing threatening to Petitioner. (T. 86). During the altercation, Petitioner never attempted to leave the bar.

Petitioner's own testimony fortified the State's position that the shooting was not done in self-defense. Petitioner testified that after his initial encounter with the victim, he left the bar to get his revolver in order to intimidate the victim. (T. 216, 222, 237-39). He also stated that during the argument no one prevented him from leaving the bar. (T. 242-43).

POINT ON APPEAL

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN APPLYING THE HARMLESS ERROR DOCTRINE TO *AN* INCOMPLETE REINSTRUCTION ON MANSLAUGHTER WHERE THE DEFENDANT WAS CONVICTED OF SECOND DEGREE MURDER.

SUMMARY OF ARGUMENT

The trial court's failure to give the jury complete reinstruction as to manslaughter does not mandate automatic reversal of Petitioner's conviction. Since Petitioner by his actions, forfeited his right to claim self-defense, a harmless error analysis should be used in this case to determine whether the court's failure to reinstruct on justifiable and excusable homicide was reversible error.

Implicit in Respondent's argument that there was no error was an argument that any error complained of could not have affected the verdict. Based on the record, the Third District correctly applied the harmless error rule, as no prejudice could have accrued to Petitioner below.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY APPLIED THE HARMLESS ERROR DOCTRINE TO AN INCOMPLETE REINSTRUCTION ON MANSLAUGHTER WHERE THE DEFENDANT WAS CONVICTED OF SECOND DEGREE MURDER.

A. The harmless error rule applies to the facts of this case.

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court thoroughly outlined the application of the harmless error rule in Florida. There, it was stated that "automatic reversal of convictions is only appropriate when the constitutional right which is violated vitiates the right to a fair trial." DiGuilio, 491 So.2d at 1134. Given the facts of the instant case, Petitioner was not denied a fair trial by the trial court's failure to give complete reinstruction as to manslaughter. Accordingly, reversal of his conviction is unwarranted.

The evidence below clearly established that Petitioner did not act in self-defense. An eyewitness testified that after a brief verbal altercation, Petitioner shot the victim, who was standing still and in no way threatening Petitioner. Furthermore, Petitioner's own testimony belies his otherwise self-serving claim of self-defense. Petitioner testified that after their initial encounter he left the bar and whatever threat the victim might have posed to him. Instead of remaining

out of harm's way, however, Petitioner armed himself and returned to the bar, presumably "looking for a fight." After another verbal exchange, Petitioner shot and killed the unarmed victim.

Having set forth above pertinent facts, Respondent hereby adopts the reasoning of the Third District regarding the application of the harmless error rule to the facts of this case. Judge Pearson's text cogently explains why no prejudice accrued to Petitioner:

> In the present case, the jury, by returning a guilty verdict to the second-degree murder charge after reinstruction, necessarily found that the killing was done -- as a conviction for second-degree murder requires -- not only by "an act imminently dangerous to another" (which arguably would include justifiable and excusable homicides), but one "evincing a depraved mind regardless of human life" (which excludes justifiable and excusable homicides), § 782.04(2), Fla.Stat. (1985). This affirmative finding that the killing was done with "a depraved mind regardless of human life" negates the possibility that the jury convicted the defendant solely on a finding that the victim's death was caused by the act, procurement, or culpable negligence of the defendant. It is this very possibility against which the law guards when it requires that the jury be fully instructed on manslaughter by defining justifiable and excusable homicides. Where, however, as here, the jury's verdict -- necessarily including that the defendant acted with "a depraved mind regardless of human life" -- assures us that no such possibility exists, no harm comes to the defendant when justifiable and excusable homicide

are not defined. See Mead v. State, 86 So.2d 773, 775 (Fla. 1956) (failure to instruct jury that grand larceny involved property worth more than $50 was harmless when jury makes specific finding that property taken was worth $51). See Lewis v. State, 419 So.2d 337 (Fla. 1982) (failure to instruct jury of minimum and maximum penalties for primary offense charged was harmless where jury convicted only on lesser-included offense); Espinosa v. State, 496 So.2d 236 (Fla. 3d DCA 1986) (error in instruction on burden of proving causation of death was harmless where jury convicted only on aggravated assault charge and therefore did not hold the defendant responsible for causing victim's death). See generally 11 C. Wright & A. Miller, Federal Practice and Procedure § 2886, at 290-91 (1973) ("Errors in instructions routinely are ignored if ... the erroneous instruction went to an issue that is immaterial in the light of the jury's verdict....").

Thus, in Dean v. State, 325 So.2d 14 (Fla. 1st DCA 1975), the trial court, after reinstructing the jury on first-degree, second-degree, and third-degree murder, gave a reinstruction on manslaughter which did not include definitions of justifiable and excusable homicide. Although the court found the instruction proper, it noted in dicta that even if there had been "technical error," it was cured by the jury's verdict of guilty of first-degree murder. The court observed: "It is illogical to say that because the judge did not redefine justifiable and excusable homicide as not constituting the crime of manslaughter, such would vitiate a verdict of first-degree murder. Such could have had no bearing upon the jury having reached a verdict of first degree murder." Id. at 19. See also Lawson v. State, 383 So.2d 1114, 1115 (Fla. 3d DCA 1980).[5]

5. The analysis in Dean must be distinguished from the quite different analysis found in a subsequently-withdrawn opinion in Banda v. State, ___So.2d___, 13 F.L.W. 451 (Fla. July 14, 1988). In Banda, the Supreme Court, relying upon Squires v. State, 450 So.2d 208 (Fla. 1984), held that where the defendant is found guilty of first-degree murder, the failure to define excusable and justifiable homicide is not fundamental error. The court went on to suggest in dicta that "[e]ven if an objection had been made, appellant would not prevail because he was convicted of an offense greater than the least of the offenses correctly instructed. State v. Abreau, 363 So.2d 1063 (Fla. 1978)." Banda v. State, ___So.2d___, 13 Fla. at 451. This dicta, of course, refers to the proposition that the failure to give an instruction in a lesser-included offense two steps removed from the offense for which the defendant is convicted does not deprive the jury of its pardoning power and thus is entirely harmless. In such a case, it is posited that the jury, having rejected the one-step removed lesser offense, necessarily would have rejected the still lesser two-step removed offense. More specifically, having convicted Banda of first-degree murder, the jury rejected second-degree murder, thus rendering harmless any defect in or omission from the instruction on manslaughter, the two-step removed offense.

In the present case, manslaughter, the offense to which the erroneous reinstruction referred, was only one step removed from second degree murder, the offense for which the defendant was convicted, and therefore the error in Garcia's trial cannot be considered harmless under the two-step analysis. However, as we have explained, an erroneous reinstruction on the justifiable and excusable homicide aspect of manslaughter is harmless even when the defendant is convicted of the one-step removed offense of second-degree murder. This is so because the defendant's conviction is inconsistent with the misinstructed charge - that is, to find a person guilty of second-degree murder necessarily is to find that the person's act was not justifiable or excusable. In contrast, for example, a guilty verdict on robbery would not be inconsistent with a guilty verdict on the lesser offense of larceny; it would instead constitute the jury's refusal to exercise its pardon power and convict on the lesser offense. Therefore, unlike the analysis in the

> first Banda opinion, our analysis applies without regard to the number of steps separating the offense upon which the defendant is convicted from the offense to which the erroneous or missing instruction pertains.
>
> The Florida Supreme Court withdrew its initial opinion in Banda and substituted an opinion, So.2d___, 13 F.L.W. 709 (Fla. Dec. 8, 1988), which stated that the error of failing to instruct on excusable and justifiable homicide was harmless because there was no evidence which would have supported either defense.

Garcia, 535 So.2d at 292-93.

Respondent also notes that the Third District's decision would not modify established rules regarding proper instruction or reinstruction to a jury, i.e., 1) a court must respond to a jury's specific request for reinstruction with a complete and correct answer, 2) reinstruction on any single subject must be equally as broad as that provided initially, and 3) instruction must not unduly emphasize the definition of criminal charges without contemporaneous explanation of applicable defenses. Application of the harmless error doctrine in this case no more countenances a violation of any of the above rules than application of the doctrine encourages error as to any other phase of the trial proceedings. On the contrary, the rule protects the criminal defendant from the effects of harmful error while not mandating a new trial where, as here, the error does not vitiate the right to a fair trial. See DiGuilio, 491 So.2d at 1135.

B. The Third Court properly applied the harmless error rule in the instant case.

Respondent would have to acknowledge that its argument before the Third District was not patently a harmless error argument. Respondent's position below was that the trial court's failure to reinstruct as to justifiable and excusable homicide was simply not error because the evidence did not establish, as a matter of law, that the killing was lawful. Specifically, Respondent contended that Petitioner forfeited his right to claim self-defense since he armed himself after his initial shouting match with the victim and then shot the victim, who neither moved toward nor threatened Petitioner in any way.

Respondent submits, nevertheless, that it did meet its burden of raising and proving the error was harmless. First, Respondent argued in the district court that Petitioner was not entitled to a self-defense instruction. Implicit in its argument that there was no error was a harmless error argument, i.e., if Petitioner was entitled to no instruction as to justifiable or excusable homicide, the trial court's failure to include those definitions in a reinstruction regarding manslaughter could not have had a harmful effect on the jury's verdict. Second, Respondent set forth facts which demonstrated that the killing was, as a matter of law, unlawful. The evidence established that Petitioner could have avoided the final, fatal confrontation. Initially, he was able to escape

from the bar to a place of safety. Instead of remaining outside, he chose to arm himself and then the encounter escalated from a shouting match to an uneven shooting match, with the unarmed victim being obviously outgunned. Based on the evidence adduced at trial and Respondent's argument before the district court, the court properly determined whether harmless error applied in the instant case. See Holland v. State, 503 So.2d 1250 (Fla. 1987) (harmless error analysis demands that all information necessary to weigh the impact of the error upon the result be present before the reviewing court). Moreover, the district court was not bound to agree with Respondent's determination as to why the error was harmless. Instead, the court was obligated to read the record, review the issue presented and apply the test with careful scrutiny. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); Holland; see § 59.041, Fla. Stat. (1987); § 924.33 Fla. Stat. (1987).

Nor is the result reached by the district court erroneous because the court considered the jury's verdict in determining whether the error complained of was harmless. The district court properly relied on established precedent which permits the reviewing court to access, in light of the verdict actually returned, whether the defendant was prejudiced by the trial court's failure to properly instruct the jury. See e.g., Lewis v. State, 419 So.2d 337 (Fla. 1982) (failure to instruct jury on penalties for charged offense harmless where jury convicted on lesser-included offense); Mead v. State, 86 So.2d 773 (Fla.

1956) (failure to instruct jury that grand larceny involved taking of property worth more than $50 harmless when jury specifically found property taken worth $51); Espinosa v. State, 496 So.2d 236 (Fla. 3d DCA 1986) (error in instruction on burden of proving causation of death harmless where jury convicted only on aggravated assault charge); Dean v. State, 325 So.2d 14 (Fla. 1st DCA 1975) (technical error in not reinstructing on justifiable or excusable homicide cured by jury's verdict for first degree murder). See generally 11 C. Wright & A. Miller, Federal Practice and Procedure § 2886 at 290-91 (1973) ("Errors in instructions routinely are ignored if ... the erroneous instruction went to an issue that is immaterial in light of jury's verdict ...."). Moreover, there was competent, substantial evidence to support the jury's verdict. See Mead.