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IN THE

SUPREME COURT OF FLORIDA

JOEY LUIS ROJAS,

Petitioner,

v. CASE NO. 73,622

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fifth District Court of Appeal and the defendant in the trial court. Respondent was the appellee and the prosecution. References to the trial transcript will be designated herein by "(R)" with the specific page number included. A copy of the Fifth District Court of Appeal's opinion in this case, Rojas v. State, 535 So.2d 674 (Fla. 5th DCA 1988) is included in the appendix to this brief.

SUMMARY OF ARGUMENT

POINT I: A harmless error analysis should be used in this case to determine whether the court's failure to instruct the jury on justifiable and excusable homicide as part of the manslaughter instruction was reversible error. No evidence was presented to support justifiable or excusable homicide as petitioner's theory of defense and the jury was not hindered in exercising its pardon power since it found petitioner guilty of second degree murder rather than first. Reversal of petitioner's conviction is not warranted.

POINT 11: Petitioner's requested jury instruction on self-defense was properly denied by the trial court where no evidence of self defense was presented at trial.

POINT 111: The trial court properly permitted the state's witness, Ed Shaw, to testify. The discussion of the matter before the court satisfied the requirements of a Richardson hearing and the court granted the specific relief requested by the defense although it did not find any willful violation of the discovery rules. Petitioner has still not articulated any prejudice to him caused by this witness being allowed to testify.

ARGUMENT

POINT I

THE TRIAL COURT'S FAILURE TO RENDER A CONTEMPORANEOUS DEFINITION OF JUSTIFIABLE AND EXCUSABLE HOMICIDE WITH ITS INSTRUCTION ON MANSLAUGHTER WAS NOT REVERSIBLE ERROR.

The failure of the trial judge to instruct on justifiable and excusable homicide as part of the manslaughter instruction is not per se reversible error. The specific facts of each case must be examined when resolving this issue. In the instant case, the failure to repeat the definitions of justifiable and excusable homicide in conjunction with the manslaughter instruction was harmless error and not fundamental since the evidence did not require the jury to pass on justifiable or excusable homicide as petitioner's theory of defense. The significant facts in the instant case which distinguish it from those cases in which reversible error was found, and which support the district court's decision in this case, are as follows: petitioner offered no defense equivalent to justifiable or excusable homicide; the court instructed on those terms elsewhere in the instructions (R 729-30); petitioner expressly approved the instructions prior to their being given (R 628) and made no objection to the manslaughter instruction afterward (R 648); petitioner was charged with first degree murder (R 753) and convicted of second degree murder (R 793-94).

Although the Fifth District Court of Appeal stated that its opinion in this case was in conflict with Walker v. State, 520 So.2d 606 (Fla. 1st DCA 1987) and Spaziano v. State, 522 So.2d

525 (Fla. 2d DCA 1988) as modified by Tobey v. State, 533 So.2d 1198 (Fla. 2d DCA 1988), Walker is factually distinguishable and the decision there is not in conflict with that of the case at bar. Walker presented a version of the killing that could have been viewed as self-defense or accidental if believed by the jury. Since justifiable or excusable homicide was clearly his theory of defense, it was fundamental error for the trial court not to reinstruct the jury fully on those terms when reinstruction was requested on the definitions of second-degree murder and manslaughter. It should be noted that the First District Court relied on its previous decisions in Ortaqus v. State, 500 So.2d 1267 (Fla. 1st DCA 1987), where the record supported a theory of defense based on excusable homicide making the trial court's error fundamental, and Kelsey v. State, 410 So.2d 988 (Fla. 1st DC 1982) without any recognition that a harmless error analysis could be applied. That analysis was correctly applied in the instant case where there was no evidence of self-defense. (Discussed in Point II herein).

At first glance, the "corrected" Spaziano would appear to conflict with the instant case, but only because of the court's discussion of Banda v. State, 536 So.2d 221 (Fla. 1988). However, Spaziano is factually more like Walker than Rojas because the instruction on justifiable and excusable homicide was essential to permit the jury to pass upon Spaziano's only defense (he did not know the gun was loaded and the shooting was claimed to be accidental). Again, such was not called for by the evidence in the instant case and *so* there was no conflict in the reasoning or the outcome of these two cases.

Banda and Squires v. State, 450 So.2d 208 (Fla. 1984) established that an error in an instruction on the lesser included offense of manslaughter was not fundamental when the defendant had been convicted of first degree murder. Affirming the decision of the Fifth District Court of Appeal in Rojas would not serve to overrule Banda, but would allow for additional considerations when applying a harmless error analysis and possibly permit Banda to be taken one step further. In Banda, this court noted that "[e]ven if an objection had been made, appellant would not prevail because he was convicted of an offense [first degree murder] greater than the least of the offenses correctly instructed." Although Rojas was convicted of second degree murder, he was charged with first degree murder, and logic should be applied to find, as did the district court, that the jury had obviously rejected the possibility that the murder committed by Rojas was justifiable or excusable, and had instead reached the conclusion that Rojas' act was "imminently dangerous to another" and "evinced a depraved mind regardless of human life." Such finding by the jury necessarily rejects any possibility that the killing was justifiable or excusable. See, Rojas, at 676.

Had the jury found Rojas guilty of manslaughter, rather than second degree murder, only then would he have a reasonable argument that the failure to fully define manslaughter (by explaining what it is not) affected the verdict in his case and possibly deprived him of being acquitted. Cf. Turner v. State, 414 So.2d 1161,1161-62 (Fla. 3d DCA 1982); Garcia v. State, 535

So.2d 290 (Fla. 3d DCA 1988)(review pending, Case No. 73,555). If petitioner's claim of prejudice concerns the jury's exercise of its pardon power, respondent's answer is the same. The jury may have been exercising its pardon power when it found petitioner guilty of second degree murder rather than of first degree murder as charged. The jury essentially never reached the manslaughter instruction and so its deficiencies were harmless error. Respondent incorporates in its argument the reasoning of the Third District Court of Appeal found in footnote 5 of Garcia, supra, at 293. (Appendix B)

What the district court did not do in reviewing the instant case was consider it only as either a "context (a)" case or a "context (b)" case, but instead looked to the evidence which had bearing on whether it was a "context (a)" case, where the question is whether a full jury instruction on a defendant's theory of defense has been given, and when it found that the defense theory did not fall within the definition of a justifiable and excusable homicide, the court then applied that finding to conclude without a doubt that the jury's verdict would not have been different even if the manslaughter instruction had been expanded. Thus, the court was able to determine that even in a "context (b)" situation where the defendant was convicted of second-degree murder, the error was not only nonfundamental (petitioner did not preserve this issue by raising an objection in the trial court), but it was harmless.

The district court's affirmance of petitioner's conviction for second-degree murder was correct and no new trial on that charge is warranted.

POINT II

THE TRIAL COURT PROPERLY DENIED PETITIONER'S REQUEST THAT THE JURY BE INSTRUCTED ON SELF-DEFENSE.

The trial court is only permitted to charge he jury with the law which is applicable to the facts of the particular case as revealed by the evidence adduced at trial. Fla.R.Crim.P. 3.390(a).

Contrary to petitioner's assertion, no evidence at his trial showed the need for petitioner to use a deadly weapon (a knife) to defend himself against the victim. In fact, the evidence shows petitioner as the aggressor in the confrontation. After the victim delivered a piece of crack cocaine to the petitioner, the latter attempted to leave in his vehicle without paying for the goods (R 457). The victim then leapt through the window of the vehicle (R 256, 537) in an attempt to retrieve his stolen merchandise or stop petitioner from leaving and avoid being "ripped off" by petitioner (R 458, 538). According to the defense witness, petitioner then drove for "up to a mile" with the victim's legs hanging out the window. (R 539). Other witnesses described the distance as two blocks. (R 185, 219). Once the victim was extricated from the vehicle, he was standing in the street 5-10 feet from the car (R 220, 222). Petitioner then left the safety of his vehicle and engaged in a fist fight with the victim when he could have simply driven away (R 185-186, 219-223). The victim was left in the road (R 221). The two girls who were in the vehicle with the petitioner testified that petitioner hit the victim a couple times (R 186), that petitioner

struck the last blow (R 221) and then he got back in the car and drove away. Terry never saw the victim hit the petitioner (R 203). Friends of the victim, who had followed petitioner's vehicle and were about four cars behind, encountered the victim on the ground with a hole in his chest (R 258-9).

Petitioner did not testify and none of the facts above, as testified to by other witnesses, suggested that petitioner stabbed the victim through the heart in self-defense. The trial court correctly rejected petitioner's request for an instruction on that defense.

The confrontation in this case could be characterized as "a sudden combat," and if so, because petitioner used a dangerous weapon, the resulting death of the victim is excluded from those killings that are by definition excusable.

POINT III

THE TRIAL COURT CONDUCTED ADEQUATE INQUIRY INTO THE STATE'S FAILURE TO INFORM THE DEFENSE PRIOR TO TRIAL THAT A PREVIOUSLY UNAVAILABLE STATE WITNESS HAD BEEN LOCATED.

When the state first called Ed Shaw as a witness, the petitioner made no objection or motion to exclude Shaw from testifying. Counsel simply requested the opportunity to speak to Shaw prior to his testimony (R 408). Although the court did not specifically state that it was going to hold a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971), the court was aware of the possible necessity for such and initiated a discussion which elicited the state's explanation for the alleged discovery violation (R 410). The state had Shaw listed as a witness, but neither side had been able to locate him until the state's investigator found him on the street in the same vicinity as where the confrontation between the victim and petitioner began (R 445), and served him with a subpoena on Good Friday (R 410-11, 438). The trial commenced on Monday. The state did not know until 7:00 the previous evening, when the prosecutor finally had a brief chance to speak to Shaw, that it was going to call him as a witness (R 412, 442). The court then took a recess and permitted defense counsel the time to take Shaw's deposition (R 446). The prosecutor had not had an opportunity to get a full statement from Shaw until just prior to that deposition (R 439-40, 443). The prosecutor did not become aware until Sunday night that Shaw had been served with the subpoena (R 444).

After defense counsel took Shawls deposition, the court provided petitioner the opportunity to express his perceived prejudice, which he did (R 443-445). The only claim of prejudice was that the defense had been forced to cross-examine "a lot of [the state's] witnesses not even knowing he's [Shaw] going to testify." (R 445) and that Shaw "said several things that contradict things James Jackson says, some of which I got out in testimony, others which I could have if I had known that this man was under subpoena." (R 443) The petitioner never did articulate an objection to or a motion to exclude the testimony of Ed Shaw, nor did the petitioner ever state what "things" he would have attempted to elicit on cross-examination had he known that the state had found, and was planning to call, Shaw as a witness. See, Johnson v. State, 461 So.2d 1385, 1390 (Fla. 1st DCA 1984).

> Defense counsel's assertion, during the Richardson inquiry, that the defense was prejudiced because they prepared their case without knowing of the statement is too broad and conclusory to entitle the defendant to exclusion of the statement.

Id.

The trial court properly ruled that it was not going to exclude Shawls testimony (R 445) and that "if any further discussions or further action needs to be taken relative to the witness we will do it then [during the lunch break after direct examination of Shaw]." (R 446) The record reflects no motion by the defense at the conclusion of the direct examination or prior to the cross-examination of Shaw. Had petitioner needed

time to obtain rebuttal witnesses, he could have moved for a recess of hours or days. Had petitioner truly been deprived of cross-examining some of the state's witnesses regarding certain information possessed by Shaw, petitioner could have recalled those witnesses during the defense case-in-chief.

The trial court did not find that the state committed any willful discovery violation. The state had supplied the defense with Shaw's last known address and witness statement in accordance with Florida Rule of Criminal Procedure 3.220(a)(1)(i) and (ii) (R 411, 445). Clearly, the state was under no obligation to procure Shaw on behalf of the defense and the state did not have any better address for Shaw after it served him with the subpoena than it did beforehand.

Although an inquiry under Richardson is not required unless it has been demonstrated that a violation of Florida Rule of Criminal Procedure 3.220 has in fact occurred, Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1980), the presentations by both counsels initiated by the court were sufficient to satisfy the requirements of Richardson and to permit the court to determine the necessity of excluding the witness. "The court's failure to call the inquiry a ***Richardson*** hearing or to make formal findings concerning each of the pertinent ***Richardson*** considerations does not constitute reversible error." Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985).

Exclusion is an extreme remedy which should be invoked only under the most compelling circumstances. Relevant evidence should not be excluded from the jury unless no other remedy

suffices, and it was incumbent upon the trial court, assuming the state had some duty to put petitioner in contact with the witness, to determine whether other reasonable alternatives could be employed to overcome or mitigate any possible prejudice. Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984). In the instant case, the court allowed petitioner unlimited time to depose Shaw and specifically did not foreclose any further requests from the defense after Shaw testified on direct. This remedial action coupled with petitioner's failure to articulate and make the court aware of the peculiar manner in which the sudden disclosure of Shaw's availability as a witness would adversely affect petitioner's case, supports the trial court's refusal to exclude the witness. "[A] ruling on whether a discovery violation calls for the exclusion of testimony is discretionary, and should not be disturbed on appeal unless an abuse is clearly shown. *Mobley v. State,* 327 So.2d 900 (Fla. 3d DCA 1976)." Wilkerson, supra.

Petitioner has not demonstrated an abuse of the trial court's discretion and so the District Court of Appeal did not err in refusing to reverse on this issue.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court uphold the decision of the Fifth District Court of Appeal and affirm petitioner's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits and Appendix has been furnished to Brynn Newton, Assistant Public Defender for petitioner, 112 Orange Avenue, Suite A, Daytona Beach, Florida, 32014, by delivery to her basket at the Fifth District Court of Appeal, this 29th day of June, 1989.

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