IN THE SUPREME COURT OF FLORIDA

ANTONIO TORRES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 73,699

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

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The record on appeal which is contained in eight (8) volumes will be referred to by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

All Issues: This Court should dismiss this petition for discretionary review as it is without jurisdiction.

Issue I: The prosecutor's argument was not a comment on petitioner's failure to testify, but was a permissible response to defense counsel's argument to the jury. The trial court made a factual finding to this effect and this finding has record support.

Issue 11: Petitioner did not have standing to challenge the assistant state attorney's peremptory challenge to certain jurors.

Issue III: Since grand theft is two steps removed from robbery with a firearm, the lower court's failure to instruct on grand theft as a lesser included offense to the robbery count was harmless. Since third degree murder is neither a necessarily lesser included offense to first degree murder and since grand theft was not alleged in the first degree murder count, it could not be considered as an underlying felony for murder in the third degree as an alleged. lesser offense to murder in the first degree. Consequently, petitioner's argument that the trial court should have instructed on third degree murder with grand theft as the underlying felony is specious.

ARGUMENT

Renewed Motion to Dismiss

Preliminary to its argument on the merits, Respondent again does hereby renew its motion to dismiss filed in this court on or about April 12, 1989, predicated on the contention that this court was without jurisdiction because petitioner's notice of discretionary review was limited to "conflict discretionary review" and this Court set a briefing schedule on the assumption that petitioner was seeking review of the certified question when, in fact, he was not. By order, this Court held resolution of the motion in abeyance.

ISSUE I

> THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION FOR MISTRIAL ON THE GROUNDS THAT THE STATE HAD IMPROPERLY COMMENTED ON PETITIONER'S SILENCE DURING CLOSING ARGUMENT.

In his closing argument to the jury, the assistant state attorney made the following statement:

> "The defendant has had his day in court. I will tell you, ladies and gentlemen, our system provides for us to literally bend over backwards for defendants. He has an attorney. He has a trial. He gets to put the family on trial. We bend over backwards, but keep this in mind: You haven't heard one word of testimony to contradict what Scott and Pauline Lehman said other than Mr. Westfield's arguments."
>
> (R 813)

Defense counsel objected, (R 813), counsel approached the bench, (R 814), and an argument ensued. The court made the following statement:

> "Let me state for the record that in reading the Shepherd case the Court found that the comment of the prosecutor was directed to defense counsel as opposed to the defendant. Rather than focusing on -- it says here it was clearly a personal reference to defense counsel himself and not to the appellant."
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> (R. 814 emphasis supplied)

The defense counsel continued to insist it was a comment on the defendant's failure to testify and asked for a mistrial. The court finally said:

> THE COURT: "That motion is denied based upon this authority. However, I am warning counsel for the State that in making such references that if it appears that the reference that you are making, if it appears to be directed towards the defendant, the defendant's failure to testify, that I will, in fact, grant a mistrial.''
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> (R 815-816)

Two conclusions can be gleaned from the record: (1) the lower court was aware of this Court's decisions in State v. Sheperd, 479 So.2d 106 (Fla. 1985) and White v. State, 377 So.2d 1149 (Fla. 1979), because the court referred to both decisions and (2) the lower court made a factual finding that the comment was a reference to defense counsel and not the defendant.

This Court has consistently held that comments which ". . . when read in context . . . are . . . merely comments upon the uncontradicted nature of the evidence" or ". . . is clearly a personal reference to defense counsel himself and not to appellant" does not constitute an impermissible comment. Wilson v. State, 436 So.2d 908 (Fla. 1983) at 910, see also White v. State, 377 So.2d 1149 (Fla. 1979) and State v. Sheperd, 479 So.2d 106 (Fla. 1985). In White, the prosecutor had said:

> "You haven't heard one word of testimony to contradict what she has said, other than the lawyer's argument."
>
> Id. at 1150.

In affirming the denial of a motion for mistrial, the court commented:

> "It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue. ***State v. Jones,*** 204 So.2d 515 (Fla. 1967). ***See also State v. Mathis,*** 278 So.2d 280 (Fla. 1973). It is thus firmly embedded in the jurisprudence of this state that a prosecutor may comment on the uncontradicted or uncontroverted nature of the evidence during argument to the jury. ***See State v. Jones, supra,*** at 515-517; ***Clinton v. State,*** 56 Fla. 57, 47 So. 389 (1908); ***Gray v. State,*** 42 Fla. 174, 28 So. 53 (1900); ***Mabrey v. State,*** 303 So.2d 369 (Fla. 3d DCA 1974); ***Woodside v. State,*** 206 So.2d 426 (Fla. 3d DCA 1968)."

Similarly in Sheperd, the prosecutor had said:

> "We've heard a lot of allegations with respect to a defense and I must confess to you, when I sat down to prepare my closing remarks, I had a lot of difficulty in trying to figure out exactly what the defense was going to be, because, frankly, for my purpose, I haven't heard any."
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> Id. at 107.

In Parks v. State, 206 So.2d 431 (Fla. 3d DCA 1968), the prosecutor had made the following remarks to the jury:

> "The State has the burden of proving their guilt by competent evidence. We did this. We put the man on who went through this, the man who identified them. This is our burden, and it is up to the defense, if they can to rebut it."
>
> Id. at 432.

The court, in affirming, stated that whether, vel non, the prosecutor's comments to the jury are improper must depend upon the circumstances of each particular case and that the comments complained of were nothing more than an observation that the testimony of the state's witness was unshaken by cross-examination. See also Woodside v. State, 206 So.2d 426 (Fla. 3d DCA 1968).

Parks was subsequently in federal court on habeas corpus proceedings, Parks v. Wainwright, 429 F.2d 1240 (5th Cir. 1970), wherein the court therein said that counsel for the prosecution is not forbidden from arguing to the effect that the evidence against a defendant is uncontradicted or to the effect that the defendant failed to produce testimony on any phase of the defense on which he relies. See also United States v. Toler, 440 F.2d 1242 (5th Cir. 1971).

In Jones v. State, 253 So.2d 154 (Fla. 2d DCA 1971), where the question was presented to the Second District, the court said:

> "In his closing argument to the jury the prosecutor made the statement that 'there is no testimony here at all to dispute James Stroman's statement, nothing in the record will be permitted to impeach James Stroman's record.' Defendant's objected to such statement in argument and moved for a mistrial, contending that it was an indirect reference to the failure of the defendants to take the witness stand and testify. However, a consideration of the entire closing argument in question discloses that the statement of the prosecutor referred not tb appellants on trial but to other witnesses in the case and to the fact that Stroman as a state witness had not been contradicted by any other witness or witnesses."

Text at 156.

In another State v. Jones, 204 So.2d 515 (Fla. 1967), decided by this Court, the prosecutor had made the following argument to the jury:

> "Now where is the evidence that said that he didn't know what he was doing?"
>
> * * *
>
> "Now how in the world have they shown to you gentlemen by any witness that he did not -- that he did not know at the time know what he was doing was wrong? Where is the testimony that came from the stand?"

Text at 516.

After considering all the circumstances, the court determined that the argument challenged was addressed to the evidence as it existed before the jury and not the failure of the defendant to explain or contradict what had been introduced.

More recently, the Third District rejected the contention that the following argument by the prosecutor was a comment on the defendant's silence:

> "Have you heard any evidence in this case, is there any evidence in this record that this guy bought a credit card from anybody? Did you hear anything from that witness stand, any word -- ?"

See Avant v. State, __ So. 2d __ (Fla. 3d DCA 1989) Case No. 88-672 decided February 7, 1989.

In the instant case, the lower court made a factual finding that the prosecutor's statement was not a comment on the defendant's failure to testify. This factual finding comes to an appellate court with the presumption of correctness. Wales v. Wales, 422 So.2d 1066 (Fla. 1st DCA 1982). The situation in this

case is analogous to what occurred in Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841, 105 S.Ct. 844 (1985). In Witt, the High Court held that the presumption of correctness rule of federal habeas corpus applies ". . . to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause . . ." Id. 83 L.Ed.2d at 854. Accord: (a trial judge's findings that a particular venireman was not biased was entitled to the presumption of correctness). Patton v. Yount, 467 U.S. 1025, 81 L.Ed.2d 847, 104 S.Ct. 2885 (1984). These findings are ". . . based upon determinations of demeanor and credibility that are peculiarly within the trial judge's province." Witt, 83 L.Ed.2d at 854.

There is adequate substantial record support for the trial judge's conclusions. Defense counsel had extensively attacked the testimony of Scott and Pauline Lehman (R 767-785) accusing them of lying, not believable and that there was no scientific evidence to support their testimony (R 777).

ISSUE II

DOES A WHITE DEFENDANT BEING REPRESENTED BY A BLACK ATTORNEY HAVE STANDING TO CHALLENGE THE STATE'S EXCLUSION OF BLACK JURORS BY USE OF PEREMPTORY CHALLENGES IN LIGHT OF BATSON V. KENTUCKY, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and STATE V. NEIL, 457 So.2d 481 (Fla. 1984).

At the outset, we would point out that the decision rendered in Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987) is on discretionary review before this Honorable Court. It is the understanding of the undersigned that the matter has been argued

before this Court and the matter is now awaiting a decision by this Court.

In Kibler, the Court said:

> "The question of standing, insofar as the posited issue concerns the United States Constitution, was answered recently in Batson v. Kentucky, __ U.S. __, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therein the Supreme Court held that, in order to establish a *prima facie* case of purposeful discrimination in selection of the jury panel, the defendant 'initially must show that he is a member of a racial group capable of being singled out for differential treatment.' Id., 106 S.Ct. at 1722. It is undisputed that Kibler cannot make this requisite showing.
>
> * * *
>
> Nothing in Neil persuades us that the Florida Supreme Court intended a different standing test than that set out by the United States Supreme Court in Batson. See also Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498, 510 (1977). Therefore, we conclude, on the basis of Batson, that Kibler was without standing to raise his racial challenge at trial to the state's exercise of its peremptory challenges."

Of course, the lower court agreed with the Kibler decision.

More recently, the Court of Appeals in and for the Eleventh Circuit has concurred. In United States v. Rodriques-Cardenas, __ F.2d (11th Cir. 1989), Case No. 88-8080, decided February 21, 1989, 3 F.L.W. Fed. C 193, that court considered whether the prosecutor's use of his peremptory challenges to exclude three black potential jurors, where the defendant was a Hispanic, violated either the equal protection clause or the Sixth Amendment. The Court said it violated neither; that as far as equal protection was concerned, standing was required, that is,

the defendant had to be a member of the same racial group as the jurors that were excluded. In rendering its decision, the Court pointed to two other federal decisions which had rendered the same ruling: United States v. Townsley, 856 F.2d 1189 (8th Cir. 1988) and United States v. Anguilo, 847 F.2d 956 (1st Cir. 1988).

The Court then pointed out that although the Supreme Court has held that the Sixth Amendment prohibits the systematic exclusion of cognizable groups within the community from the jury pool, the court has refused to extend this requirement to petit juries, citing Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) and quoting from Lockhart v. McCree, 476 U.S. 162, 173-174, 106 S.Ct. 1758, 1764-65, 90 L.Ed.2d 137 (1986) as saying:

> "We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit, juries, as opposed to jury panels or venires, to reflect the composition of the community at large . We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound."

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUESTED INSTRUCTIONS IN REGARD TO GRAND THEFT AND THIRD DEGREE MURDER AS LESSER INCLUDED INSTRUCTIONS.

Appellant argues that the trial court erred in refusing to instruct on grand theft as a lesser included offense to the robbery count and on third degree murder as a lesser included offense to the first degree murder count.

Grand theft as lesser included offense to the robberv count.

Grand theft is not a necessarily lesser included offense to robbery because a necessarily offense is one that must be proven in order to prove the greater, that is, it is an essential ingredient to the greater. Brown v. State, 206 So.2d 377 (Fla. 1968). Grand theft is not an essential ingredient to robbery because theft of the value of over $100.00 is not necessary to prove a robbery. Petit theft, with the additional element of force, violence, assault or putting in fear suffices to prove robbery. In the instant case, the lower court did instruct on petit theft (R 842-843).

Florida Rule of **Criminal Procedure 3.510** does provide that the jury may convict the defendant of any offense which is necessarily included or which is charged in the indictment or information and is supported by the evidence. The lower court agreed with petitioner that grand theft was charged and there was evidence in the record to support the charge. Nevertheless, under authority of Perry v. State, 522 So.2d 817 (Fla. 1988); State v. Abreau, 363 So.2d 1063 (Fla. 1978) and Tobey v. state, 533 So.2d 1198 (Fla. 1988), the lower court held that because Grand Theft is two steps removed from robbery with a firearm, the trial court's failure to give an instruction on grand theft was harmless error. Petitioner, in his brief to this Court, has

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[1] For some reason the undersigned stated in his brief to the lower court that "Grand Theft was not charged in the indictment." This was an apparent mistake.

totally ignored those cases and has failed to explain how the lower court's reliance on them was misplaced.

Third degree murder as a lesser offense to first degree murder.

The lower court also held that while the evidence supported the grand theft charge and because the charge was included in the indictment the court should also have instructed on third degree murder as a lesser included offense. However, here again, because there was no grand theft instruction, there could be no basis for a third degree murder instruction based on grand theft as the underlying felony. Again, petitioner has failed to demonstrate how the lower court's analysis was erroneous.

We do, however, quarrel with the lower court's analysis to the extent that grand theft was charged. Grand theft was charged, but only with respect to the robbery count. It was not charged with respect to the first degree murder count (R **1033**). The fact that one count of an information, charging a separate crime, alleges a lesser offense does not mean that the lesser offense should be applied to another count which does not mention the lesser offense.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities, the decision of the lower court affirming the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert M. Mack, Assistant Public Defender, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 25th day of April, 1989.

OF COUNSEL FOR RESPONDENT