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ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY FAILED TO GIVE COMPLETE INSTRUCTIONS ON MANSLAUGHTER AND ON THE THEORY OF THE DEFENSE THAT THE CRIME WAS AN ACCIDENT.

In his initial brief, petitioner argued that (1) the manslaughter instruction improperly failed to refer to justifiable and excusable homicide and (2) the court should have given the long form instruction for excusable homicide because the evidence supported it. The state's answer brief, however, addresses only point (2) and does not address point (1). The state does not discuss the trial court's failure to give the following standard instruction as part of the definition of manslaughter: "However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable as I have previously defined those terms." Fla. Std. Jury Instr. for Manslaughter. According to Rojas v. State, 552 So.2d 914 (Fla. 1989), failure to give this instruction was fundamental error.

ISSUE II

THE COURT IMPROPERLY FAILED TO INSTRUCT THE JURY ON MILLER'S DEFENSE THAT THE ACCIDENT WAS IN FACT AN ACCIDENT PROXIMATELY CAUSED BY THE PURSUING OFFICER.

As the state would have it, petitioner is arguing that "the fatal crash was simply not his fault because he had the right to flee from the law and that had Officer Sauro not violated this right by giving chase, the accident would never have happened." Brief of Respondent at 5. This statement from the state's brief mischaracterizes petitioner's argument in at least three ways. First, the state has with great vigor knocked down a straw man, because petitioner is not arguing to this court that the crash was not his fault. Whether he was at fault was a question of fact for the jury and not a question of law for this court to decide, as the state apparently wants this court to do. The state here perpetuates the error of the prosecutor, who successfully persuaded the trial court to decide that the petitioner was at fault as a matter of law and consequently not entitled to instructions on his defense.

To support its view that the petitioner was at fault, the state points out that "only one witness said the officer pursued Appellant within six inches of his vehicle." Brief of Respondent at 7. According to the state, the evidence therefore showed that the officer acted with due care. This argument implies that a jury need not be instructed on a defendant's defense if only one witness provides testimony to support it.

Petitioner is unaware of any requirement that two or more witnesses must testify in support of a jury instruction before it can be given. To the contrary, an instruction must be given if any evidence supports the defendant's theory, no matter how weak or improbable that theory might be. Solomon v State, 436 So.2d 1041 (Fla. 1st DCA 1983). If the jury had been instructed on the petitioner's theory, it could have found factually that his actions were not the proximate cause of the accident.

Second, the state thinks that the petitioner is arguing he had the right to flee from the law. Here again, the state knocks down a straw man, because petitioner agrees that no one has the right to flee from the law. At the same time, however, a person fleeing from the law is not necessarily guilty of every unfortunate event that occurs afterward. Sometimes, an excusable accident might occur. Other times, an independent event might be the supervening proximate cause of the accident. Petitioner is arguing, not that he was entitled to flee from the law, but rather that a jury could have found that other events or agencies were the proximate cause of the accident. Consequently, the court should have instructed the jury on these possibilities rather than giving instructions solely on the state's theory of the case.

The state's third straw man is that, according to petitioner, the officer violated his rights by chasing him. Once again, petitioner agrees that an officer has the right to chase a fleeing suspect. At the same time, however, an officer must always act with due care. If he does not act with due care when chasing a

suspect, then his negligence could be the sole proximate cause of an ensuing accident. Petitioner presented some evidence to support his theory that the officer's negligence was the proximate cause of the accident, and the court's refusal to instruct the jury on the defense theory was therefore error.

ISSUE III

THE GUIDELINES DEPARTURE REASON OF GREAT DANGER TO OTHERS WAS INVALID BECAUSE (1) MILLER'S PROBATION WAS REVOKED, (2) EXTREME DANGER TO OTHERS WAS INHERENT IN THE CRIME OF MANSLAUGHTER, (3) HE WAS NOT CHARGED WITH CULPABLE NEGLIGENCE FOR CAUSING DANGER TO OTHERS, AND (4) HE WAS ACQUITTED OF SECOND DEGREE MURDER.

The state argues that "petitioner's reliance on the standard jury instruction for culpable negligence is misplaced because the statute makes culpable negligence criminal when the actor's conduct inflicts personal injury on a specific victim." Brief of respondent at 10. The state neglects to point out that the statute does not define culpable negligence. Consequently, petitioner looked to the standard jury instruction for a definition of culpable negligence and found that the instruction refers to "persons," "public," and "others." These words are all plural. The instruction thus instructs the jury to consider all the persons endangered when it decides whether to convict a defendant for a single manslaughter. The evidence of danger to many persons is part of the evidence used to convict for the single death and therefore cannot be used as a reason to depart from the guidelines.

The state finds it illogical to suppose that factors relating to an uncharged crime cannot be used as a reason to depart. Brief of respondent at 11. Petitioner sees nothing illogical about this idea. The rule states that "factors relating to the instant offenses for which convictions have not been obtained" are not a valid basis for departure. Fla. R. Crim. P. 3.701(d)(11). This

rule applies to both charged and uncharged offenses. Otherwise, the state could charge a defendant only with some offenses and use factors relating to other offenses as reasons to depart several cells without possibility of appellate review. The state could in effect sentence a defendant for offenses that **it** did not or could not prove beyond a reasonable doubt. This result would be contrary to due process and the intent of the guidelines.

The state suggests that the double jeopardy doctrine would not have allowed the state to charge the defendant with multiple acts of culpable negligence. Brief of respondent at 12. Petitioner wishes this were true. If **it** were, he would argue that he should not have been convicted of three counts of manslaughter for three deaths as part of a single transaction.

Finally, the state finds **it** significant that petitioner did not renew his argument based on Pendelton v. State, 493 So.2d 1111 (Fla. 1st DCA 1986). Petitioner corrects that oversight and expressly states that he continues to rely on Pendelton. Petitioner agrees that the trial court's and second district's actions in his case were not as egregious as those in Pendelton, in which the trial court was dissatisfied with the jury's illogical verdict. The net effect, however, was the same. He still is being sentenced for crimes for which he was acquitted.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 10th day of May, 1990.

Respectfully submitted,



STEPHEN KROSSCHELL
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

SK/mlm