IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,831

STATE OF FLORIDA,

Petitioner,

vs.

CANDACE JEAN SCHUCK,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

****

INITIAL BRIEF OF THE STATE ON THE MERITS

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MINARY STATEMENT

The State of Florida, the prosecuting authority and appellee below in Schuck v. State, 556 So.2d 1163 (Fla. 4th DCA 1990), review granted, Case No. 75,831 (Fla. 1990), and the petitioner here, will be referred to as "the State." Candace Jean Schuck, the criminal defendant and appellant below, and the respondent here, will be referred to as "respondent."

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, a conformed copy of the decision under review is appended to this brief. References to the four-volume record on appeal and certiorari will be designated "(R:)." References to prior papers filed in this cause will be designated by their titles.

Any emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On July 7, 1988, the State filed an information in the Broward County Circuit Court charging that respondent had committed the manslaughter of Mark Hamilton with a firearm the previous June 16 in violation of section 782.07, Fla. Stat. (R 496). A jury trial was held before the Honorable Robert Tyson that December (R 1-495).

At trial, the State sought to prove respondent's guilt for manslaughter with a firearm through culpable negligence by adducing evidence that respondent, who was angry at Mr. Hamilton because he had terminated their romantic relationship, had picked up the victim's loaded shotgun, pointed it at the back of his head and fired it, killing him (R 135-140, 150-153, 210, 216-217, 351-359, 370, 439-464). The State never took the position that this killing could not be an excusable homicide under section 782.03, Fla. Stat. because a dangerous weapon was used. Respondent did not dispute the foregoing facts, but rather consistently argued that because she had allegedly believed the gun was unloaded, Hamilton's death was an "accident;" i.e., an excusable homicide as a matter of law (R 140-142, 181, 377-383, 418-439, 464-474).

Pursuant to pages 61 and 68-69 of this Court's Florida Standard Jury Instructions in Criminal Cases (1985 ed.), reported as The Florida Bar re: Standard Jury Instructions in Criminal Cases, 477 So.2d 985 (Fla. 1985), and with the "complete...concur[rence]" of defense counsel (R 389-394, 412-413, 487), Judge Tyson instructed respondent's jurors on the

substantive offense of manslaughter with a firearm through culpable negligence as follows:

> Candace Jean Schuck, the defendant in the case, has been accused of the crime of manslaughter with a firearm....Manslaughter is unlawful. A killing that is excusable or was committed by the use of justifiable deadly force is lawful. If you find that Mark Hamilton was killed by Candace Jean Schuck, the defendant, you must consider the circumstances surrounding the killing in deciding whether the killing was manslaughter or whether the killing was excusable or resulted by the justifiable use of force.
>
> The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing.
>
> Excusable homicide. The killing of a human being is excusable, and therefore lawful, when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion, or upon sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.
>
> Manslaughter. Before you can find the defendant guilty of manslaughter, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. Mark Hamilton is dead.
>
> 2. The death was caused by the act, procurement or culpable negligence of Candace Jean Schuck. However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide, as I have previously explained those terms.
>
> I'll now define "culpable negligence" for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation

> is negligence. But culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of action that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

(R 474-477). Pursuant to page 76 of this Court's Florida Standard Jury Instructions in Criminal Cases and section 790.001(6), Fla. Stat., and again with the blessing of defense counsel (R 393-394, 413-414, 487), the judge then instructed respondent's jurors on the defense of excusable homicide as follows:

> An issue in this case is whether the killing of Mark Hamilton was excusable. The killing of a human being is excusable, and therefore lawful, when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent.
>
> A dangerous weapon is any weapon that taken into account the manner in which it was used, is likely to produce death or great bodily harm.
>
> A "firearm" as alleged in the information, means any weapon, including a starter gun, which will is designed to or may readily be converted to expel a projectile by the action of an explosive, the frame or receiver of such weapon.

(R 477-478).

Without requesting any reinstruction, respondent's jurors found her guilty as charged (R 489-492, 499). She was so adjudicated, and received a sentence of 12 years' imprisonment from Judge Tyson on February 27, 1989 (R 522-523).

Respondent timely appealed her manslaughter adjudication to the Fourth District Court of Appeal (R 526), arguing in pertinent part that although her trial defense counsel had concededly failed to object upon this basis, Judge Tyson had committed "fundamental error" by giving the jurors the "short" definition of excusable homicide found at page 61 of the Florida Standard Jury Instructions in Criminal Cases as a part of the manslaughter instruction because it incorrectly implied that excusable homicide cannot involve the use of a dangerous weapon, thus both improperly defining this defense and rendering the entirety of the manslaughter instruction fatally inaccurate (See "Initial Brief of Appellant," pages 32-35). The State answered that defense counsel had not only failed to contemporaneously object to this alleged compound "error," but had in fact encouraged its commission; and that this alleged "error" was not error at all, let alone "fundamental error," because respondent's jury was adequately instructed on the offense charged and the potential defenses thereto (See "Answer Brief of Appellee," pages 7-9; R 389-394, 412-414, 487).

The Fourth District, with Judge Anstead dissenting, agreed with respondent and granted her a new trial, Schuck v. State, 556 So.2d 1163, 1164. Citing this Court's new decision of Rojas v. State, 552 So.2d 914 (Fla. 1989), the State timely filed for either a rehearing, or a certification of conflict and/or an issue of great public importance to this Court and a stay of mandate ("Motion For Rehearing; or Motion for Certifications and

Stay of Mandate," pages 1-3). On March 7, 1990, the Fourth District denied the State's post-decisional motions in their entirety. However, on April 17 this Court granted the State's emergency motion for a stay of respondent's projected retrial pending the disposition of its petition for a writ of certiorari in this Court based upon conflicts between Schuck v. State and Banda v. State, 536 So.2d 221 (Fla. 1988), cert. denied, U.S. 109 S.Ct. 1548 (1989), Smith v. State, 539 So.2d 514 (Fla. 2nd DCA 1989), review granted, Case No. 73,822 (Fla. 1989), Berry v. State, 547 So.2d 969 (Fla. 3rd DCA 1989), and Miller v. State, 549 So.2d 1106 (Fla. 2nd DCA 1989) ("Brief of Petitioner on Jurisdiction," pages 4-6, and "Appendix"). On July 5, this Court accepted jurisdiction of this cause, setting oral argument for November 8.

SUMMARY OF ARGUMENT

The Fourth District reversibly erred by granting respondent a new trial on her manslaughter charge, because the trial judge did not err, fundamentally or otherwise, in instructing her jury on excusable homicide in defining manslaughter. See Banda v. State, 536 So.2d 221, 223 and Rojas v. State, 552 So.2d 914, 915, 916 note 2.

ISSUE

THE FOURTH DISTRICT REVERSIBLY ERRED BY GRANTING RESPONDENT A NEW TRIAL ON HER MANSLAUGHTER CHARGE

ARGUMENT

The State submits that Fourth District reversibly erred by granting respondent a new trial in Schuck v. State, 556 So.2d 1163, 1164, because Judge Tyson did not err, fundamentally or otherwise, in instructing respondent's jury on excusable homicide in defining manslaughter (R 474-477).

As noted, respondent argued to the Fourth District that although her trial defense counsel had concededly failed to object upon this basis, the trial judge had committed "fundamental error" by giving the jurors the "short" definition of excusable homicide as part of the manslaughter instruction because it incorrectly implied that the defense of excusable homicide cannot involve the use of a dangerous weapon, thus both improperly defining this defense and rendering the entirety of the manslaughter instruction fatally inaccurate. Respondent is incorrect on both of these interrelated scores.

The first prong of respondent's claim, that Judge Tyson fundamentally erred by giving the jurors the "short" definition of excusable homicide in defining manslaughter because it incorrectly implied that this defense cannot involve the use of a dangerous weapon, thus improperly defining this defense, is contrary to this Court's decision in Banda v. State, 536 So.2d 221, 223 that such an instruction is not prejudicial to a defendant when no evidence is introduced to support an excusable

homicide defense. Accord, Berry v. State, 547 So.2d 969, 971-972 and Miller v. State, 549 So.2d 1106, 1110-1111. See also Smith v. State, 539 So.2d 514, 515-518, holding that such an instruction did not constitute fundamental error on this basis even though "[t]here was evidence to support the defense of excusable homicide." Respondent's doubtlessly forthcoming protest to the contrary notwithstanding, her actions in picking up Mr. Hamilton's shotgun, pointing it at the back of his head and firing it with fatal results could never constitute a defense to manslaughter as a matter of law merely because she supposedly believed the gun was unloaded. See Hines v. State, 227 So.2d 334, 335 (Fla. 1st DCA 1969), in which the First District held that a second degree murder conviction was warranted where that defendant, in the complete absence of any ill will, shot and killed his girlfriend while he was "stupidly funning around" with a shotgun. The court stated that regardless of the defendant's motives, his actions in pointing the gun at the victim's head "certainly implie[d] malice of the type present when death is caused by recklessness." Compare also Marasa v. State, 394 So.2d 544 (Fla. 5th DCA 1981), review denied, 402 So.2d 613 (Fla. 1981) with Dominique v. State, 435 So.2d 974 (Fla. 3rd DCA 1983).

The second prong of respondent's claim, that Judge Tyson fundamentally erred by giving the jurors the "short" definition of excusable homicide in defining manslaughter because it incorrectly implied that excusable homicide cannot involve the use of a dangerous weapon, thus rendering the entirety of the manslaughter instruction fatally inaccurate, is contrary to this

Court's decision in Rojas v. State, 552 So.2d 914, 915, 916 note 2 that a trial judge who follows his definition of manslaughter with a reminder to the jurors that "the defendant cannot be guilty of manslaughter if the killing is either justifiable or excusable homicide as I have previous explained those terms" in accordance with its 1985 amendment to the Florida Standard Jury Instructions in Criminal Cases, page 68, as the trial judge did here (R 476), does not commit error. But see Smith v. State, 539 So.2d 514, 518-520.

Axiomatically, "it is the rare case in which an improper [jury] instruction will justify reversal of a criminal conviction when no objection has been made in the trial court,'' Henderson v. Kibbe, 431 U.S. 145, 154 (1977). Obviously, the reason for this rigid rule is to prevent criminal defense attorneys from silently permitting the unwitting commission of known errors by trial judges, only to raise such on appeal in the event their clients are not acquitted, see State v. Jones, 204 So.2d 515, 518 (Fla. 1967). As this Court has held:

> The Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not preserved. Instances where the rule has been permitted by the appellate courts to apply seem to be categorized into three classes of cases: (1) where an involved statute is alleged to be unconstitutional, (2) where the issue reaches down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged, and (3) where a serious question exists as to the jurisdiction of the trial court.

State v. Smith, 240 So.2d 807, 810 (Fla. 1970); see also Williams v. State, 400 So.2d 542 (Fla. 3rd DCA 1981), cert. denied, 459 U.S. 1149 (1981). Any error committed by Judge Tyson at respondent's trial was assuredly not "fundamental" such that it could be reached upon direct appeal absent a contemporaneous objection, as Judge Anstead of the Fourth District explained in his lucid dissent below:

> I cannot agree that fundamental error was committed. The trial transcript reflects that the issue in this case was clearly drawn and presented to the jury. The State asserted that [respondent] was guilty of culpable negligence in pointing a loaded weapon at the deceased and pulling the trigger. And, contrary to the State's claim of recklessness, [respondent] claimed that the shooting was an accident involving simple negligence at most. The State did not contend that because a dangerous weapon was involved, the [respondent] could not claim excusable homicide. I fail to see how the jury instruction in question constituted fundamental error.

Schuck v. State, 556 So.2d 1163, 1164 (Anstead, J., dissenting).

Moreover, even if the trial judge's initial instructions on the substantive offense of manslaughter could somehow be construed as "fundamentally erroneous," respondent would still not be entitled to relief as a result both because her trial counsel clearly invited any error by enthusiastically agreeing with the judge's proposal that they be so instructed (R 393-394), compare Ellison v. State, 349 So.2d 731, 732 (Fla. 3rd DCA 1977), cert. denied, 357 So.2d 185 (Fla. 1978); and also because the judge subsequently instructed the jurors on the defense of excusable homicide by omitting that portion of the instruction

which allegedly implies that this defense can never involve the use of a dangerous weapon and then completing the instruction with definitions of a "dangerous weapon" and a "firearm" (R 477-478), thereby explicitly informing the jurors immediately before they retired to deliberate that excusable homicide could involve the use of a dangerous weapon and curing any error. Contrast Kingery v. State, 523 So.2d 1199, 1205-1207 (Fla. 1st DCA 1988) and Walker v. State, 520 So.2d 606, 607-608 (Fla. 1st DCA 1987).

Axiomatically, jurors are presumed to behave rationally, Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), modified on other grounds, 408 U.S. 935 (1972), and "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge," Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). Respondent's rational jurors plainly did not convict her of manslaughter because they were confused as to whether excusable homicide can involve the use of a dangerous weapon, since this was not even a joined issue at trial. Rather, respondent's jurors clearly convicted her of manslaughter because they correctly decided that her asserted defense of accident did not legally excuse her homicidal conduct, compare Hines v. State.

It follows that this Court must reverse the Fourth District's decision in Schuck v. State as contrary to its own decisions in Banda v. State and Rojas v. State, and remand this cause with directions that respondent's adjudication and sentence for manslaughter entered by Judge Tyson be approved.

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that this Honorable Court must REVERSE the Fourth District's decision in Schuck v. State and REMAND this cause with directions that the judgment and sentence entered by Judge Tyson be APPROVED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by courier to MARCY K. ALLEN, Assistant Public Defender, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 30th day of July, 1990

Of Counsel

JT/bc